

The following form shall be used under the provisions of r. 131 of O. 21 :—

Suit No. of 19 .
Plaintiff
versus
Defendant.

To

WHEREAS it is alleged that a debt of Rs. is due from you to the judgment-debtor :

Or that you are liable to deliver to the above-named judgment-debtor, the property set forth in the schedule hereto attached ; take notice that you are hereby required on or before the day of 19 to pay into this Court the said sum of Rs.

Or to deliver, or account to the Amin of this Court for the movable property detailed in the attached schedule, or otherwise to appear in person or by advocate, vakil or authorised agent in this Court at 10-30 in the forenoon of the day aforesaid and show cause to the contrary, in default whereof an order for the payment of the said sum, or for the delivery of the said property, may be passed against you.

Dated this day of 19 .

Munsiff
Subordinate Judge.
At

LOC. AM.—[OUDH.] *Added by Oudh Chief Court. O. 21, rr. 104-114:—*

104. The Court may, in the case of any debt due to the judgment-debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a Revenue Court) or any movable property not in the possession of the judgment-debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, or to deliver or account for such movable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into the Court the debt due from or the property deliverable by him to such judgment-debtor or so much thereof as may be sufficient to satisfy the decree and the cost of execution.

105. If the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor, or so much as may be sufficient to satisfy the decree and the cost of execution and does not dispute his liability to pay such debt or deliver such movable property, or if he does not appear in answer to the notice, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

106. If the garnishee disputes his liability, the Court, instead of making such order, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit ; and upon the determination of such issue shall pass such order upon the notice as shall be just.

107. Whenever in any proceedings under these rules it is alleged or appears to the Court to be probable, that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon, or an interest in it, the Court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary.

108. After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such Court shall seem just and reasonable.

109. Payment or delivery made by the garnishee whether in execution of an order under these rules or otherwise shall be a valid discharge to him as against the judgment-debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realised although such order or the judgment may be set aside or reversed.

110. Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction :

Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be sufficient appearance by the firm.

111. The costs of any application under these rules and of any proceedings arising therefrom or incidental thereto, or any order made thereon, shall be in the discretion of the Court.

112. (1) Where the liability of any garnishee has been tried and determined under these rules, the order shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

NOTES.

O. 21, R. 104 (Oudh C.C. rules).
—It cannot be contended that until a debt is ascertained, it cannot be called a "debt" within the meaning of R. 104 of O. 21. This rule does not involve any question of attachment. 179 I.C. 601=1939 O.W.N. 82=

A.I.R. 1939 Oudh 86.

O. 21, R. 107 (Oudh).—An appeal is allowed under R. 112 against an order of a Civil Court proceeding under R. 107. No right of second appeal is allowed under the Code. 160 I.C. 42=1936 O.W.N. 114=1936 Oudh 167.

(2) Orders not covered by sub-rule (1) shall be appealable as orders made in execution.

Illustration.—An application for a garnishee order is dismissed either on the ground that the debt is secured by a charge or that there is no *prima facie* evidence of debt due. This order is appealable as an order in execution.

113. All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under O. 7 or O. 8 shall apply to all proceedings taken under O. 21 or S. 47.

114. The following form shall be used under the provisions of r. 104 of O. 21 :—

Execution Case No. _____

of 19 ____

Decree-holder

versus

Judgment-debtor.

To

WHEREAS it is alleged that a debt of Rs. _____ is due from you to _____ the judgment-debtor.

Or that you are liable to deliver to the above-named judgment-debtor the property set forth in the schedule hereto attached ; take notice that you are hereby required on or before the day of _____ 19 ____, to pay into this Court the said sum of Rs. _____ to deliver, or account to the Nazir of this Court for the movable property detailed in the attached schedule, or otherwise to appear in person or by advocate, wakil or authorised agent in this Court at 10-30 in the forenoon of the day aforesaid and show cause to the contrary, in default whereof an order for the payment of the said sum, or for the delivery of the said property may be passed against you.

Dated this _____

day of _____

19 ____

Munsiff,
Subordinate Judge.
At _____

LOC. AMS.—[PATNA.] Add the following rule to O. 21 :—

" R. 104.—For the purpose of all proceedings under this order service on any party shall be deemed to be sufficient if effected at the address for service referred to in O. 8, r. 11, subject to the provisions of O. 7, r. 22 provided that this rule shall not apply to the notice prescribed by r. 22 of this Order."

[CALCUTTA.] Insert the following as O. 21-A :—

ORDER XXI-A.

1. Every person applying to a Civil Court to attach movable property shall, in addition to the process-fee, deposit such reasonable sum as the Court may direct, if it thinks necessary for the cost of its removal to the Court-house for its custody, and if such property is livestock, for its maintenance according to the rates prescribed in r. 2 of this Order. If the deposit, when ordered, be not made, the attachment shall not issue. The Court may, from time to time, order the deposit of such further fees as may be necessary. In default of due payment the property shall be released from attachment.

2. The following daily rates shall be chargeable for the custody and maintenance of livestock under attachment :—

Goat and pig ...	...	...	Annas 2 to Annas 4.
Sheep ...	...	...	" 2 " 3.
Cow and bullock ...	...	...	" 6 " 10.
Calf ...	...	...	" 3 " 6.
Buffalo ...	...	...	" 8 " 12.
Horse ...	...	...	" 8 " 12.
Ass ...	...	...	" 3 " 5.
Poultry ...	...	...	" 2 " 3-6.

Explanation.—Although the rates indicated above are regarded as reasonable the Courts should consider individual circumstances and the local conditions and permit deposit at reduced rates where the actual expenses are likely to fall short of the minima or maxima. If any specimen of special value in any of the above classes is seized a special rate may be fixed by the Court. If any animal not specified is attached, the Court may fix the cost as a special case.

3. Where the property attached consists of agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the proviso to r. 43, O. 21, he may, unless the Court has otherwise directed, leave it in the village or place where it has been attached—

(a) In the charge of the judgment-debtor or decree-holder or of some other person, provided that the judgment-debtor, decree-holder or other person enters into a bond in Form No. 15-A of Appendix E to this schedule with one or more sureties for the production of the property when called for, or

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O. 21, R. 112 (Oudh).—An appeal is allowed under this rule against an order of a Civil Court proceeding under Rule 107

(Oudh). No right of second appeal is allowed. 160 I.C. 42=1936 O.W.N. 114=1936 Oudh 167.

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of fifteen days paid in advance.

4. If attached property (other than livestock) is not sold under the proviso to r. 43 of O. 21, or retained in the village or place where it is attached, it shall be brought to the Court-house at the decree-holder's expense and delivered to the proper officer of the Court. In the event of the decree-holder failing to make his own arrangement for the removal of the property with safety, or paying the cost thereof in advance to the attaching officer, then, unless such payment has previously been made into Court, the attachment shall at once be deemed to be withdrawn and the property shall be made over to the person in whose possession it was before attachment.

5. When livestock is attached it shall not, without the special order of the Court, be brought to the Court or its compound or vicinity but shall be left at the village or place where it was attached in the manner and on the conditions set forth in r. 3 of this order :

Provided that livestock shall not be left in the charge of any person under cl. (a) of the said rule unless he enters into a bond for the proper care and maintenance thereof as well as for its production when called for, and that it shall not be left in charge of an officer of the Court under cl. (b) of the said rule unless in addition to the requirements of the said clause provision be made for its care and maintenance.

6. When for any reason, the attaching officer shall find it impossible to obtain compliance with the requirements of the preceding rule so as to entitle him to leave the attached livestock in the village or place where it was attached and no order has been made by the Court for its removal to the Court, the attaching officer shall not proceed with the attachment and no attachment shall be deemed to have been effected.

7. Whenever it shall appear to the Court that livestock under attachment are not being properly tended or maintained, the Court shall make such orders as are necessary for their care and maintenance and may if necessary direct the attachment to cease and the livestock to be returned to the person in whose possession they were when attached. The Court may order the decree-holder to pay any expenses so incurred in providing for the care and maintenance of the livestock and may direct that any sum so paid, shall be refunded to the decree-holder by any other party to the proceedings.

8. If under a special order of the Court livestock is to be conveyed to the Court, the decree-holder shall make his own arrangement for such removal and if he fails to do so, the attachment shall be withdrawn and the property made over to the persons in whose possession it was before attachment.

9. Nothing in these rules shall prevent the judgment-debtor or any person, claiming to be interested in attached livestock from making such arrangements for feeding, watering and tending the same as may not be inconsistent with its safe custody, or contrary to any order of the Court.

10. The Court may direct that any sums which have been legitimately expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the sale proceeds of the attached property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

11. In the event of the custodian of attached property failing, after due notice, to produce such property at the place named to the officer deputed for the purpose or to restore it to its owner if so ordered or failing in the case of livestock to maintain and take proper care thereof, he shall be liable to be proceeded against for the enforcement of his bond in the execution proceedings.

12. When property other than livestock is brought to the Court, it shall immediately be made over to the Nazir, who shall keep it on his sole responsibility in such place as may be approved by the Court. If the property cannot from its nature or bulk be conveniently stored, or kept on the Court premises or in the personal custody of the Nazir, he may subject to the approval of the Court, make such arrangements for its safe custody under his own supervision as may be most convenient and economical. If any premises are to be hired and persons are to be engaged for watching the property, the Court shall fix the charges for the premises and the remuneration to be allowed to the persons (not being officers of the Court) in whose custody the property is kept. All such costs shall be paid into Court by the decree-holder in advance for such period as the Court may from time to time direct.

13. When attached livestock is brought to Court under special order as aforesaid it shall be immediately made over to the Nazir, who shall be responsible for its due preservation and safe custody until he delivers it up under the orders of the Court.

14. If there be a pound maintained by Government or local authority in or near the place where the Court is held, the Nazir shall, subject to the approval of the Court, be at liberty to place in it such livestock as can be properly kept there, in which case the pound-keeper will be responsible for the property to the Nazir and shall receive from the Nazir the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description.

15. If there be no good pound available, or, if in the opinion of the Court, it be inconvenient to lodge the attached livestock in the pound, the Nazir may keep them in his own premises or he may entrust them to any person selected by himself and approved by the Court.

16. All costs for the keeping and maintenance of the livestock shall be paid into Court by the decree-holder in advance for not less than fifteen days at a time as often as the Court may from time to time direct. In the event of failure to pay the costs within the time fixed by the Court the

attachment shall be withdrawn and the livestock shall be at the disposal of the person in whose possession it was at the time of attachment.

17. So much of any sum deposited or paid into Court under these rules as may not be expended shall be refunded to the depositor.

ORDER XXII.

Death, Marriage and Insolvency of Parties.

No abatement by party's death, if right to sue survives. 1. The death of plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

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O. 22: SCOPE.—O. 22 is confined to question of the continuance of suit by virtue of devolution of the deceased's right to sue on other persons during pendency of the suit. But there may be cases in which suit can be continued by other persons who have an independent right to sue on same cause of action. 31 Punj.L.R. 973=1931 L. 79 (2)=12 L. 275=1931 L. 79. If, after an appeal is filed in a Court which has no jurisdiction to entertain it, a respondent dies and his L. Rs. are not brought on record, no question of abatement arises. Question of abatement can only arise when the appeal is pending in a Court having jurisdiction to entertain it. 152 I.C. 939=1935 A. 92=4 A.W.R. 1460 (Rev.). Non-compliance with procedure laid down in O. 22 would not involve want of jurisdiction, but would be a mere irregularity so long as the decree is passed between living persons. 133 I.C. 303=1931 A. 746. Under O. 22 an application is necessary to bring on record the L.R. of a deceased party and Court cannot proceed out of its own accord to ascertain who the heirs are and bring them on record. 151 I.C. 755=1934 A.L.J. 16=1934 A. 465. Rules of abatement laid down in O. 22 apply to appeals against orders on the execution side. 55 M. 1006=1932 M. 574=63 M.L.J. 827; 1935 A. 27=154 I.C. 920=4 A.W.R. 1025. Where certain family disputes are referred to arbitration and the parties intend to proceed with the arbitration to a decision, the death of one of the parties to the arbitration will not bring the arbitration to an end. So long as a dispute is pending before arbitrators on a private reference, the proceedings before them are not governed by O. 22, and there can be no question of the legal representative of a deceased party being brought on the record. 1940 M.W.N. 1083=52 L.W. 556=1941 Mad. 129=(1940) 2 M.L.J. 520. The provisions of O. 22, C. P. Code, do not apply where a party dies after a final decree has been passed. If a plaintiff sues and dies after his suit has been dismissed, his legal representatives may appear from the decree without making any application to be brought on the record in his place. 40 P.L.R. 767.

APPLICATION OF RULE.—O. 22 applies to joinder of L.R. of a person who is properly on record and dies pending the suit or appeal as the case may be but not to the case where a person is dead long before suit or appeal. 26 S.L.R. 362=1932 S. 220. *Quære.*—

Whether on death of the manager of a Hindu joint family his sons should be brought on record in accordance with the provisions of O. 22. 145 I.C. 164=35 Bom.L.R. 388=1933 B. 245. O. 22 cannot be applied to a case instituted or defended by a few persons on behalf of numerous persons not on record under O. 1, R. 8, or to suit instituted under S. 92. 168 I.C. 113=17 Pat.L.T. 926=1937 P. 149. O. 22 has no application to *applications for leave to appeal to Privy Council*. (4 I.C. 454, Ref.) 28 S.L.R. 150=148 I.C. 819=1934 S. 36. Applicability of O. 22 to proceedings under U.P. Encumbered Estates Act. See 1939 A.W.R. (H. C.) 713; 1940 O.A. 518; 1941 O.W.N. 418 (F.B.). O. 22, under which substitution proceedings are taken is *not applicable to execution proceedings*. A decree-holder has an absolute right to execute the decree for the benefit of himself and other decree-holders and if any one of the other decree-holders dies, it is not strictly necessary that his heirs should be brought on the record. 4 A.W.R. 1025. Proceedings in appeal from any decree or order in proceedings in execution are not proceedings in execution and they are proceedings in appeal and R. 11 of O. 22, makes the whole of O. 22 *applicable to appeals*. 150 I.C. 425=11 O.W.N. 917=1934 O. 337. See also 55 M. 1006=63 M.L.J. 827. The provisions of O. 22 about abatement of suits and appeals do not apply to *applications for revision*. 144 I.C. 883 (2)=1933 S. 200; 1939 A.W.R. (C.C.) 149=1939 Oudh 277; 1940 A.W.R. (B.R.) 126=1940 R.D. 367. The death of one or more of several plaintiffs or defendants or several appellants or respondents in a suit or appeal, who are suing or being sued in a representative character does not lead to the abatement of the suit or appeal on failure to bring on record the legal representatives of the deceased party or parties within the time limited by law. O. 22 cannot be applied to a case instituted or defended by a few persons on behalf of numerous persons not on record under O. 1, R. 8, C.P. Code, or to suit instituted under S. 92, C.P. Code. 17 Pat.L.T. 926=A. I.R. 1937 Pat. 149. See also 1940 Pat. 180; 1939 L. 572; 1940 A.M.L.J. 63. Municipality—Suit by Municipality represented by Special Officer—Decree—Appeal by defendant—Administration vested in commissioner pending appeal—Latter not impleaded in place of Special Officer—Effect—*Held*, that the Municipality

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was a corporate body and it never died. The Commissioners who had taken charge of the Municipality could not be said to be representatives of the Special Officer, who was made a respondent. No substitution was therefore necessary in such a case and the appeal therefore did not abate. 171 I. C. 691=A.I.R. 1937 Pat. 588. In a suit by A and a mutawalli of a mosque for declaration that the mosque was wakf a decree was passed. During the pendency of the appeal the mutawalli died. Since the death of the mutawalli, A had been managing the mosque and the properties and performing the same duties as the deceased mutawalli was alleged to have performed in his lifetime. *Held*, that A could be treated as a legal representative or prosecuting the appeal. A.I.R. 1941 Lah. 36.

O. 22, R. 1: SCOPE OF RULE.—In order to work abatement of a suit or appeal it is not necessary for the Court to pass any order. 48 A. 334=93 I.C. 313=1926 A. 217. Rules 1 to 10 do not contemplate the representatives of judgment-debtor being placed on record after the appellate decree has been passed. 18 B. 224. The cause of action of the original and revived suit must be the same, and no fresh cause of action can be imported into the revised suit. 22 C. 92 (97). Substitution of L.R. of a deceased plaintiff or defendant at one stage of a suit, as for instance, on an appeal from an interlocutory order in the suit, is effective for all future stages of the suit. 45 C. 94=33 M.L.J. 486=44 I.A. 218 (P.C.); 1928 L. 784. A suit ordinarily abates only against the deceased defendant, unless there are circumstances which would cause an abatement as against one to operate as an abatement against all. 18 R.D. 553=15 L.R. 667 (Rev.); 155 I.C. 602=1935 A.L.J. 509=1935 A. 640; 164 I.C. 971=1936 L. 578. A suit for ejectment of several defendants who are collaterals of the deceased tenant by reason of the death of one defendant who is a remoter collateral than the surviving defendants, because the latter who are nearer than the deceased have precedence. (*Ibid.*) Where in appeal in a suit brought in a representative capacity one of the original plaintiffs dies, the surviving plaintiffs are competent to prosecute the appeal. 37 P. L.R. 85. So also in suits instituted with leave under O. 1, R. 8, C.P. Code. 39 C.W.N. 303=60 C.L.J. 556=1935 C. 413. The fact that an application by appellant for setting aside the fancied or imaginary abatement has been dismissed does not affect the competency of the appeal. (*Ibid.*) When in an appeal against a decree dismissing suit, one of the appellants and one of the respondents die pending appeal, and all heirs of the deceased appellant and respondent are already on record, the case is governed by R. 2 of O. 22, and not by Rr. 3 and 4; no application for substitution is therefore necessary

in such a case. Appeal cannot therefore abate by reason of the omission to apply for substitution. 15 P. 326=17 Pat.L.T. 584=1936 P. 548. Even if it be that there are other heirs of deceased appellant besides those on record there cannot be a total abatement of the appeal, when the shares or interests of several appellants are separate. The surviving appellants, if successful, will get a decree to the extent of their shares. (*Ibid.*) Where a plaintiff after the institution of a suit transfers his entire rights but continues as co-plaintiff with his transferees and dies during the pendency of the suit and a decree is passed in ignorance of such death, the decree does not become a nullity because of that plaintiff's death, for the reason that after his transfer he was not a necessary party to the suit. 1939 O.W.N. 500=1939 Oudh 196.

RIGHT TO SUE.—This is based upon facts which go to make up what is called "the cause of action". 22 C. 92. It includes a "right to appeal", and "a right to prosecute by law or to obtain relief by means of legal procedure". 26 B. 597 at 599 and 607; 33 I.C. 45=38 M. 1064; 9 Bur.L.T. 38=34 I.C. 249. See also 74 I.C. 14; 50 C. 650=74 I.C. 929=27 C.W.N. 621. The words "if the right to sue survives" mean, if the cause of action survives or continues. 26 B. at 599. See also 2 Luck. 464=4 O.W.N. 235=1927 O. 156; 104 I.C. 308=1927 N. 343.

BURDEN OF PROOF as to survival of right to sue is on the person desiring to prosecute the suit or appeal. 48 A. 630=24 A.L.J. 796=1926 A. 610.

ILLUSTRATIVE CASES.—When the cause of action against the deceased defendant is based on a *tort or breach of contract* of personal service, and the deceased has not left any personal assets, the right to sue does not survive. 8 M.L.J. 180. See also 9 Bur. L.T. 38=34 I.C. 249 (action for slander); 62 P.R. 1915=28 I.C. 455 (action for personal injuries); 48 A. 630. There are certain types of wrongs which, though a remedy for them is available against the wrongdoer during his lifetime, does not permit of a remedy against his representatives after his death. By English law an executor represents the debts and the property of his testator but not his person. And that in general, is true of the position of a legal representative in India. Generally the only cases, apart from cases of contract in which a remedy for a wrongful act can be pursued against the estate of a deceased person is one in which the wrong consists of the appropriation by the deceased of property, or the value of property belonging to another. To those special types of wrongs which have produced for the wrongdoer either property or money which has accrued to his estate, the English law has refused to apply the maxim of "*factio personalis moritur cum persona*". These principles are applicable to

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India as well. Wherever it is found that a deceased person has by his wrong diverted either property or the proceeds of the property belonging to some one else into his own estate, recourse can be had to that estate, through his legal representatives when he is dead to recover it—subject of course, to the limitation that any decree obtained will be limited to the assets of the deceased wrongdoer's estate. Further wherever a relationship based on contract, quasi contract or fiduciary relationship or some obligation to perform a duty, is found to exist that also is alone sufficient to entitle a remedy to be pursued against the legal representatives of the wrongdoer. 1941 A.L.J. 93. Death of one joint tort-feasor does not cause the suit to abate as against the other tort-feasors. 1930 L. 709=120 I.C. 9. Personal right does not abate after decree. 59 I.C. 939; 1929 L. 807=11 L. 1. Decree is properly capable of inheritance. (*Ibid.*) Actions which are not personal to the plaintiff survive after the death of minor plaintiff (as, suit by minor repudiating will of father). 27 I.C. 396=27 M.L.J. 674; 33 C. 1163. The right to an office as mahant is purely personal and comes to an end on the death of the person claiming it. 12 L. 1=125 I.C. 891=1930 L. 703 (2). Right to sue *in forma pauperis* is a personal right and does not survive to the heirs of the pauper. 64 I.C. 63; as also a suit for damages for breach of contract of marriage. 44 B. 446=55 I. C. 624. The cause of action in a suit by a father for the custody of his minor children, who are in the custody of the defendant does not survive against the widow of the deceased defendant. 25 B. 574. See also 1941 A.L.J. 93 (claim in respect of minor's property misappropriated by guardian). When a submission to arbitration has been made a rule of Court, and the right is one which is not personal the proceedings do not abate by reason of the death of a party. In such cases the procedure laid down in R. 5 should be followed. 13 M.L.J. 311. When a defendant in a suit for damages for wrongful arrest and malicious prosecution dies pending suit, the suit abates. 13 B. 677; 65 I.C. 66; 4 P.L.J. 676=52 I.C. 348; 38 I.C. 823=31 M.L.J. 772. See also 1937 Nag. 216; 41 P.L.R. 610=1939 Lah. 492=I.L.R. (1940) Lah. 447; 49 M. 208=92 I.C. 366=50 M.L.J. 34. Suit to enforce right to a *pala* or worship does not abate on the death of the *paladar* as the cause of action is not merely of a personal nature. 53 C. 132=30 C.W.N. 389=1926 C. 490; 34 I.C. 4 (suit by manager of joint Hindu family—No survival to other members). See also 145 I.C. 164=35 Bom.L.R. 388=1933 B. 245. Suit under S. 92, C. P. Code—Death of one of the plaintiffs obtaining sanction. Neither the suit nor an appeal therefrom abates. 47 M.L.J. 745=1925 M. 244; 48 C. 493=48 I.A. 12 (P.C.). See also 1941 Lah. 36;

1937 Pat. 149=17 Pat.L.T. 926; 37 P.L. R. 85. If a *defamation suit* plaintiff gets a decree, and the defendant appeals but dies before the hearing of the appeal, the appeal does not abate and his son can be placed on the record. 26 B. 597. See also 26 M. 499 and 9 A. 131 (F.B.); 31 C. 90; 34 I.C. 249=9 Bur.L.J. 38. As to second appeal, see 62 P.R. 1915=28 I.C. 455. As to suits by Hindu reversioners declaratory suit by one survives to next reversioners. See 38 M. 406=42 I.A. 125 (P.C.). See also 1939 Lah. 580. [The following are not good law:—22 M.L.J. 375=15 I.C. 213; 16 I.C. 865=12 M.L.T. 664; 15 I.C. 461=23 M.L.J. 719; 27 M. 588. See now the Full Bench case, 41 M. 659=35 M.L.J. 57 (F.B.). See further 18 I.C. 329=65 P.R. 1913.] Suit by unmarried daughter as plaintiff—Right to sue survives to her married sisters. 38 A. 111=32 I.C. 104=14 A.L.J. 8. In joint Hindu family, surviving members represent the deceased member. 33 I.C. 123=14 A. L.J. 255. See also 145 I.C. 325=1933 P. 270. Hindu limited owner—Suit by—Death of plaintiff—Right of reversioners to continue suit. See 32 P.L.R. 712=1931 L. 675; 134 I.C. 771=1931 L. 293 (continuance of suit depends not on the qualifications of the person claiming to be the representative of the deceased, but on the nature of the suit). Malabar Tarwad—Suit by Karnavan and some other members complaining of mismanagement by Anandravan. On Karnavan dying and defendant becoming Karnavan—Other plaintiffs can continue suit. See 49 M.L.J. 691=1925 M. 894. Application for letters of administration by residuary legatee does not survive to his heirs. 31 I.C. 76=45 C. 862. The rule of joint ownership and survivorship as understood by the Benares School of Hindu Law does not apply to Jat agriculturists. They enjoy the family property as tenants in common and share of each is capable of separation and division. Where therefore one of five Jat brothers, owning certain property, transfers it and the brothers institute a suit for its possession and during the pendency of the suit one of the brothers dies but his L.R. is not brought on record, the suit abates only as regards the share of the deceased brother and does not abate as a whole. 164 I.C. 971=1936 L. 578. Right to be appointed guardian of reversioner, if survives to his son. See 116 P.L.R. 1917=42 I.C. 410. In a suit for a declaration that defendant is not lawful wife of plaintiff, the cause of action does not survive. 52 I.C. 545=87 P.R. 1919. Where there is only an application for leave to sue *in forma pauperis* and the applicant dies before leave is granted, the right to sue as a pauper being a personal right cannot survive. 33 C. 1163. See also 54 I.C. 63. When an agent suing on behalf of an undisclosed principal, dies pending the suit, suit should after the death of the agent be conti-

2. Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

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nued, if at all, by the agent's representative, and not by the principal. 17 M.L.J. 116. Where pending a suit filed by a partner on behalf of a firm he dies, there is no question of abatement at all. 93 I.C. 144=1926 A. 351. As to principles governing survival of cause of action in suits founded on torts (as) for damages for malicious prosecution, see 49 M. 208=1926 M. 243=50 M.L.J. 34; 1941 A.L.J. 93. Representative suit by some proprietors which could be brought by any of them does not abate on death of one proprietor. 120 I.C. 543=1930 L. 282. See also 37 P.L.R. 85. If the suit is a representative suit the death of some of the plaintiffs would not result in the abatement wholly or in part of the suit. (1931 L. 167, Rel. on; 1930 L. 353 and 1931 P. 17, Dist.; 1930 L. 515. Ref.) 146 I.C. 141=34 P.L.R. 1035=1933 L. 654.

PARTITION SUIT—DEATH OF MINOR PLAINTIFF—RIGHTS OF HEIRS TO CONTINUE.—Where a minor plaintiff dies during the pendency of a suit for partition instituted on his behalf, his L. Rs. are not entitled to continue the suit; for the rule that the institution of a partition suit effects a severance of the joint status of the family is not applicable to a suit filed on behalf of a minor, as in such a suit it is for the Court to determine whether a decree for partition will be beneficial to the minor. 152 I.C. 715=36 Bom.L.R. 738. But see 65 M.L.J. 630 (F.B.) *infra*. The suit did not abate in such a case but the Court should proceed with the trial of the suit; and if it should come to the conclusion on the evidence that the suit as instituted was for the benefit of the minor, it should pass a decree, the benefit of which will go to the legal heirs of the deceased minor; hence the mother who instituted the suit on behalf of the minor could bring herself on record and ask for a decision on the issue whether the suit would be for the benefit of the minor. (41 M. 442, Diss.; 1930 M. 486, Appr.) 146 I.C. 269=1933 M. 890=65 M.L.J. 630 (F.B.). But see 36 Bom.L.R. 738 *supra*.

TEMPLE COMMITTEE.—A Committee appointed by the Government under S. 7 of the Religious Endowments Act (XX of 1863) is *ipso facto* dissolved on the death of one of its members pending the suit and the suit can be continued by the surviving members of the Committee. (39 C. 304, Ref.) 61 C. 80=149 I.C. 1215=38 C. W. N. 214=1934 C. 328.

O. 22, R. 2: SCOPE OF.—See 14 I.C. 544=11 M.L.T. 409; 39 C.W.N. 303. (See also C.C.M.—141

notes under O. 21, R. 1, *supra*.) As to what is meant by *right to sue*, see under R. 1. A legal representative must continue the litigation on the cause of action sued upon and cannot set up her own individual right. 99 I.C. 160=1927 N. 162. The rule does not apply to proceedings in Mamlatdar's Courts. 17 B. 645; 6 W.R. 2, Ref.; 27 B. 284; 30 M. 67; 10 C.W.N. 891. Appeal against decree for rent. One of the plaintiffs who is a respondent dies. Heirs not added—*Held*, appeal should be dismissed. 10 C.W.N. 891. It cannot be said that the word "survive" in O. 22, R. 2 is used in the technical sense of accrual of rights by survivorship. The word is used in its ordinary sense of outliving. 11 I.C. 537=1929 S. 225. The rule is not confined in its application to cases in which the right to sue survives against the surviving defendants by reason of some circumstances antecedent to the suit. 4 C.L.J. 568; 11 C. W.N. 186. In a suit against a dead man, substitution of legal representatives is a nullity. 25 Bom.L.R. 7=1924 B. 109; 51 I. C. 160. Suit instituted against dead man and other persons—Interest of dead man devolving on other defendants—Suit can be proceeded with. 30 Punj.L.R. 259=117 I.C. 899=1929 L. 440 (1). Scheme suit does not abate on death of original plaintiff. 48 C. 493 (P.C.); 47 M.L.J. 745=85 I.C. 666. See also 47 M.L.J. 745. Appeal decreed in ignorance of appellant's death—Decree is nullity. 27 Bom.L.R. 91=1925 B. 290. If an appeal against several respondents abates against all, if their interests cannot be discriminated. 64 I.C. 49. See also 54 I.C. 396=30 C.L.J. 203 (co-sharers); (27 C. 417; 25 C.L.J. 469, Foll.); 51 I.C. 409=29 C.L.J. 461 (co-shebaits); 47 I.C. 638=28 C.L.J. 201 (co-sharer landlords); 33 I. C. 1006=29 P. W. R. 1916; 94 I.C. 300=1925 L. 474; 91 I.C. 558 (L.). Appeal by one of several co-defendants—Other co-defendants impleaded as respondents—Death of sole appellant—Appeal abates—Right to sue does not survive to co-defendants who were made respondents in appeal. 53 A. 521=1931 A.L.J. 266=1931 A. 349. Brothers instituting joint suit—Death of one brother—Appeal without impleading sons of deceased—Not legal. 15 R. D. 27. See also 1934 P. 559. It would be otherwise if the liability of each of the defendants or respondents be separately ascertained. 1 R. 618=1924 R. 127. See also 1939 All. 526=1939 A.W.R. (H.C.) 411; 152 I.C. 289=1934 P. 559. In case of several joint tort-feasors on death of one cause of

3. (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

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action survives against others. 106 P.R. 1915=32 I.C. 18. Delay in bringing L. Rs. on record may be excused in a proper case. 74 I.C. 912=1924 P. 319. Where L. Rs. are already on record, no application is necessary. 66 I.C. 24=24 O.C. 374; 7 L. 399=27 Punj.L.R. 668. Application must be made in time by person ultimately found to be L. R.; another's application in time would not help the rightful party. 49 I.C. 34=15 N.L.R. 21. See also 11 P.L.R. 1921=59 I.C. 238. If, in a joint Hindu family, on death of manager, other members are substituted, there is no abatement. 51 P.L.R. 1913=18 I.C. 44. See also 14 I.C. 491=11 M.L.T. 240. If wrong L. Rs. be brought on record without notice to respondent he can object at time of hearing. 44 M.L.J. 60=69 I.C. 529=1923 M. 367. On this rule, see also 4 L. 72=1924 L. 45; 35 B. 393=11 I.C. 559=13 Bom.L.R. 517 (limitation). Legatee and executor co-plaintiffs—Death of executor—Suit does not abate if L. Rs. of the executor are not brought on record. 121 I.C. 177=1930 L. 138.

PRO FORMA DEFENDANT.—Omission to bring on record the L. R. of a deceased respondent who has been added in the suit only as a *pro forma* defendant and who is not a necessary party to the suit is not fatal to the hearing of the appeal and the appeal does not abate on that ground. 145 I.C. 713=34 P.L.R. 858=1933 L. 406. See also 1923 L. 647; 1939 Pat. 225.

O. 22, Rr. 2, 3 and 4: DIFFERENCE BETWEEN.—In all cases where the right to sue is fully represented by the surviving plaintiff or against the defendant already on record. R. 2 applies; when it would not be fully represented unless some person not already on record is added as a party. R. 3 or 4 applies. The application of R. 2 or Rr. 3 and 4 does not depend upon the distinction between the right to sue surviving to a person in his own name or accruing after the death of the party pending the suit, but on whether the right to sue fully vests in the surviving plaintiffs or is fully available against the surviving defendants. 29 N. L. R. 12=1933 N. 95=142 I.C. 347. Co-widows hold the estate of their deceased husband jointly and are governed by the rule of survivorship. Both of them jointly represent the estate of their deceased husband, and if one of them dies the other continues to represent the estate alone. No substitution is necessary and the suit or appeal does not abate and R. 2 applies to such a case. 12 P. 778=14

P.L.T. 702=1933 P. 464. Suit for declaration—Several plaintiffs—Claim by each individually—Decree—Appeal by defendant—Death of one plaintiff—Whole appeal does not abate. 1934 L. 621=36 P.L.R. 230.

O. 22, R. 3: CONSTRUCTION OF RULE.—See 5 Bur.L.T. 77=15 I.C. 366=6 L.B. R. 52.

SCOPE OF RULE.—See 18 B. 224 under R. 1. See also 17 M. 209; 26 M. 224; 1939 Sind 234. R. 3, which deals with substitution after the death of a party, does not apply to a man who does not come in as a legal representative of a deceased party but as an assignee from him. 15 P. 82=17 Pat.L.T. 73=1936 P. 123. Where the right which a person claims does not accrue to him on the death of the plaintiff but on a lease obtained by him from her in her lifetime, it is obvious that he cannot come in as a man entitled to have his name substituted in consequence of the death of the original plaintiff. (*Ibid.*) All L.Rs. must be brought on record as plaintiffs or appellants, or if any refuses to join, as defendants or respondents. 20 I.C. 366=11 A.L.J. 719; 16 A. 211. See also 28 Punj. L.R. 3=100 I.C. 418=1927 L. 94. Though joint purchasers may have equal shares in the property they buy, and may as between themselves, each, be liable to pay a half of the revenue; each of them is so far as the Government is concerned liable to pay the whole. So when both of such persons sue as one entity to recover from the defendant the revenue which they had been wrongly compelled to pay, there is no presumption that each of them has paid one half of it. When such a suit is decreed and pending the appeal one of the plaintiffs respondents dies, the whole appeal abates as no presumption could be made about the payment made by the dead person. 183 I.C. 479=1939 O.A. 622=1939 R.D. 430=1939 A.W.R. (C.C.) 105=1939 O.L.R. 519=12 R. O. 40=1939 O. W. N. 711=1939 Oudh 241. It is open to a Court, when application for substitution is made and the Court finds that all the heirs of a deceased person have not come forward to apply, to refuse to make an order for substitution upon the ground that there are other heirs who ought to have joined in the application. Where however some of the heirs make such an application disputing the right of the other persons to claim as heirs it cannot be said that the Court cannot make an order for substitution in their favour. 145 I.C. 170=37 C.W.N. 138=1933 C. 498. There is nothing in O. 22, R. 3 (1), to suggest that an application under that rule can only be

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

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made by one who is legal representative. The right to make an application under the rule is not confined to the heirs of a deceased plaintiff. An application by a person who claims to be a legal representative, although he does not turn out to be one after full inquiry or by one who claims to have an interest in the continuance of the suit must be held to be such as would not allow the suit to abate. The only limitations are that the application must be a *bona fide* one and that the applicant must have claimed an interest in the suit in which an application is made under the rule in good faith. 48 L. W. 932=1939 Mad. 148. Death of one of several plaintiffs pending suit—Heirs not impleaded—Decree passed by appellate Court—Question of abatement raised in second appeal—Permissibility—Procedure. 30 Punj.L.R. 13=117 I.C. 665=1929 L. 119. If some do not choose to be brought on record there is no abatement. 1927 M. 1071. Suit on behalf of deity—All *shebait*s parties to suit—Death of one pending suit—Decree without effecting substitution in time limited—Validity—No abatement is caused. 7 Cut. L.T. 87. Scheme suit does not abate on death of original plaintiffs. 48 C. 493=22 L.W. 123=25 C.W.N. 794=62 I.C. 737=48 I.A. 12 (P.C.). See also 47 M.L.J. 745; nor a suit by creditors to set aside fraudulent transfers. 27 Punj.L.R. 219=7 L. 12=1926 L. 167; nor do execution proceedings. 2 Pat. L.T. 245=61 I.C. 4; 50 A. 621; 117 I.C. 165=1929 P. 200. Appeals in proceedings relating to execution of a decree are mere continuation of execution proceedings and Rr. 3, 4 and 8 cannot apply. 38 P.L.R. 281=1936 L. 519. An appeal arising out of an order passed in the course of proceedings in execution of a decree or order does not abate on the death of respondent if the appellant fails to apply to make the L.R. of the deceased respondent a party to the appeal within the time prescribed by law. 9 P. 372=122 I.C. 148=1929 P. 565 (F.B.). Nor do proceedings for ascertainment of mesne profits. (*Ibid*). See also 50 A. 621; 1929 P. 200=117 I.C. 165. In a suit by two partners, death of one partner does not cause whole suit to abate. 60 I.C. 755=19 A.L.J. 266. See also 112 I.C. 455. Appeal by two co-sharer landlords against dismissal of their suit for rent abates on the death of one of them. 97 I.C. 569 (1)=7 Pat.L.J. 797=1927 P. 44. See also 67 I.C. 10=34 C.L.J. 405. Where some tenants-in-common file a suit against another tenant-in-common regarding trespass committed by him and pending appeal in District Court filed by the

plaintiffs, one of them dies and his L. Rs. are not brought on record and the appeal is dismissed on merits, they can carry on, in their own behalf, the second appeal filed by them. 26 S.L.R. 362. Where on the death of an appellant leaving a number of heirs taking definite share in the inheritance, one of them is not added as a party within the time, the whole appeal cannot abate but only as regards the share of the person not added. 1941 A.W.R. (Rev.) 1078=1941 O.W.N. 1239. Decree passed in appeal after death of a joint plaintiff without L.Rs. being brought on record is a nullity. 45 A. 286=21 A.L.J. 91=71 I.C. 321; 15 R.D. 29. On death of a *pro forma* plaintiff, it is not necessary to bring his L.Rs. on record. 22 I.C. 929. So also in the case of *pro forma* defendant. 1923 L. 647; 145 I.C. 713=34 P.L.R. 858=1933 L. 406. So also in the case of *pro forma* respondent in appeal. 1923 L. 350; 45 A. 286=21 A.L.J. 91. See also 1925 L. 651; (1938) A.W.R. (H.C.) 138. Where the legal representative of a *pro forma* respondent who is dead is not brought on record, the appeal does not abate *in toto*. 43 C.W.N. 41=A.I.R. 1938 Cal. 639. Whether an appeal can be heard in the absence of any of the respondents depends on the nature of the suit and where a successful appeal will not create any contradictory decrees between the appellants and deceased formal respondents, the appeal can be heard without the legal representatives. 1941 O.W.N. 95=1941 R.D. 63. Regular application is necessary. The fact that the L.Rs. were brought on record in memo. of objection will not prevent appeal from abating. 52 I.C. 591=25 P.W.R. 1919; 162 I.C. 592=17 Pat.L.T. 129=1936 P. 266. See also 60 M.L.J. 267. But see 45 I.C. 949=34 M.L.J. 177. The rule only requires an application to be made by a person claiming to be the L.R. and it is not necessary that all the representatives should apply. 10 B. 220. See also 145 I.C. 693=1933 R. 234. In the case of mortgage suits the right to sue comes to an end with preliminary decree and the suit does not abate on the death of plaintiff after preliminary decree. 51 M. 701=55 M.L.J. 253 (F.B.); 2 Luck. 464=101 I.C. 174=1927 O. 156; 4 O.W.N. 1002; 1929 C. 430; 1935 L. 712; 17 L. 817=39 P.L.R. 168=1937 L. 164. But see 1930 A.L.J. 857; 1938 Nag. 42; 1930 A. 762; 1930 A.L.J. 999; 1930 A.L.J. 825=1930 A. 779=52 A. 910; 1931 A.L.J. 715=134 I.C. 236=1931 A. 490. (F.B.). Suit does not abate if defendant dies after preliminary decree and pending an application for ascertainment of mesne profits. 129 I.C. 84=11 Pat.L.T. 796=1931 P. 57; 1936 C. 540.

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If a mortgagee dies pending his suit to bring the mortgaged property to sale, a person claiming under his will can be brought on the record as a legal representative without taking out probate first. It would, however, be necessary for him either to take out probate or obtain a succession certificate before proceeding to take out a personal decree, if this becomes necessary. 43 P.L.R. 16. When a person sues for a debt and dies pending suit, his widow holding a succession certificate is alone entitled to be brought on record as his L.R. 26 M. 224. When a decree-holder dies pending execution petition his L.R. can be substituted in his place. 55 M. 352=62 M. L.J. 1=1933 M. 73 (F.B.). (50 M. 1, overruled.) Where the executor applying for probate dies during the pendency of such a proceeding his sons, who claim as legatees, or as representatives of the deceased legatee, can intervene and continue the proceeding. This is independent of the son's right to be impleaded as L.R. under O. 22. 56 M. 346=1933 M. 114=63 M.L.J. 899. See also 43 P. L. R. 16. Substitution of L. R. at one stage of suit is effective in all subsequent stages. 45 C. 94=33 M.L.J. 486=44 I.A. 218 (P.C.); 1928 L. 784=112 I.C. 704. Order for abatement of suit is a decree, and ought not to be made without notice to plaintiff. (*Ibid.*) Order setting aside abatement and bringing L. Rs. on record is a conditional and not an absolute order. 27 Punj.L.R. 638=94 I.C. 243=1926 L. 422. See also 11 C. W.N. 698. Registrar refusing to register will—Two legatees suing for registration—One of them dying—Other is his L. R. so far as right to continue suit is concerned. 115 I.C. 831 (1)=1929 M. 524. Two independent appeals against single decree—L.Rs. impleaded in one appeal—Abatement of other appeal. 60 M. L. J. 267. See also 52 I.C. 597 (L.R. brought on record in memo. of objections.) The test to determine whether or not failure to bring on record the heirs of one of several parties who had died has the effect of causing the entire appeal to abate or not is, can the appeal be decided, without bringing the L.Rs. of the deceased party on to the record without bringing into existence two decrees contrary to each other. If the result of hearing and deciding the appeal would be to bring into existence two decrees of Courts of competent jurisdiction contrary to each other, the appeal would abate as a whole. 1935 P. 4=158 I.C. 56. On the death of the pauper plaintiff the right to sue will survive as in all other cases, but the personal right to sue as a pauper will not survive, and the L.R. will have to continue the suit either as a pauper on a fresh application that he is a pauper or on payment of Court-fees. 146 I. C. 235=1933 N. 334. See also 1936 P. 591. Where one of the petitioning creditors having once been impleaded as a party to an insolvency proceeding dies pending an appeal

it is necessary to implead his representatives. It cannot be said that he is merely a *pro forma* defendant. The inclusion of his name and that of his representatives in the appeal is, therefore, essential. 145 I.C. 474=34 P. L.R. 827=1933 L. 642 (2). In a suit for malicious prosecution the plaintiff's right, which is a mere right to sue for damages for a personal injury, changes its character once it is merged in a decree. It then becomes a matter of record which is a right of higher nature. The rights and liabilities arising under a decree awarding damages for malicious prosecution therefore continue when the plaintiff dies during the pendency of an appeal against the decree, so far as the appeal is concerned, but as regards the cross-objections they abate. 30 N.L.R. 186=1934 N. 119. Where a suit for accounts ended in a decree and some of the defendants appealed and one of them died pending the appeal but his L. Rs. were not brought on record within time. Held, that the appeal abated and that O. 41, R. 4 did not apply. 15 L. 667=1934 L. 206. The L.R. or a deceased decree-holder who dies during the pendency of an execution petition filed by him can be substituted in his place in the execution petition and be allowed to continue it. 57 B. 616=35 Bom.L.R. 769=1933 B. 358. A Hindu widow suing to recover a mortgage debt due to her husband sues as a representative of her husband's estate. If she dies pending the suit, the right to sue survives and devolves on the reversioners who are her legal representatives within the meaning of S. 2 (11), C.P. Code, inasmuch as the estate vested in them on her death. If the reversioners do not apply to be substituted in time, the suit abates under O. 22, R. 3 (2) and they are, therefore, debarred from instituting a fresh suit on the mortgage under O. 22, R. 9. A purchaser of their interest is under the same disability. 45 C.W.N. 105. Where one of three appellants, who are members of a joint Hindu family, dies, but the right to sue does not survive in the remaining members, although the members of the joint family are already on the record and represent in a sense the interest of the deceased member of the same family, yet it is necessary to bring them on the record in the capacity of representatives of the deceased. And if they are not so brought on record, the appeal abates as a whole. 1933 P. 702. See also 1939 R.D. 310=1939 A. W.R. (B.R.) 259. A body of reversioners had obtained a declaration during a widow's lifetime that certain alienations were not binding on them. After her death some of them brought a suit for possession of their share and the remaining reversioners were made defendants. One of the plaintiffs died and his L.R. was not brought on record in time. Held, that the suit did not abate as a whole as the remaining plaintiff's shares were ascertainable and also because any of the

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previous plaintiffs could have brought a suit in respect of his share only (1928 L. 572, Ref.) 1933 L. 938. The fact that the legal representative of a deceased defendant is already on the record, but not as such (but in another capacity) does not prevent the abatement of the suit, and a plaintiff is not thereby relieved from the duty of applying within the time limited for the substitution of the legal representative of the deceased defendant under O. 22, R. 4. 39 Bom.L. R. 1156. See also 1938 Oudh 259. There is no justification enlarging the words of O. 22, R. 3, so as to cover a case where all that is required is formal amendment of the record, and not the addition of new parties. There is no justice in holding that a suit abates for want of parties when all parties interested are in fact before the Court. A person who is already a party cannot be made a party over again. If the proper parties are not before the Court, the suit cannot proceed; but if a party is on the record, he can appear either in person or by counsel and make any representation which seems good to him whether in one capacity or in more than one capacity, and being on the record, it is competent to him to put in a plaint or written statement stating his attitude in the different capacities in which he is suing or is being sued. On its being brought to the notice of the Court that the record does not show that he is suing or is being sued in more than one capacity, it is the duty of the Court to have the record amended. An amendment of that sort can be made at any time. The fact that the interest of the party pleading has not been properly shown on the record does not justify an order striking out the pleading. I.L.R. (1940) Bom. 497=42 Bom.L.R. 494=1940 Bom. 259. Where in a suit brought in a representative capacity, one of the plaintiffs dies during the pendency of the appeal by defendants and no steps are taken to bring his L.R. on the record, the appeal does not abate *in toto*. 152 I.C. 817=1935 A.L.J. 139=1935 A. 106. Where one of plaintiff-respondents dies during the pendency of appeal and the right to sue does not survive the defendant-appellants cannot possibly apply under R. 3 for bringing on the record the L.Rs. of the deceased inasmuch as no such representatives in the eye of the law exist and the omission to do what could not legally be done cannot be fatal to the appeal. (*Ibid.*) When trial Court decree declared that plaintiff and defendants were entitled to certain areas out of the joint holding and one of the respondents died pending appeal and his L.R. was not brought on record within limitation period. Held, that as the decree affected all the respondents, the appeal abated *in toto* and not merely against the deceased respondent. 157 I.C. 994=1935 Pesh. 126. Contract to sell land in favour of two persons—Shares not specified—Decree dismissing suit

by vendees for specific performance—Appeal by both—Death of one—Heirs not impleaded. Held, that the right to enforce the contract vested, on the death of one of the appellants, under S. 45 of the Contract Act, in his L.Rs. along with the other and not in the latter alone; it was therefore impossible to give any relief to the surviving appellant in the absence of the heirs of the deceased appellants on the record. The appeal therefore abated not only as regards the deceased appellant, but *in toto*. 15 L. 355=37 P.L. R. 400=1935 L. 478.

O. 22, Rr. 3 and 8.—Suit by daughter for possession of father's estate—Dismissal—Appeal by plaintiff—Death of appellant leaving insolvent son—Application by Official Receiver to be impleaded—Subsequent withdrawal—Subsequent application by insolvent son for permission to continue appeal in his own right as reversioner not maintainable. 47 L.W. 363=1938 Mad. 420=(1938) 1 M. L.J. 413 (F.B.).

LEGAL REPRESENTATIVE.—These words must, where there are more than one L.R. be read in the plural. 20 A. 341. See also 23 C. 636; 18 N.L.R. 21=1923 N. 101; 32 C.W.N. 1020. Admission of person as L.R., effect of. 70 I.C. 209=1923 N. 209. Omission to bring L.R. of sole appellant (deceased) is not mere irregularity curable under S. 99. 9 I.C. 977. Death of the sole plaintiff in a mortgage suit and the omission to bring his heirs on the record within the period of limitation results in an abatement of the suit. The abatement is automatic and does not require any formal order by the Court. 129 I.C. 545=1931 A. 154=53 A. 374=1931 A.L.J. 153. Propriety of order setting aside abatement of suit. See 47 B. 92=1922 B. 449. What is sufficient cause for setting aside order of abatement, see 1 L.L.J. 26. The rule relates to the case of plaintiff dying before judgment. It has no application to a case where a plaintiff dies after decree, and his representative wishes to appeal. 3 M. 237. See also 9 C.W.N. 171; 9 C.W.N. 361; 10 A. 223 (F.B.); 8 M. 300; 23 M. 125. In a case in which an action would abate upon the death of plaintiff before judgment, the action could not abate if final decree had been obtained before his death. 9 A. 134 (F.B.). See also 27 B. 579. The question of abatement must be considered with reference to the subject-matter of the suit; where the suit relates to a sum of money the suit need not abate in its entirety merely because all the heirs of one of the plaintiffs have not been brought upon the record. 1932 A.L.J. 1029=16 R.D. 583. Death of one of several defendants (appellants) causes the appeal to abate only so far as the deceased appellant is concerned and not the whole. 10 I.C. 27. See also 50 A. 792=1928 A. 345 (F.B.); 1930 A. 211 (2)=125 I.C. 591; 61 C. 879=38 C.W.N. 743=1934 C. 703. But if the nature of the appeal is such that

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it cannot be decided in the absence of the deceased defendant the whole appeal abates. 32 C.W.N. 229=107 I.C. 726; 56 C. 622=33 C.W.N. 359=1929 C. 519. Where there are several appellants, any single one of whom is competent to maintain and prosecute the appeal, the death of one of them does not cause an abatement on failure to implead his L.Rs. The right to sue in such case survives to the other appellants alone. 1935 L. 879. Decree obtained against wrong L.Rs. cannot be enforced as against the proper L.Rs. 139 I.C. 465=63 M.L.J. 319. But see 29 N.L.R. 89=1933 N. 73 (1926 M. 487, Dist.) An objection that a person is not the L.R. of the deceased plaintiff must be taken at the earliest opportunity. When once the name of a person is entered on the record under this rule, the Court is bound to proceed with the suit. 26 M. 224. See also 70 I.C. 209=1923 N. 209. An *ex parte* order under this rule does not preclude the defendant from urging at the hearing that the suit has abated. 11 C.W.N. 698. See also 94 I.C. 243. It would be open to a defendant or respondent to apply to bring on record the L.R. 90 I.C. 72. A person who allows his benamidar to sue in his own name and not in a representative character cannot come in on his death as his L.R. 1930 M. 221=58 M.L.J. 57.

ESTOPPEL against original party also binds L. R. 19 I.C. 258. L.R. of a deceased plaintiff is confined to pleadings and the case of the deceased plaintiff. 1930 M. 593=127 I.C. 127.

APPEAL.—An appeal lies against an order passed under this rule. 17 M. 209. But see also 1 L. 493=2 L.L.J. 738; 49 M. 450=50 M.L.J. 485=1926 M. 586 (F.B.). An order dismissing a suit as abated, is a decree. 26 M. 224. See also 17 M.L.J. 69 (Recent cases) and 10 B. 220; I.L.R. (1940) Nag. 324 (Order that cross-appeal has abated, if decree and appealable). An order stating that certain persons cannot be substituted in the place of a deceased plaintiff is not appealable. 140 I.C. 529=1932 A.L.J. 308=1932 A. 466. Joint decree in pre-emption suit—Appeal—Death of one vendee pending—L.R. not brought on record—No abatement. Mere fact that one of the vendees had dropped out, would not prevent the other vendees from prosecuting their appeal, because they were interested in the property transferred and were entitled to press their appeal as against the plaintiff on a ground common to all the vendees and that the appeal did not abate as a whole. 146 I.C. 511 (2)=1933 A.L.J. 1049=1933 A. 733. An appeal by a deity is not incompetent merely by reason of its being allowed to abate as against the heirs of one of the shebaites who died pending the appeal. 42 C.W.N. 837=1938 Cal. 541.

REVISION.—An order passed by a District Judge dismissing an appeal from the order

of a Munsif that the name of a representative already brought on the record be struck out, is liable to revision under S. 115. 26 M. 224.

LIMITATION.—See Limitation Act, Art. 176. 3 I.C. 438; 5 Bur.L.T. 77=15 I.C. 366; 13 I.C. 313=22 M.L.J. 169. (If one L. R. be brought on record in time, there is no bar of time if others are brought in subsequently.) 52 I.C. 614; 71 I.C. 176=1923 N. 166. Under R. 3, the suit abates so far as the deceased plaintiff is concerned when there is no application within 90 days under Art. 176 for the substitution of his L.R. and if within the 90 days an application in that behalf has been made then the Court under O. 1, R. 10 can afterwards permit other persons who are also L.Rs. to be joined as co-plaintiffs in the suit in spite of the fact that their application is presented more than 90 days after the death of the original plaintiff. 145 I.C. 693=1933 R. 234. See also 1937 Rang. 199. The procedure laid down in Rr. 3, 4 and 11 for substitution of L.R. of appellant or respondent is not exhaustive. Such application can be made at any time within the period prescribed by Art. 181, Limitation Act. 9 P. 372=122 I.C. 148=1929 P. 565 (F.B.).

DISCRETION OF COURT.—See 43 M.L.J. 147=45 M. 703.

O. 22, Rr. 3 and 4.—See 1937 Rang. 199. O. 22, R. 12 excludes Rr. 3 and 4 from execution proceedings and does not prohibit the substitution of the name of the L. R. of the deceased decree-holder in execution on the latter's death. An execution proceeding does not abate on the death of the decree-holder and there is no bar to the execution continuing at the instance of his representative. A fresh application for execution is not necessary. 13 P. 777=155 I.C. 969=1935 P. 117. The provisions of Rr. 3 and 4 have no applicability to a case where the plaintiff dies after securing a preliminary decree and before the passing of the final decree in a mortgage suit. 17 L. 817=1937 L. 164; 1935 L. 712. A final decree passed in a mortgage suit against a defendant who has died after the passing of the preliminary decree and without substitution of his heirs is not a valid decree. 39 C.W.N. 1284. See also 17 Lah. 817=39 P.L.R. 168=1937 Lah. 164; 1937 Pat. 612; 1940 Bom. 318.

O. 22, Rr. 3 and 4.—The provisions of O. 22, C. P. Code, apply to Civil revision-petitions under S. 115, C. P. Code, where the petitioner in a civil revision petition dies, and his legal representatives do not apply to be brought on the record and to continue the revision petition, within the period of 90 days prescribed therefor, the revision petition abates. After the said 90 days there is no revision petition pending in the High Court. If the High Court in ignorance of the death of the party disposes of and passes an order on that petition, after it has abated, that order is without jurisdiction and a nullity. 1937 M.W.N. 787.

4. (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

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O. 22, Rr. 3 4 and 11.—Where a suit against several defendants for a declaration that the plaintiffs were entitled to water their lands from a particular stream at a specified point and for a perpetual injunction that the defendants should remove their dam in order to enable the plaintiffs to do so is decreed, the decision jointly affects all the defendants and if in appeal by them one of them dies and his legal representative is not brought on record within time, the appeal does not abate against all the appellants. 1941 Pesh. 36.

O. 22, Rr. 3 and 9.—O. 22, R. 3 read with R. 9 deals with representation of deceased appellant. Upon the death of the appellant, if one of his legal representatives is properly brought on record, this would prevent the appeal from abating. Applications to place other legal representatives on record can be made and allowed even after the period of limitation has expired and such applications do not operate as an automatic abatement of the appeal. I.L.R. (1939) Lah. 433=41 P.L.R. 843=1939 Lah. 439.

O. 22, Rr. 3 and 11.—Where a sole defendant in a suit against whom a decree is passed, dies pending the appeal filed by him, and some only of his heirs are substituted, within time as appellants, the appeal abates unless the existence of the other heirs are unknown. If any of them are unwilling to proceed with the appeal, they must be made respondents. 43 C.W.N. 1088.

O. 22, Rr. 3 and 10: DIFFERENCE BETWEEN.—There is a difference between R. 3 and R. 10. In case there is a death of a party to a suit, the Court, on a proper application, is bound to substitute the L.R. of the deceased party under R. 3, while R. 10 refers to cases of assignment, creation or devolution of an interest during the pendency of a suit other than on death, etc. In this case the Courts have a discretion to give leave for the suit to be continued by or against the person to or upon whom such interest has come or devolved. 15 P. 82=17 Pat.L.T. 73=1936 P. 123.

O. 22, Rr. 3 and 11 are not overridden by O. 41, R. 4. 1940 P.W.N. 361=1940 Pat. 346.

O. 22, R. 4: SCOPE OF RULE.—See 1930 M. 930. The rule is applicable to insolvency proceedings. 7 A. 734. But see 10 A. 264 (F.B.). It is sufficient compliance with R. 4, if one L. R. alone is brought on the record on the death of a defendant. It is not necessary that all his L. Rs. should be impleaded. An abatement under the rule as against a particular defendant cannot operate

as an abatement of the whole suit as against all the defendants. 37 Bom.L.R. 288=1935 B. 287. See also 1941 O.W.N. 1195=1941 O.A. 891 (test to find whether abatement of appeal is total or partial). 1938 Oudh 62. So also where the appellant has impleaded all the persons known to him and *bona fide* omitted one subsequently brought on record. 7 L. 438=28 Punj.L.R. 287=1927 L. 6. See also 7 Pat.L.T. 746=94 I.C. 209=1926 P. 376; 4 P. 320=89 I.C. 280=1925 P. 551; 1935 L. 712 (1933 L. 356, Dist.; 1927 L. 6 and 1933 L. 380. Rel. on.) 59 M. 660=43 L.W. 500=1936 M. 336. Hence where on the death of a defendant his two sons are brought on record as his L. Rs. but one of them dies and this is not known to the plaintiff who continues the suit and the subsequent proceedings *bona fide* with the two sons on record and the other son contests all proceedings, the subsequent proceedings taken are not null and void. (*Ibid.*) On this rule, see also 36 C.W.N. 1007=56 C.L.J. 365. Words 'right to sue' in the rule means 'right to appeal' in case where a party dies after decree but pending appeal. 1934 A.L.J. 933=1934 A. 1029. Decree in favour of Hindu son that decree against father not binding on his share—Appeal by defendant—Death of plaintiff—Effect—Abatement. (*Ibid.*) Although the decree appealed against is common to all the defendants against whom the suit was dismissed, the abatement of appeal against one of the defendants-respondents does not have the effect of the abatement of the entire appeal if the interest of that defendant is quite distinct and separate from that of the other defendants. 1938 O.W.N. 40=1938 Oudh 62. See also 1938 Sind 239. The failure to implead all the legal representatives of a deceased defendant does not cause the suit to abate as against him. There is no provision in O. 22, R. 4, allowing a suit to abate when an application has been made, merely because the application does not include all the legal representatives of the deceased. 40 P.L.R. 90=1938 Pesh. 4. If a decree is made jointly in favour of all the defendants, and their interests *inter se* are neither separate nor separable, it may lead to two conflicting decrees, if an appeal is allowed in the absence of some of the defendants in whose favour the original decree stands. In cases like these therefore, the non-inclusion of some of the defendants as respondents must naturally result in the failure of the whole appeal. But where this is not the case and there is no danger of coming into conflict with any other recognized principle of law, there is no bar against an appeal proceeding in the absence

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of some of the defendants who are not impleaded as respondents. 18 Lah. 746=40 P. L.R. 273=1938 Lah. 35. See also 1938 Nag. 42=I.L.R. (1938) Nag. 266; 1941 Pesh. 41. Where the death of one of the respondents to an appeal does not make the representation of the interests involved incomplete, the appeal does not abate and can proceed; but where such death renders the representation incomplete, the appeal as a whole abates. In an appeal against a decree for partition, when one of the co-sharer-respondents dies and his heirs are not impleaded in time, the appeal abates as a whole because no decree for partition can be made in absence of even a single co-sharer. 16 Pat.L.T. 308=154 I. C. 856. Where, on the death of one of several respondents, the appellant withdraws his appeal as against him instead of bringing his L. Rs. on record, the whole appeal will abate and become incompetent if it will result in two inconsistent decrees being made. 1936 A.M.L.J. 19. Death of defendant—Omission to implead all L. Rs.—Effect—Subsequent order allowing withdrawal of the suit with liberty—Legality. 43 C.W.N. 1019.

APPLICABILITY.—*Suit for accounts*.—Death of defendant after preliminary decree and before final decree—Suit if abates. 87 I.C. 818=1926 C. 308; 1937 Lah. 615. As to mortgage suit see 89 I. C. 236=1926 S. 20. But see *infra* 51 M. 701 (F.B.). O. 22, R. 4, does not apply to a case in which a preliminary decree has been passed. Where in a mortgage suit, the mortgagor dies after the preliminary decree, and his heirs are not brought on the record within the time limited, there is no abatement of the suit. The preliminary decree is a good decree although the mortgagor dies on the same day on which judgment is pronounced but the decree is passed only the next day. O. 22, R. 6 applies to the judgment based on arguments which have been concluded before the death and such judgment may be the judgment founding either a preliminary decree or a final decree. I.L.R. (1940) Bom. 689=42 Bom.L. R. 663=1940 Bom. 318. A suit does not abate on account of the death of a defendant after a preliminary decree is passed. The word "suit" means only such proceedings as are antecedent to the passing of a preliminary decree or otherwise. 2 Luck. 464=101 I.C. 174=1927 O. 156; 1929 N. 206; 1929 C. 648; 11 R. 446=1933 R. 318. See also 132 I.C. 31=1931 A. 235; 1937 Lah. 423; 1938 Sind 239; 1938 Nag. 42; 1937 Lah. 615. Where mortgagors obtain a preliminary decree for redemption, and some of them die and the rest are their representatives in interest by right of survivorship, R. 10 and not this rule applies and there is no period of limitation for the right to apply for the substitution of the representatives of the deceased. (*Ibid.*) See also 29 Bom.L.R. 244=101 I.C. 129=1927 B. 156. But see *contra* 49 A. 310=100 I.C. 288=25 A.L.J. 175=1927 A. 272. A final decree in a mortgage suit is a "decree" within the meaning of S. 2 (2), C. P. Code, and as such, is subject to the general rule

that a decree made against a dead defendant, i.e., a defendant dead at the date it was made, is a nullity. The L.R. can properly raise the question of validity of the decree so made in an independent suit, and cannot be prejudiced by the fact that their interests were technically represented in the execution by an administrator appointed *pendente lite*. It is not necessary that they should take steps in the mortgage suit itself. 63 C. 472. *Wrong representative brought on record*—No fraud or collusion—Decision binds real representative as well. 1930 M. 930=60 M.L.J. 97; 29 N.L.R. 89=1933 N. 73; 1933 L. 380=141 I. C. 580=34 P.L.R. 511. It not uncommonly happens, in a suit for administration, that for one reason or another a particular interest is not represented before decree, but is either provided for by the decree, or is asserted at a later stage under the decree, or is given effect by a party being permitted to attend certain accounts and enquiries so as to be bound by the result. A Mahomedan brought a suit against his co-heirs for administration. One of the defendants who had the same interest and was in the same position as that of the plaintiff died and no application was made by the plaintiff to bring his heir on the record. *Held*, that the suit for administration did not come to an end by reason of abatement as against the deceased defendant. A.I.R. 1940 P.C. 215=67 I.A. 406=45 C.W.N. 226=53 L.W. 1. When the defendant mentioned in an application to sue *in forma pauperis* dies, the applicant is not affected by the provisions of this rule. 7 B. 373. The rule does not apply to cases in which an assignment or creation of an interest pending the appeal plus the death of the assignor, arises. Such cases fall under R. 10. 9 B. 151. This rule and not R. 9 applies to the bringing on record of the L.Rs. of a deceased defendant, in a suit for dissolution of a partnership. 16 B. 27. As to applicability of rule to partition suit after the passing of preliminary decree, see 1933 C. 696=60 C. 940. See also 11 O.W.N. 1487; 1938 Sind 239. Death of one of the defendants in a partition suit after preliminary decree and before final decree does not cause abatement. But this is not applicable to appeal from preliminary decree. In such an appeal in which the preliminary decree is put in jeopardy it is necessary that all the parties interested should be joined; and if a respondent who was one of the alienees impleaded in the suit dies during the pendency of the appeal and if his L.Rs. are not impleaded as parties within the time limited, the appeal must necessarily abate. 30 S.L.R. 428; 11 O.W.N. 1487=1935 O. 36; 1935 O.W.N. 401=1935 O. 329. So also where one of the co-sharer respondents dies and his L.Rs. are not brought on record, the whole appeal abates. 154 I.C. 856=16 Pat.L.T. 308=1935 P. 241. When some of several respondents die and their L. Rs. are not added, the appeal abates only so far as they are concerned, and must proceed against the others. 26 B. 203. See also 22 B. 718; 94 I.C. 30; 48 A. 251=91 I.C. 859=1926 A. 234; 4 P. 53=1925 P.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

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480; 102 I.C. 304=1927 L. 783; 100 I.C. 839=28 Punj.L.R. 148; 1925 N. 299; 85 I.C. 563=1925 A. 623; 4 P. 187=1925 P. 434; 6 L. 233=86 I.C. 1; 49 B. 118=85 I.C. 197; 1928 L. 572=10 L. 7 (F.B.); 1928 M. 1148; 50 A. 599=1928 A. 172. So also where a mortgagee sues for recovery of mortgage money, and one of the mortgagors dies pending suit, and no L. Rs. of the deceased mortgagor are brought on record within limitation, the whole suit does not abate. 132 I.C. 31=1931 A.L.J. 902=1931 A. 235; 1933 L. 1001 (Case of appeal by mortgagee and a puisne mortgagee dying.) But in cases where the cause of action is one and indivisible like *pre-emption suit* and *representative suit*, the appeal will fail *in toto*. 90 I.C. 324=23 A. L.J. 935; 89 I.C. 378; 23 A.L.J. 938; 48 A. 81=1926 A. 128; 94 I.C. 253 (1); 92 I.C. 35=26 Punj.L.R. 797; 1928 L. 869; 51 A. 267=56 I.A. 80=56 M.L.J. 304; 1929 N. 358; 1930 L. 33; 27 N.L.R. 220=1931 N. 184; 35 P.L.R. 513=1934 L. 429. Suit against three members of a *joint Hindu family*—Death of one of them (respondent) pending appeal—L. R. not brought on record—Whole appeal abates. 7 P. 285=108 I.C. 552; I.L.R. 1937 Nag. 423. *See also* 1933 P. 646. But where the *manager of the family* died after the disposal of the appeal but before the second appeal was filed but the succeeding manager and the other adult co-parcener were impleaded as party respondents, *held*, that the omission to implead the L.Rs. of the deceased manager was not fatal to the second appeal. 1932 M.W.N. 491 [51 B. 450, (P.C.), Ref.]; 1935 R.D. 5. Death of one of three defendants who were brothers—Widow of deceased not impleaded as legal representatives—Representation by other defendants that they formed joint family—Plaintiff acting in good faith—Decree binds legal representatives. 42 P.L.R. 806. On death of the defendant who is sued as an executor, the estate of the testator devolves on the residuary legatee, and if he is not brought on the record of the appeal within the period of the limitation provided for by law, the appeal abates. 62 C. 998. Suit for possession of land and demolition of buildings thereon—Decree—Appeal by all defendants—Death of one of them—Representative not added—Plaintiff's suit dismissed *in toto*. *Held* there was nothing improper in it. 1935 A. L.J. 501=1935 A. 640. Suit for declaration of plaintiff's *ownership and injunction* restraining defendants—Death of one defendant—L. R. not brought on record—Suit abates *in toto*. 118 I.C. 437=1929 L. 256. But *see contra*, 150 I.C. 148=3 A.W.R. 615=1934 A. 716, which is a suit for possession and injunction against trespassers. Where the rights of the defendants as a body were in question, *held*, the entire suit abates on account of the death of one. 28 Punj.L.R. 52=99 I.C. 970=1927 L. 87; 1925 A. 141=22 A.L.J. 1033; 89 I.C. 162. *See also* 8 L.L.J.

134=94 I.C. 563=1926 L. 332; 94 I.C. 300=1926 L. 474 (joint decree); 9 P. 693; 168 I.C. 983=1935 P. 430. *Representative suit* under O. 1, R. 8—Death of respondents other than representatives—Failure to bring L.Rs. on record—Appeal does not abate. 120 I.C. 794=1930 L. 18; 132 I.C. 657=1931 L. 610; 145 I.C. 432=34 P.L.R. 844=1933 L. 682. *See also* 1937 Pat. 149=17 Pat.L.T. 926. O. 22, cannot be applied to a suit or appeal instituted or defended by a few persons on behalf of numerous persons not on record under O. 1, R. 8, C.P. Code, where certain respondents to an appeal are allowed by the Court to defend the appeal on behalf of all the respondents who are a large number, the death of some of such respondents defending the appeal will not result in the abatement of the appeal by reason of the omission to implead or substitute their heirs within the time limited. It is for the Court in such a case to decide whether it will permit the remaining respondents to continue to defend the appeal or whether it will insist on the original number of respondents being maintained by adding some of the respondents. 18 Pat. 723=21 Pat.L.T. 637=1940 Pat. 180. *See also* 1940 A.M.L.J. 63. Where a person is appointed by the Court on an application under O. 1, R. 8 to be sued and defend the suit on behalf of a class, he is not a party to the suit in his personal capacity, but is impleaded as a representative of a class and derives authority to do so from the order of the Court. This right is personal to him, and on his death, it does not survive to his personal heirs who, without another order by the Court appointing them, or any of them, *co nomine* have no authority to act as representatives of the class. In such a case the right to sue does not survive, and therefore the provisions of O. 22, Rr. 3 and 4 do not apply. Hence it is not necessary for the plaintiff under the law to bring his legal representatives on the record as defendants, as required by O. 22, R. 4 within the period of 90 days prescribed under Art. 177, Limitation Act. 1939 Lah. 572. *See also* 1937 Pat. 149. In a suit for declaration of title where one of the defendants dies and his L.Rs. are not brought on record, the suit abates against the deceased defendant and not against all. 1930 A. 369=129 I.C. 371. The ordinary test to see whether the suit abated against other defendants was that if the continuation of the suit would result in conflicting decrees, then the suit must abate against the other defendants as well, but if there would be no such contradiction, then it would not abate against all. 1936 N. 292. *See also* 1935 O.W.N. 297; 1936 P. 191; 1936 R.D. 473. In a suit filed against a Hindu joint family business formed by brothers none of them was impleaded as the manager of the joint family. The eldest member died but his son was not brought on record. *Held*, that suit abated against him only and not against other defendants. 1936 N. 292. Where in a suit on

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a hand-note, the trial Court having either intentionally or through oversight omitted to grant interest *pendente lite*, the plaintiff appeals from the suit praying for grant of interest *pendente lite* and during the pendency of the appeal one of the respondent dies and the appellant fails to bring his L. R. on record within the prescribed period, the appeal abates as a whole, because if the appeal is allowed there would be two inconsistent decrees on the basis of the same hand-note. 161 I.C. 862=1936 P. 191. An appeal as a whole does not abate on the death of a *pro forma* respondent. 1925 L. 651 (2)=92 I.C. 261. See also 60 C.L.J. 225. Where in a suit on a mortgage for sale certain defendants are impleaded as being in possession and occupation of the mortgaged properties and not because they are interested in the equity of redemption such defendants are only proper but not necessary parties to the suit. If, therefore, one of such defendants dies pending an appeal from the decree in the suit, and heirs are not brought on record, the appeal would abate only as against that particular defendant and not as a whole. 16 Pat.L.T. 893=1935 P. 383. Where the question in dispute in the suit does not affect the deceased defendant the suit does not abate. 91 I.C. 32=1926 L. 189; 1927 L. 418. The question of the abatement of the whole suit depends on whether the deceased was such a necessary party that his absence should result in the dismissal of the whole suit. 91 I.C. 991=1926 M. 379; 1930 L. 353; 1933 L. 129=143 I.C. 364. Whether abatement is *in toto* or in part—Test. See 13 L. 70=137 I.C. 820=1932 L. 281; 1933 S. 384; 16 L. 747=37 P.L.R. 850=1935 L. 853 [1928 L. 572 (F.B.) and 1930 L. 126, Appl.] The question whether an appeal can or cannot proceed in the absence of the L.Rs. of one of the respondents who has died, must depend upon the nature of each case and it is impossible to lay down a general rule applicable to such cases. Each case must depend upon its own circumstances. (*Ibid.*) Where pending an appeal against a joint decree in favour of three co-sharers, one of the respondents died, *held*, the appeal cannot proceed in the absence of the L.Rs. of the deceased. 53 C. 752; 43 C.L.J. 401=1926 C. 893. See also 100 I.C. 482=1927 A. 331; 137 I.C. 319=1932 M. 212; 135 I.C. 245=1932 A.L.J. 219=1935 O.W.N. 297. So also where one of several respondents to an appeal, who are joint tenants of a holding, dies pending the appeal. 1935 R.D. 5=16 L.R. 173 (Rev.). Suit under S. 106, B. T. Act—Appeal by one co-sharer landlord—Death of respondent-co-sharer—Abatement *in toto*. 146 I.C. 831 (2)=37 C.W.N. 756=58 C.L.J. 29=1933 C. 787. But where each of the plaintiffs has an ascertained share distinct from the others, the mere fact that the L.Rs. of one of them have not been brought on record is not prejudicial to the prosecution of the appeal. 27 N.L.R. 220=134 I.C. 679=1931 N. 184; 146 I.C. 945. See also 146 I.

C. 154=1933 L. 556. There were two separate attachments of a bungalow by two decree-holders. On objection to the attachments being dismissed, a suit was filed under O. 21, R. 63, which was also dismissed. The objector preferred an appeal impleading both the decree-holders as respondents. When the appeal came up for hearing, it was reported that one of the decree-holders had died more than three months previously and an order was passed that the appeal had abated against him. *Held*, that the appeal did not abate *in toto* and that it could proceed against the surviving respondent. 38 P.L.R. 269. L.Rs. already on record—Application still necessary. 90 I.C. 41=1926 L. 37; 3 P. 853=1925 P. 123; 150 I.C. 915=1934 N. 165. But see 1926 L. 607=7 L. 399; 1930 M. 579=126 I.C. 486; 51 M. 347=54 M.L.J. 675; 15 P.L.T. 380=1934 P. 427; 144 I.C. 618=1933 L. 710; 144 I.C. 607=34 P.L.R. 778=1933 L. 765; 1939 A.M.L.J. 109. When a suit is instituted against a dead man, Court cannot substitute the representative as defendants. 17 M.L.J. 551; 9 L. 526; 1928 M. W.N. 240; 143 I.C. 596=37 L.W. 489=1933 M. 454. The general rule is that, as the representative of a deceased plaintiff can only prosecute the cause of action as originally framed, so the defendant can raise no other defence against him than he could have raised against the deceased. 19 M. 347; 1930 A. 348=1930 A.L.J. 836=123 I.C. 376. Where an appeal is filed against a dead person no question of abatement arises, Court may in such cases excuse time and permit L.Rs. to be impleaded. 33 P.L.R. 116=1932 L. 305=138 I.C. 277. Decree passed in favour of two persons—Only one applying for execution and getting order—Judgment-debtor appealing—Other decree-holder dead before filing appeal—Judgment-debtor applying for substitution of L. Rs. after prescribed time—Appeal is not barred against representatives. 118 I.C. 901=1929 L. 673. See also 1939 A.M.L.J. 109. Proceedings as regards taking additional evidence, under the direction of the appellate Court pending in lower Court—One of the respondents dying—Application for substitution of names can be entertained by the appellate Court and not by the lower Court. 115 I.C. 610=1929 A. 319. Respondent's L.R. wishing to bring himself on record ought to apply by petition under O. 22, R. 4, but he need not apply for setting aside abatement. 139 I.C. 574 (1)=36 L.W. 169=1932 M. 527. Decree against dead person is void as also the execution sale in pursuance thereof. L. R. of deceased can be granted restitution by Court by virtue of its inherent power. 11 P.L.T. 361. Where a respondent dies before the decree of appellate Court and his L. R. is not brought on record, if the appeal is of such a nature that it can proceed without bringing the L. R. on record and the appellate Court passed the decree after hearing the merits, the decree is not invalid for that reason, and it can be executed if it is not barred under Art. 182. (1930 M. 719; 39 M. 386 and 1925 P. 480, Foll.) 145 I.C.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

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765=1933 M. 218. Delay in making application to implead L. Rs.—When condoned. 32 P.L.R. 822=1932 L. 148. Application to implead L. Rs.—When extension of time granted. 15 R.D. 476=12 L.R. 237 (Rev.). Where the legal representative of a deceased defendant is already on the record, an application to bring his legal representative on record within three months is not necessary. It is enough if the fact is brought to the notice of the Court and is recorded. 1938 O. W.N. 1043=1938 Oudh 259. Where there are several defendants to a case, only some of whom are contesting the case actively the knowledge of the silent defendants may be presumed from the fact that other co-defendants are actively contesting the proceedings. But this presumption can hardly apply to a deceased defendant. Neither his knowledge nor that of his heirs can be presumed from the fact that some of the other defendants, who are alive, are contesting the proceedings. The provisions of O. 22, R. 4 are mandatory and it is necessary before the proceedings can continue that when one of the defendants dies his heirs must be brought on the record. 1940 A.W.R. (B.R.) 195=1940 O.A. 1021. A counter-claim stands in the same category as a cross-suit for the purposes of the C. P. Code, and counter-claim would abate by reason of the omission to bring the heirs of the deceased defendant to the counter-claim on record in the counter-claim. On the plaintiff's death (the plaintiff in the suit) his heirs can come on record and amend the plaint which is their pleading. But it is no part of their duty to amend the title of the written statement. If the defendant who counter-claims wants to amend the title of his counter-claim and his written statement, it is his duty to obtain an order for that purpose. I.L.R. (1940) Bom. 10=41 Bom.L.R. 1288=1940 Bom. 117.

MISCELLANEOUS.—An application under O. 22, R. 5 praying for decision as to who the L. R. is, may be treated as one under R. 4, to bring on record any particular person as L. R. 38 L.W. 792=1933 M. 920=65 M.L.J. 798. Cause of action for breach of trust survives against L.R. of deceased trustee. 40 L.W. 122=1934 M. 448=67 M.L.J. 222. Where one of the tort-feasors dies during the course of the suit and his L. Rs. are not brought upon the record within time, the suit can proceed without them, as the death of one tort-feasor cannot affect the case against another. 36 P.L.R. 182=1934 L. 941. *Plaintiffs* formerly a firm—Subsequent dissolution—Suit in individual capacity by all partners but not in name of firm—Death of one pending appeal—L. R. not added in time. *Held*, that O. 30, R. 4 did not apply and suit abated as a whole. 148 I.C. 333=1935 P. 121. So also where *defendants* constituted a firm but sued on individually. 14 L. 543=1933 L. 356. Where several L.Rs. of a deceased party have been brought on the record, if one of

them dies and the estate continues to be represented by the remaining L.Rs. the omission to implead the heir of the deceased L.R. does not cause abatement of the case. In such a case there is no lack of representation, because, the remaining representatives can as well represent the estate as the original group did. 1934 M. 730 (2)=67 M. L.J. 681. If the petitioning creditor dies, no valid order of adjudication can be made. But where a person, who is not directly participating in the insolvency proceedings, dies pending an appeal, the first step for the insolvent-appellant to take is to bring his own appeal into order by getting the L.R. of deceased petitioning creditor impleaded before urging that the order of adjudication itself is a nullity. 145 I.C. 474=34 P.L.R. 827=1933 L. 642 (2).

O. 22, R. 4 (3).—No order declaring abatement necessary. The suit abates automatically. 7 L. 73=94 I.C. 422=1926 L. 234; 48 A. 334=24 A.L.J. 369=93 I.C. 313=1926 A. 217 (F.B.), overruling 44 A. 459 and upholding 42 A. 540; 112 I.C. 5=1928 L. 746; 152 I.C. 227=35 P.L.R. 457=1934 L. 442; 1937 N. 88. *See also* I.L.R. (1937) Bom. 602=1937 Bom. 401. An application filed to set aside such abatement within 60 days from the date of abatement of suit is proper and not premature, even though it is made before the order of the Court that the suit had abated. 1937 N. 88. Where only some of the L.Rs. of the deceased persons are brought on record within the time the suit does not abate though other L.Rs. are left out. 1928 M. 1199=117 I.C. 138. Meaning of L.R.—Only one of several representatives added. *Held* appeal abated. 14 L. 543=142 I.C. 649=34 P.L.R. 11=1933 L. 356. But *see* 144 I.C. 607=34 P.L.R. 778=1933 L. 765; 14 L.R. 469 (Rev.)=17 R.D. 616 (Case of proceedings under U. P. Land Revenue Act III of 1901). Where an applicant under S. 21-A of the Punjab Alienation of Land Act omits to implead the L.Rs. of one of the necessary parties thereto who is dead, the application abates under O. 22, R. 4 (3), C. P. Code. 1935 L. 443. So also in suit under S. 44, Agra Tenancy Act. 1936 R.D. 473. *See also* 1940 O.W.N. 622=1940 Oudh 365.

LIMITATION.—*See* Art. 175. 10 A. 264 (F. B.) and 16 B. 27; 87 I.C. 632=1925 L. 599 (1); 1937 Lah. 794. Under O. 22, R. 9 (3) which specifically applies the provisions of S. 5 of the Limitation Act to the application to set aside abatements, the Court has power to extend the time to the applicant to bring the L.Rs. on records. 1935 L. 443.

APPEAL.—An order declaring that the suit had abated because the L.R. of the deceased defendant had not been brought on the record in time is a decree and appealable as such though no formal decree dismissing the suit had been drawn up. 10 P. 471=133 I.C. 767=1931 P. 353. (42 M. 52 and 30 M.L.J. 486, Foll.) An appeal against a finding that

LOC. AMS.—[CALCUTTA.] 1. At the end of sub-rule 3 *delete* the period and *add* the words “except as hereinafter provided.”

2. *Insert* the following as sub-rule 4:

4. The Court whenever, it sees fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or has failed to appear and contest the suit at the hearing; and judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant, and shall have the same force and effect as if it has been pronounced before death took place.

(MADRAS.) O. 22, r. 4 (3). The words “except as hereinafter provided” were *added* at the end.

O. 22, r. (4). *Insert* as sub-rule (4):—

(4) The Court, whenever it sees fit, may exempt the plaintiff from the necessity to substitute the legal representative of any such defendant who has been declared *ex arte* or who has failed to file his written statement or who having filed it, has failed to appear and contest at the hearing; and the judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant, and shall have the same force and effect as if it has been pronounced before death took place.

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a suit had abated is maintainable but such an appeal is one against the decree in the suit and it should be accompanied by a copy of the decree. 26 S.L.R. 81. But *see* 34 P.L.R. 221=1933 L. 152. An order setting aside an abatement in the course of trial and allowing substitution of the heirs of a deceased party, cannot be questioned in appeal from the decree in the suit whether such an order is passed before or simultaneously with the decree. 14 L. 361=141 I.C. 337=34 P.L.R. 221=1933 L. 152.

REVISION.—*See* 26 M. 224; 21 L.W. 21=1925 M. 456; 101 I.C. 84=1927 O. 221.

O. 22, R. 4 (4) (Madras).—O. 22, R. 4 (4) is applicable to appeals also as provided by R. 11. The power which the rule gives to the Court to grant exemption is of course only discretionary and probably it rarely will be exercised in the case of a single respondent. But where there are several respondents whose interests are common, and some contest and others do not enter appearance, it is fairly safe to assume that the defence of the decree has been left in the hands of some on behalf of all. Hence where on the death of one of the respondents, the appellants fail to bring on record his L.R. the appellate Court has jurisdiction to exempt his being brought on record and the appellate decree has the same force and effect as if it had been passed before he died. 58 M. 752=1935 M. 236=68 M.L.J. 318.

O. 22, Rr. 4 and 5.—O. 22, Rr. 4 and 5, do not apply to a case where the defendant dies after the passing of a preliminary decree as the rights of the parties are already determined by the passing of the preliminary decree. 1937 Lah. 615. *See also* 42 Bom.L.R. 663=1940 Bom. 318. A decree obtained against a wrong legal representative might bind the true representative who was no party to the decree, if it be shown that the plaintiff had acted *bona fide* and was ignorant of the true facts, that there was no fraud or collusion and that the person wrongly impleaded was impleaded in a representative capacity, the decree also being passed against him as representing the state. 22 Pat.L.T. 338=1941 Pat. 299.

O. 22, Rr. 4 and 9.—O. 22, Rr. 4 and 9

contemplate two separate proceedings and in no case can an application which is meant to be under O. 22, R. 4 be treated as one under O. 22, R. 9. 190 I.C. 30=A.I.R. 1940 Pesh. 39.

O. 22, Rr. 4 and 11.—Where in an appeal the relief claimed against the respondents is joint, and one of the respondents dies but his L.Rs. are not added within the time allowed by law, the whole appeal will abate under O. 22, R. 4 read with R. 11. 1940 A.W.R. (B.R.) 128=1940 O.A. 779. Where an appellant claims correction of the *khatauni* and wants his name to be entered as the exclusive holder of the *sir* and *khudkasht* situated in *patti* and for the expunction of the names of all the respondents, and one of the respondents dies pending appeal and his legal representatives are not brought on record, under O. 22, R. 4 read with R. 11, the appeal abates not only against the legal representatives of that respondent but also as against the remaining respondents inasmuch as the relief claimed against the various respondents is not separate but joint. 1940 R.D. 217=1940 A.W.R. (B.R.) 82. If in an appeal, the absence of the legal representatives of a deceased party from the record would result in the possibility of two inconsistent and contradictory decrees or will make it impossible effectively to execute a decree that may be passed in the appeal, the appeal must fail. Where a joint relief is being sought for by the plaintiff against all the defendants on whose joint act the cause of action for the suit is based, and one of the defendants dies during the pendency of the appeal against the dismissal of the suit, and where his legal representatives are not brought on record, the appeal is incompetent. In the absence of the legal representatives it is not possible to grant the relief prayed for by the plaintiff appellant, because it involves the taking of action which cannot be completed without their joining in it. I.L.R. (1939) All. 921=1939 A.L.J. 807=1939 All. 698.

O. 22, Rr. 4 and 12.—The failure to bring the legal representative of the judgment-debtor on record does not necessarily make the proceedings a nullity. 1938 N.L.J. 166=1938 Nag. 308.

5. Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.

LOC. AM.—[MADRAS.] Add the following as a proviso to r. 5 of O. 22 :—

"Provided that an appellate Court before determining it, may direct any lower Court to take evidence thereon and to return the evidence so taken together with its finding and reasons and may take such finding and reasons into consideration in determining the question."

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O. 22, R. 5: SCOPE OF RULE.—Under O. 22, R. 5, it is the duty of the Court to go into the matter as to who is the proper person to be substituted in place of a deceased party. It is not sufficient for the Court to merely substitute one petitioner (who applies for substitution) in preference to another. That is clearly wrong. The order of substitution can be made only after enquiry. 18 Pat.L.T. 763 = 1937 P. W. N. 756 = 1937 Pat. 530. The dispute need not be between persons claiming to represent the deceased plaintiff. 18 M. 496. See also 21 B. 162 (168). The rule applies even when there is but one claimant and the defendant denies his representative character. 17 M. 209 (210). Contest as to who is L.R. The dispute should be decided at or before the final hearing on the merits. 27 B. 162; 21 L.W. 21 = 1925 M. 456. See also 150 I.C. 425 = 11 O.W.N. 917 = 1934 O. 337 (Case where the L.R. of deceased respondent was appellant himself). L.R.—Court's order after due notice to parties—Same whether can be re-opened on the ground that there are other heirs. 111 I.C. 238. Intermeddler cannot be recognised as L.R. 21 L.W. 21 = 86 I.C. 178. See 42 M. 76 = 35 M.L.J. 732; 44 I.C. 987 = 1918 M.W.N. 198; 180 I.C. 812 = 1939 Pat. 117; 1938 P.W. N. 803. Where the appellant in an appeal dies and one of his heirs is, on his application, substituted as the legal representative of the deceased appellant after notice to the other heirs and without any objection on their part, the question so far as the appeal is concerned, is final and cannot be re-opened; and it must be held to have been constructively decided that the substituted heir is the legal representative of the deceased and competent to prosecute the appeal in that capacity. 19 Pat. 433 = 1940 Pat. 516.

Chatterji, J.—Under O. 22, R. 5, the question as to who is the legal representative has to be decided, and the person substituted shall, for the purpose of the suit or appeal be deemed to be his legal representative. An *ex parte* order is as much binding as a contested order, and the order of substitution cannot be challenged by the other heirs in the suit or appeal. 19 Pat. 433 = 1940 Pat. 516. When two persons claim to represent the judgment-debtor, both of them might be placed on the record with the consent of the decree-holder. 13 B. 22. See also 8 M. 300; 18 B. 224; 26 M. 224. The appointment of a L.R. of a deceased plaintiff under this rule is not a determination of an issue which is properly raised in the suit. 28 A. 109. As to delegation of powers of inquiry as to who is L.R. see 39 I.C. 893. Wrong L.R. brought on record—Proper L.R.'s, rights. 43 M.L.J.

486 = 46 M. 190. Proper L.Rs. will be in a position to get the benefit of the decree and thus be in possession of assets. (*Ibid.*) Inquiry into right—Question of adoption. 16 I.C. 798; 9 I.C. 603 = 9 M.L.T. 403.

"COURT."—The word "Court" means the Court before whom the question arises, viz., the trial Court if the question arises at the trial stage or the appellate Court if the question arises in appeal. 3 Pat.L.T. 380 = 65 I.C. 131. The effect of allowing an appeal to be heard and a decree passed in ignorance of the death of one of the joint plaintiffs is that the judgment and decree become a nullity. 53 I.C. 548. Death after hearing but before judgment does not affect the decree. 106 P. R. 1915 = 32 I.C. 18. See also 1933 A. 111 = 1932 A.L.J. 1069.

RIGHT OF SUIT.—Suit to establish title by L.R. 40 M. 177 = 30 M.L.J. 274.

APPEAL.—An order refusing to implead a person as a L.R. of a deceased plaintiff is an adjudication of his claim and hence appealable. 43 M. 812 = 39 M.L.J. 218. See also 10 P. 471 = 133 I.C. 767 = 1931 P. 353; 12 A. 200. But see *contra* 131 I.C. 294 = 1931 L. 235 [1926 M. 856, Ref.; 128 P.R. 1916 (F.B.) Dist.; 1 L. 493; 1925 L. 218, Expl.]; 31 I.C. 166 = 1926 L. 181; 38 I.C. 833 = 13 N.L.R. 32. See also 20 I.C. 898 = 16 O.C. 350; 20 I.C. 950 = 25 M.L.J. 279; 49 M. 450 = 50 M.L.J. 485 = 1926 M. 586 (F.B.).

RES JUDICATA.—Orders passed under O. 22, R. 5, regarding the choice of a legal representative do not finally determine the rights of any claimants to the property in suit. Such orders are limited to the purpose of carrying on the suit and do not have the effect of conferring any right to heirship or to property. Even if the claimants choose to put directly in issue any such right, the decision on such an issue does not operate as *res judicata*. 43 P.L.R. 16. A decision under O. 22, R. 5, as to whether a person is not a legal representative though not *res judicata*, is final so far as the suit in which it is made is concerned, not on the ground of *res judicata*, but because of S. 47, C. P. Code. That question alone is not finally concluded by a decision under O. 22, R. 5, except in so far as it concerns the suit in which the decision is made. But no subsequent decision in a separate suit can be used to affect the rights of the parties so far as questions relating to the 'execution', discharge or satisfaction of the decree in connection with which the order concerned was made. I.L.R. (1939) Nag. 165 = 1939 N.L.J. 82 = 1939 Nag. 147. See also 1940 Pat. 516. Where in a proceeding under O. 22, R. 5 a certain person is (or is not) held to be the L.R. of a deceased party the same question

6. Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.

7. (1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

8. (1) The insolvency of a plaintiff in any suit which the assignee or receiver

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can be re-agitated in separate suit and is not barred by the rule of *res judicata*. 1934 L. 465; 166 I.C. 393=1937 O.W.N. 17=1937 O. 220 (F.B.) (8 Luck. 477 Overr.); 169 I.C. 798=1937 O.W.N. 782.

O. 22, R. 6: SCOPE OF RULE.—The rule supersedes the ruling in A.W.N. (1904), p. 4 and follows the rulings in 19 B. 807. A decree passed after defendant's death without L.R. representing him afterwards, is a nullity. 17 C.L.J. 634; 17 I.A. 150=13 A. 53 (P.C.); 1930 S. 259. See also 182 I.C. 208=5 B.R. 732 (case of decree for amount admitted by defendant). Death of a party to a legal action—Decision on the merits of the action after the death and before abatement—L.Rs. not brought on record on the date of the decision—The decision not valid. 1929 M. 802=57 M.L.J. 424=120 I.C. 374. The decree might be impeached in execution without resorting to separate suit. 20 I.C. 506=17 C.L.J. 634; 16 I.C. 58=16 C.L.J. 571; 2 L. L.J. 144; 38 M.L.J. 413=42 I.C. 530; 31 I. C. 198=38 M. 682; 40 A. 423=45 I.C. 21. Decree against a dead person is void *ab initio*—Execution proceedings also void. 11 I.C. 782=4 Bur.L.T. 164. An appellant died on the day fixed for the hearing of the appeal but before the hearing. *Held*, his L.Rs. were not bound by the decree and the appeal must be reheard. 55 I.C. 498. See also 43 I.C. 161=14 N.L.R. 71. Death during argument—Judgment pronounced without L.R. is bad. 48 I.C. 859; 106 P.R. 1915. Death of party before judgment—Withdrawal of suit. 4 Pat.L.J. 240=50 I.C. 529 (F.B.). Where a defendant dies after the hearing of a case and arguments but before the pronouncement of the judgment and the plaintiff files an appeal, he can bring on record the L.R. of the deceased defendant without making an application to the Court for the purpose and the appeal does not abate on the ground that he has not so applied, if the appellant has substituted the name of L.R. in place of the deceased defendant. 144 I.C. 618=1933 L. 710. See also 42 Bom.L.R. 663=1940 Bom. 218=

I.L.R. (1940) Bom. 689. Death of party after hearing and before decree—Decree passed is not bad—No application for substitution of names necessary. 1932 A.L.J. 1069=1933 A. 111. See 32 I.C. 18. Where one of the appellants to His Majesty in Council died before the passing of the Privy Council decree, and no substitution was made, the Privy Council decree could not be held void by the Courts in India. 58 I.C. 212=1 P.L.T. 426 (1 Pat.L.T. 325=5 P.L.J. 314. Foll.) Failure to substitute would have rendered the decree void only in so far as it was in favour of the deceased appellant. 1 P.L.T. 426. Where during the interval between the last date of hearing of the suit and the date on which the judgment is pronounced, the Court makes local inspection of the site in suit and makes a reference to it in its judgment, the hearing of the suit cannot be said to have concluded on that date of hearing within the meaning of O. 22, R. 6. 164 I.C. 971=1936 Lah. 578. Nor can the preliminary decree in a mortgage suit be regarded as the conclusion of the hearing, within the meaning of O. 22, R. 6. 39 C.W.N. 1284. Where on an application to set aside *ex parte* decree, a conditional order was passed that if R. 15 was deposited by a certain date the *ex parte* decree would be set aside, and otherwise it would stand, between the date of the order and the time fixed for deposit one of the plaintiffs died. L.R. was not added, and the Court recorded the final order setting aside the *ex parte* decree. *Held*, that failure to implead L.R. did not affect the final order which was merely formal, and that the matter was covered by the principles underlying O. 22, R. 6. 62 C. 1057=39 C.W.N. 863=61 C. L.J. 319=1935 C. 506.

O. 22, R. 8: SCOPE AND APPLICATION OF RULE.—The rule applies only to a case where there is an actual bankruptcy or insolvency in which there is an assignee or Receiver appointed. It does not apply to a case where there has been a mere application. 27 C. 219. See also 31 Bom.L.R. 357=1929 B. 202, R. 8 applies to an insolvent plaintiff and is confin-

When plaintiff's insolvency bars suit.

might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

(2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

Effect of abatement or dismissal.

9. (1) Where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action.

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ed to suits when the events mentioned therein happen (97 I.C. 486, overruled.) 146 I.C. 521 = 1933 Mad. 851 = 65 M.L.J. 719 (F.B.). O. 22, R. 8 applies to the case of a suit or an appeal which has already been filed before insolvency occurs. It has no application where the insolvency occurred before the appeal was filed and indeed before the suit was brought. 151 I.C. 579 = 1934 A. 1011. A right to appeal against a money-decree is not affected by the insolvency of the appellant debtor. The words "might maintain" in O. 22, R. 8 (1) mean has the power, or is entitled, to maintain. Where pending an appeal against a money-decree the appellant is adjudicated insolvent, the Official Assignee cannot continue the appeal for the benefit of the insolvent's creditors and the appeal cannot abate under O. 22, R. 8. 43 Bom.L.R. 644. Where plaintiff was adjudicated insolvent subsequent to suit—Notice to Official Receiver should be given. 12 L.W. 551 = 61 I.C. 300; 109 I.C. 589. Official Assignee must be given an opportunity to prosecute the suit. 12 B. 257. For form of order, see 16 B. 404. But where the Receiver after due notice took no steps to bring himself on the record and a third person, claiming to be an assignee from the Official Receiver applied to be brought on the record in place of the original plaintiff and wanted to maintain the suit for his own benefit. *Held*, that the Official Receiver not having chosen to continue the suit, the Court had no option but to dismiss the suit under R. 8, that the Receiver who was no party to the suit had no interest in the suit which he could validly assign under R. 10, which applies only to those cases which were not specifically provided for by the prior rules. 157 I.C. 900 (Lah.). Where pending an appeal the appellant becomes insolvent the appeal can be continued only by the Receiver in insolvency. 18 I.C. 922. See also 1928 L. 596. No limitation for Official Assignee to apply for substitution. 43 A. 621 = 19 A.L.J. 685. Where a plaintiff after instituting a suit *in forma pauperis* is adjudicated an insolvent the Receiver in insolvency can continue the suit in the same way as the insolvent. 47 I.C. 577 = 16 A.L.J. 440. The general principle on which the Courts act is not to order further security for the costs

of the appeal to be given merely on the ground that the appellant is poor. 43 Bom.L.R. 644. See also 46 L.W. 550. As to what constitutes costs for which the Official Assignee is to give security, see 28 Bom.L.R. 1074 = 97 I.C. 797 = 1926 B. 533. Suit instituted by insolvent after adjudication—Receiver cannot continue it. 23 I.C. 813. *Held*, that the guardian was not debarred by virtue of his being adjudicated insolvent from acting as guardian of the minor decree-holder. 1930 L. 205 = 125 I.C. 186. As execution proceedings do not abate on the decree-holder being adjudicated an insolvent, it follows that such proceedings should continue in his name. But so far as a judgment-debtor is concerned, it does not lie in his mouth to claim that the execution proceedings should be dropped merely because the decree-holder has been adjudicated insolvent and the Official Receiver does not care to continue them. (*Ibid.*) See also 55 A. 509 = 144 I.C. 391 = 1933 A. 388; 9 P. 372 = 122 I.C. 148 = 1929 P. 565 (F.B.) cited under O. 22, R. 12.

O. 22, R. 9: SCOPE OF RULE.—The rule does not apply to a case in which the defendant or respondent dies. 7 M. 195. See also 8 C. at 842. The rule applies only to orders passed under Rr. 4 and 8. 9 C. 163. A Court after declaring that the suit has abated under R. 4 does not become *functus officio*, but retains the right of setting aside the abatement if it is moved by an application under R. 9. 1935 Lah. 712. R. 9 is a disabling rule and should be construed strictly. 31 P.L.R. 973 = 1931 L. 79 (2). It is open to the Court in a proper case to treat an application under O. 22, R. 4 as an application under R. 9. 26 S.L.R. 81. No fresh cause of action can be imported into a revived suit. 22 C. 97. See 9 A. 229 under R. 10. The abatement of a suit under this rule has not the force of *res judicata*. 6 Bom.L.R. 638. An abatement takes place automatically and does not require an order of the Court to be passed to that effect. Where the decree-holder died after the preliminary decree and the sons without applying within time to implead themselves applied for a final decree, *held*, that the Court could in spite of the abatement pass a final decree. 1932 A.L.J. 883

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

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=1932 A. 698. See also 1939 Lah. 572. The mere fact that the representative of a deceased person happens to be already a party on the record in his own right does not dispense with an application for setting aside the abatement and substitution. 29 I. C. 470. See also 39 Bom.L.R. 1156; 42 Bom.L.R. 494=1940 Bom. 259. But see 51 M. 347. Application to implead L.Rs., giving no reason for delay, cannot be treated as one under this rule for setting aside the abatement. 94 I.C. 300=1926 L. 474. But see 112 I.C. 5=1928 L. 746. Where a deceased plaintiff or appellant leaves an heir or heirs who can, if they choose, apply to be brought on record as the legal representative of the deceased plaintiff or appellant but they or any of them neglect to be brought on the record to prosecute the case, the person obtaining the grant of letters of administration to the estate after the abatement of the suit or appeal is entitled to apply for the setting aside of the abatement of the suit or appeal and it would be set aside if sufficient cause is shown. 1941 Rang.L.R. 371. Abatement of suit—Petition for substitution—Fact of abatement and date of death not mentioned—Validity of petition—Application for substitution cannot be treated as one for setting aside abatement. 57 C. 148=1930 C. 422. Abatement—Effect of. 39 I.C. 277=23 P.R. 1917; 38 M.L.J. 266=54 I.C. 565. If by some oversight the abatement of an appeal is set aside without notice to the respondents, their objections if any must be heard at the time of hearing the appeal. 1928 M. 1148=115 I.C. 150. Suit by alleged donor for cancellation of gift—Donor dying and suit abating under R. 9—Next suit by his legatee for possession against the alleged donees is not barred. 27 A.L.J. 492=1929 A. 306=110 I.C. 562. See also 1939 P. W.N. 863=21 Pat.L.T. 81=1940 Pat. 177 (Application by assignee for substitution). Death of defendant—Absence of application within time to bring the L.R. on record—Decree—Validity. 122 I.C. 562. Where one of four brothers, respondents in an appeal dies and his legal representatives is not brought on record, but the other three have been served and are quite competent to look after the appeal, the appeal need not necessarily abate. 1940 O.A. 488=1940 A.W.R. (B.R.) 105. Where a reversioner sued challenging an alienation and he having died the suit abated and subsequently another reversioner sued on the same cause of action held, that the later suit was not barred. 131 I.C. 98=1931 L. 79 (2). *R.*, a benamidar for *C.*, sued for possession of certain properties. He died pending suit. The sons of *R.* did not

come on the record, and no L. Rs. having been brought on the record the suit abated. An application filed by the sons of *C.*, to implead *R.*'s sons on the record was dismissed ultimately by the High Court. The sons of *C.* then sued for possession as being the beneficial owners of the property. Held, that the suit was barred by O. 22, R. 9, C. P. Code. 45 L.W. 171=1937 M. 101=(1937) 1 M.L.J. 33. Though technical points should not be pressed too far in rent cases, yet when a plaintiff with knowledge of the death of the defendant before decree, refrains from taking steps to remedy his decree, which he has for a year known to be null and void, then the law as to abatement cannot be interpreted liberally in his favour. 1938 A.W.R. (B.R.) 305=1938 A.L.J. (Supp.) 128.

SCOPE AND APPLICATION OF SUB-CL. (2).—R. 9 (2) is not controlled by cl. (3) and the "sufficient cause" mentioned in cl. (2) is not confined to the circumstances given in S. 5 of the Limitation Act. 42 A. 540=59 I.C. 903=18 A.L.J. 688; 36 A. 235; 51 I.C. 534; 21 L.W. 220=1925 M. 494. It contemplates that a formal order declaring that a suit or appeal has abated should be made before an application under the rule is made. (36 A. 235, Foll.; 42 A. 540, Not foll.). 44 A. 459=66 I.C. 554=1922 A. 209. But see 1930 A. 379 (2); 50 C.L.J. 543=1930 C. 267; 1939 Lah. 572.

SUFFICIENT CAUSE TO EXCUSE DELAY.—Before an abatement is set aside, Court has to be satisfied that there was sufficient cause for not applying in time. 49 C. 62=1922 C. 335; 36 A. 235=12 A.L.J. 299; 1923 L. 470. As to what is sufficient cause, see also 50 I. C. 422=20 P.R. 1919; 90 I.C. 811=1926 C. 175; 97 I.C. 142 (1)=8 L.L.J. 331. Under this rule it must be shown that appellant was prevented by sufficient cause from going on with the suit within the time limited by law; if he so proves he is entitled, as a matter of right, to have the abatement set aside. 28 I. C. 803. Appellant must prove to get extension of time for bringing the representative of the deceased respondents on record, that he was not aware of death in time. 3 P.R. 1916=32 I.C. 829; 15 I.C. 708=204 P.L.R. 1912. Ignorance of death, standing by itself, may be sufficient cause; but if it is accompanied by great delay and dilatoriness it would be otherwise. 49 C. 62=1922 C. 335; 4 L.L.J. 171=1922 L. 61; 1925 O. 306 (2); 24 I.C. 275; 1935 R.D. 5; 49 I.C. 531; 22 P. W.R. 1919; 46 P.W.R. 1918; 44 I.C. 9=24 P. L.R. 1918; 31 I.C. 697=12 P.W.R. 1916; 54 A. 280=1932 A.L.J. 18=1932 A. 459 (1925 P. 162 Ref.). See also 1933 Lah. 916; 1933 Lah. 356; 91 I.C. 560; 1926 L. 137=89 I. C. 162; 1939 Pat. 623; 1941 Oudh 16; 1940 A.M.L.J. 79. Ignorance of death

(3) The provisions of S. 5 of the ¹Indian Limitation Act, 1877, shall apply to applications under sub-rule (2).

LEG. REF.

¹ See now Act IX of 1908, Ss. 4 and 5.

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is not "sufficient cause" and cannot be considered to be an adequate ground to excuse the delay in applying or to extend the time under S. 5 of the Limitation Act. 155 I.C. 610=37 P.L.R. 400=1935 L. 478. If it is due to applicant's negligence, 1935 R.D. 5=16 L.R. 173 (Rev.). There may be circumstances in which ignorance might be excusable. It is for the appellant to make out such circumstances. 1935 O.W.N. 371. See also 1939 Pat. 623=1939 P.W.N. 680; 1940 O.W.N. 219; 15 Luck. 580=1940 O.W.N. 411. An appellant, in the prosecution of his appeal, is under an obligation to keep himself informed as to the existence of the opponent. Mere ignorance of the death of the opposite party is never a sufficient ground for setting aside an order of abatement. 1940 O.W.N. 219=1940 A.W. R. (C.C.) 120=15 Luck. 580. See also 1940 O.L.R. 213=1940 O.W.N. 411. Ignorance on the part of an appellant of the death of the respondent to the appeal is a sufficient cause within the meaning of O. 22, R. 9. The appellant is no doubt required to be diligent in prosecuting his appeal, but when he has succeeded in getting the notice of appeal served on the respondent before his death, he must be taken to have done all that was expected of him in connection with the appeal. The appellant cannot reasonably be expected and is not required to inquire from day to day as to the movements of the respondent or to the state of his health or as to whether he is dead or alive. 17 Pat. 84=18 Pat.L.T. 1014=174 I.C. 40=4 B.R. 379=10 R. P. 471=A.I.R. 1938 Pat. 125. See also 39 Bom. L. R. 444=1937 Bom. 401. There is no justification for holding that ignorance on the part of an appellant of the death of the respondent to the appeal, in the absence of any negligence or other act or omission for which the appellant can be held responsible, is not a sufficient cause within the meaning of O. 22, R. 9 (2), C. P. Code, and S. 5 of the Limitation Act, affording a ground for setting aside the abatement. It is incumbent upon an appellant to make periodical inquiries as to whether the respondent is alive. If the appellant therefore does not become aware of the death of the respondent for a long time after the death, and if there is no delay in filing the application under O. 22, R. 9 (2) after the news of the death is received, the appellant is entitled to have the abatement set aside. I.L.R. (1938) Mad. 275=46 L.W. 898=1938 Mad. 218=(1938) 1 M.L.J. 54. Under O. 22, R. 9 (2), read with S. 5 of the Limitation Act, the Court has a discretion to excuse delay. In exercising the discretion, which must be judicially exercised, the Court should construe the words "sufficient cause" liberally, having regard to the facts and circumstances of the case. Ignorance of the

legal representatives of a deceased domiciled in a Native State or a foreign place may be a sufficient cause for excusing delay in seeking to set aside an abatement, unless there is clear negligence or carelessness or unnecessary delay. I.L.R. (1938) Bom. 704=40 Bom. L.R. 658=1938 Bom. 408. The number of parties to the case was very large and the appeal had remained pending for a long time. There was no negligence in making applications for substitution of L.Rs. Held, that in the peculiar circumstances of the case the delay in making the application should be condoned and the abatement set aside. 165 I.C. 521=38 P.L.R. 915=1936 L. 710. An application to bring on record the L.Rs. of a deceased respondent in an appeal was out of time by 9 days. The reason for the delay was alleged to be that the appellant was a minor and his next friend was a pardanashin lady and that she did not come to know in time of the respondent's death which took place in a different district. Held, that sufficient cause was shown for the delay in making the application and that the abatement of the appeal should be set aside. 36 P.L.R. 156=1934 Lah. 998. The plaintiff died after the decision in the lower Court and an application for substitution of the plaintiff's heirs was not made until five months afterwards. The defendant-appellant applied for setting aside the abatement of the appeal. The facts were that the village of the plaintiff and the village of the defendant were only 15 miles apart and the parties were related by marriage. Held, dismissing the application, that there could be no excuse for people in the position of the defendant not knowing of the death of the plaintiff when they were living so closely together and that knowledge ought to and must have come to him within 90 days which was the prescribed time for filing an application for the substitution of names, and that the appeal had abated. 151 I.C. 147=1934 Lah. 934 (1). Minor party represented by pardanashin lady as next friend—Mistake due to negligence or ignorance of pleader—Delay—If excusable. 19 N.L.J. 273. Delay in applying to bring the L.R. on record caused by a slip on the part of the party's vakil should be excused if the party himself is not at fault. 41 M.L.J. 65=62 I.C. 795. Fraud of agent would be sufficient cause. 53 I.C. 585. Bona fide mistake of fact is sufficient cause, as well as bona fide mistake of law. 1923 L. 475; 55 I.C. 883=1 L. 481; 8 P.R. 1916=32 I.C. 829; 67 I.C. 306=2 Lah.L.J. 44; 54 M.L.J. 234=1928 M. 404=108 I.C. 288. Mere ignorance of law that an application is necessary or mere ignorance of the death of a respondent is not sufficient cause within the meaning of R. 9 (Case-law referred.) 14 L. 543=142 I.C. 649=1933 L. 356 (2). Sufficient cause—Doubtful construction of old Act and ignorance of new amendment is sufficient cause. 43 C.W.N. 1143. A suit for partition cannot be proceeded with in the absence of the alleged co-sharers. The

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failure to implead the L.Rs. of a deceased party will in such a case entail abatement. It is no excuse for the party seeking to set aside the abatement to say she was not aware of the law. 147 I.C. 1187=35 P.L.R. 95. The Court has wide powers to set aside an abatement and these powers should be used somewhat liberally unless there is clear proof of laches. Where the plaintiff has had difficulties in keeping in touch with all his adversaries it does not lie in their mouth to object if the Court should condone delay. 26 S.L.R. 81. Quarrel among L.Rs. is no sufficient cause to excuse delay in applying to be brought on record as L. Rs. under R. 9. 31 I.C. 38. That succession certificate was obtained after the expiry of time fixed for addition of L. Rs. is sufficient reason to excuse delay. 73 I.C. 215=26 O.C. 244. Appellant's carelessness and the culpable means adopted by him to conceal it are sufficient to reject his application to set aside order of abatement. 30 I.C. 717=155 P.L.R. 1915.

DISCRETION OF COURT.—The discretion of the Court under this rule, if exercised in favour of the party in default, is open to scrutiny and interference by the appellate Court only if the discretion has been exercised in a perverse or an unjudicial manner and where this is not the case, the order once made cannot be declared to be illegal, merely because the application to bring the L.R. on the record was submitted beyond time. 1935 L. 712. In an appeal against a decree dismissing a suit for injunction against several defendants, the cause of action being precisely the same against all, if some of the defendants die, it is the duty of the Court to set aside the abatement under R. 9 (2) and (3); if that is not done, the second appellate Court will do so under O. 41, R. 23. 13 L.L. T. 22.

LIMITATION.—The period of limitation is that prescribed by Art. 177 of the Limitation Act, 2 P. 168; 84 I.C. 1001. See 5 C. 139, where the suit was revived after the expiry of 3 years. See also 8 C. 837; 30 C. 609; 8 C. 420; 51 I.C. 534. Petition to add L.Rs. presented after the prescribed period should be treated as one to set aside the abatement. 1928 L. 746=112 I.C. 5; 117 I.C. 884=1929 L. 129=10 L. 816. See also 1933 N. 85=29 N.L.R. 118.

PROCEDURE.—Where a suit has abated and an application is made not as an application to set aside the abatement but for substitution of a L.R. and the application is treated as one to set aside the abatement would have been within time, the application for substitution may be considered as an application under R. 9 (2), for setting aside the abatement. 1933 N. 85=29 N.L.R. 118; 14 L. 543=34 P.L.R. 11. See also 1928 L. 746=112 I.C. 5; 117 I.C. 884=1929 L. 129; 1937 Lah. 455. Where an appeal abates by reason of the death of the respondent and the failure to bring his L.Rs. within time, but the Court in ignorance of the fact hears and allows the appeal and the L.Rs. of the deceased respondent file a petition for review of the appel-

late judgment and along with it an application under R. 4, for their substitution on record, the order granting the application for substitution is not tantamount to an order setting aside the abatement, as the sole object of the L.Rs. in making that application was to have it declared that the appeal had abated and that the order accepting it was a nullity in the eye of the law. 152 I.C. 227=35 P.L.R. 457=1934 L. 442. See also 1939 Lah. 572=42 P.L.R. 731. If the L.R. is not brought on record in time, the appeal against him abates automatically and unless that abatement is set aside within sixty days or a period extended under S. 5 of the Limitation Act, the appeal is dead and it is not necessary that an order should have been passed declaring that the appeal has abated. 14 L. 543=142 I.C. 649=1933 L. 356 (2). Death of appellant—Impleading of widow and minor son—Subsequent death of widow—Failure to appoint fresh next friend—Effect—Procedure—Application of respondents for appointment of next friend. 17 P. L.T. 86. Death of appellant—Court ordering substitution of minor heirs without application and appointing Court guardian—Competency—Appeal—If abates—Remedy of minor heirs. 17 P.L.T. 129.

REVIEW.—An order setting aside abatement by a Division Bench cannot be reopened at a subsequent stage of the case by a different Bench even though the order was made *ex parte*. The proper remedy is by a review. 29 M.L.J. 574=30 I.C. 669.

APPEAL.—An order refusing to set aside an abatement in an appeal cannot be appealed against. 121 I.C. 564=33 C.W.N. 881=1929 C. 532 (2). See also 40 Bom.L.R. 658. An application to bring on the record the legal representatives of a deceased party after the expiry of the time fixed for this purpose must be deemed to be an application to set aside the abatement and an order refusing to set aside an abatement is appealable. 147 I.C. 699 (1)=1934 L. 315. The fact that the Court went outside the considerations which are necessary for disposal of an application seeking an order under O. 22, R. 4, that the suit had abated would not bar plaintiff from filing the application to set aside abatement which R. 9 of O. 22 permits him to make. An appeal under O. 43, R. 1 (k) lies from an order passed under O. 22, R. 9 and not from an order passed under R. 4 of that order; and although it may be said that an order under R. 4 may amount to a decree and therefore be appealable, yet R. 9 provides a concurrent remedy of which the party aggrieved may avail himself. 191 I.C. 447.

FRESH SUIT.—Where a suit abates or is dismissed under O. 22, no fresh suit can be brought on the same cause of action nor can the same rights be set up in defence in a subsequent suit. 144 I.C. 605=1933 L. 752. It is true that a suit by a reversioner is a suit on behalf of the whole body of reversioners, but the abatement of a suit instituted by a reversioner to set aside an alienation by a widow does not bar a fresh suit for the same

10. (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

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relief by another reversioner. The provisions of O. 22, R. 9 as to abatement do not apply to such a case. (A.I.R. 1931 Lah. 79, Rel. on.). A.I.R. 1939 Lah. 580.

O. 22, R. 10: SCOPE AND APPLICATION OF RULE.—A person who institutes a litigation may prosecute it to its conclusion notwithstanding a devolution of his interest in the property. The litigation will continue in his name for the benefit for his successor. 15 P. 607=17 P.L.T. 564=1936 P. 420.

Per *Costello, J.*—O. 22, R. 10 can only apply before a final decree or order has been passed or made in the suit. 42 C.W.N. 1183.

Per *Derbyshire, C.J.*—Under O. 22, R. 10 the Court has discretion in the matter of ordering substitution of a party. It has to look at the position and see what is contemplated and what is likely to happen. 42 C.W.N. 1183. The language of O. 22, R. 10 is wholly inapplicable to a case where some one is seeking to come into the proceedings in order to put forward a claim adverse to that of the original parties in the proceedings. 42 C.W.N. 1183. "Suit" in O. 22, R. 10 means also an appeal and a second appeal; and a second appeal may be continued by or against a person who has acquired the interest of one of the parties to the appeal in the subject-matter of the suit, though the original parties to the appeal have compromised the matter, when the party seeking to come on record has a substantial interest which is in danger of being injured by the proposed compromise. 178 I.C. 205=47 L.W. 728=1938 Mad. 576=(1938) 1 M.L.J. 882. R. 10 makes it discretionary with the Court to allow an application for substitution in the circumstances of a particular case. Where lower Court struck off the name of one of the defendants on the ground that he was an insolvent and that his interests had vested in the trustee in bankruptcy in England, *held*, that the order was valid. Unless the law casts a duty on the plaintiff to bring the Receiver or trustee on the record it cannot be said that the insolvent must be represented in the suit. He has no right to remain on the record as a defendant and he cannot insist that he must remain on the record through his trustee. 34 C.W.N. 53=1930 C. 388. Leave should not be unreasonably refused. 15 P. 607=17 P.L.T. 564=1936 P. 420. The discretion of the Court must be exercised judicially. When the application is made after long delay—there being interminable, unexplainable and unnecessary delay and dallying since the commencement of the suit for nearly 10 years—the Court will rightly exercise its discretion by refusing leave to the applicant. 44 L.W. 263=1936 M. 714=71

M.L.J. 307. See also 1936 L. 652. Court would be justified in refusing such an application if fraud is alleged and proved against the person applying under the rule. 156 I.C. 152=42 L.W. 340=1935 M. 423. R. 10 applies only to cases which do not fall under the preceding rules of the same order. 45 M. 872=42 M.L.J. 301; 91 I.C. 166=1926 L. 181. See also 22 L.W. 860=49 M.L.J. 704. R. 10 has no application to a case where the devolution of interest is by death. 1933 S. 371. By consent of parties and the leave of the Court a suit may be amended to cover an increased claim. 9 A. 229. The rule does not apply to cases of assignment of interest which is the subject-matter of litigation between the date of decision of the first Court and the filing of appeal. 38 I.C. 511=20 O.C. 31; 1 P.L.J. 596=38 I.C. 237. See also 1939 P.W.N. 863. The first four rules of O. 22 cannot apply to a case in which the death of the defendant occurs between the passing of preliminary and final decrees in a suit, as there is then no right to sue surviving. 64 I.C. 307=17 N.L.R. 81; 116 I.C. 657=1929 N. 152; 123 I.C. 473. The rules in this order deal with the devolution of interest by the operation of law and not by act of parties. 53 M. L.J. 142=1927 M. 693; 27 A.L.J. 921=1929 A. 444. See also 1937 Sind 47; (1941) 1 M.L.J. 22. R. 10 empowers the Court to give leave to a person who has taken an assignment from a party to continue the suit. The "party" there obviously refers to a party already on the record. Where the L.R. of a deceased plaintiff, instead of coming forward and himself taking up the responsibility of the suit, transfers his interest to another man, it will be defeating the object of the law to permit that man to continue the suit. 15 P. 82=17 P.L.T. 73=1936 P. 123. So also in the case of assignee from Official Receiver. 157 I.C. 900. Where after the passing of a preliminary decree for dissolution and accounts of a partnership the plaintiff widow died and certain ultimate reversioners applied to be substituted. *Held*, that the Court could permit them to continue the case. 58 C. L.J. 240. A creditor of a decree-holder who has attached the decree pending an appeal against it is not entitled to be made a party respondent to the appeal under this rule. 20 A. 38. On this rule, see also 5 A. 212; 9 A. 229; 20 A. 38; 23 A. at 335; 5 C. 720; 30 C. 609; 10 A. 97. The words "other cases" mean cases other than those specifically mentioned in the previous rules. 9 C.W.N. 171. As to effect of order, see 43 M. 37=37 M.L.J. 449. The position of the party substituted is exactly the same as

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that of the original person. 16 I.C. 567=17 C.W.N. 862. A deed of compromise filed during the pendency of a suit cannot be regarded as an "assignment". 5 A. 209 (212). As to Court's power to decide dispute as to assignment, *see* 94 I.C. 926=1925 L. 574. Death of plaintiff after decree but before appeal—Substitution of his widow on basis of evidence in case—Failure to file special affidavit—Effect. 51 C.L.J. 25=1930 C. 270. Where once application is allowed under this rule and substitution is made, the original party ceases to have any *locus standi* in matters relating to the suit. 1935 O.W.N. 842=156 I.C. 990=1935 Oudh 486. A deed of relinquishment does not amount to any assignment, creation or devolution of an interest within the meaning of R. 10 of O. 22. 160 I.C. 801=1936 O.W.N. 183=1936 Oudh 224. Where after the passing of a preliminary decree, but before the decree was made absolute the person against whom the decree was passed relinquished his interest or rights in favour of another and the relinquisher did not inform the Court or the decree-holder of the relinquishment. *Held*, that the decree was not nullity against the person in whose favour the relinquishment was made. 159 I.C. 725=1935 Pat. 488.

PENDENCY OF SUIT.—Whether the expression '*the pendency of the suit*' in R. 10 covers the period between the original and an amended decree, *see* 43 M.L.J. 559=69 I.C. 977=1923 M. 57. Rule applies to cases of devolution of interest pending suit and not to cases of persons acquiring interest after decree. 40 I.C. 846; 1917 M.W.N. 306; 64 I.C. 307=17 N.L.R. 81; 43 M.L.J. 589=27 C.W.N. 29=49 I.A. 220=1 P. 581 (P.C.). *See also* (1940) 2 M.L.J. 376; 1941 A.W.R. (Rev.) 598; 1926 C. 173; 1934 A.L.J. 832=1934 A. 442. Nor to cases of persons who have acquired interest in the subject-matter prior to the institution of the suit. 25 A.L.J. 985=108 I.C. 699=1928 A. 120. R. 10 is not one of the rules in O. 22, which declare the abatement of a suit but it is merely a provision enabling the assignee to continue the suit if, during the pendency of the suit, the interest of the plaintiff has been assigned to him. It is merely a permissive provision for the benefit of an assignee and not a punitive one to the detriment of the assignor. There is no provision in the Code which shows that a plaintiff who has assigned his interest in the property in suit during the pendency of the suit or an appellant who has assigned his interest in the property being the subject-matter of the litigation during the pendency of the appeal, loses his right of further prosecuting the suit or appeal. Where a plaintiff after dismissal of his suit and before filing an appeal against it, assigned his interest in the subject-matter of the suit, it was *held*, that it was not incompetent for him to prefer an appeal against the dismissal. 1941 Rang.L.R. 366. *See also* 1941 A.W.R. (Rev.) 598=

1941 R.D. 518. A simple mortgagee subsequent to suit of the share of a party in a partition suit cannot be allowed to be added as plaintiff and continue the suit after the original plaintiff has withdrawn the suit under R. 10 or under the residuary provisions of S. 146. A person who applies to be made a plaintiff under R. 10 must show that the original plaintiff's interest in the suit has devolved on or has been assigned to him absolutely and not merely that he has obtained a derivative interest in the subject-matter like a simple mortgagee. While on the one hand assignees of fractional interests, if absolute, would be entitled to be added as parties, assignees of derivative title, like lessees or mortgagees are not entitled to be so added. [6 L. 388 (P.C.) and 1 P. 581 (P.C.), *Rel. on*]. 38 L.W. 280. In the case of an application by the mortgagee of the rights of the plaintiff it was held that the petitioner was a person on whom an "interest" as contemplated by R. 10 had devolved that he might be allowed to continue the appeal, and that on the dismissal of the appeal, he should pay the costs of the respondents. [1 P. 581 (P.C.), *Dist.*]. 56 M. 469=1933 M. 411=64 M. L.J. 489.

"INTEREST".—The interest must be the interest in the property, which is the subject-matter in the suit. 30 C. 961; 30 S.L.R. 170=165 I.C. 305 (2)=1936 Sind 166. Where, during the execution of a decree against the estate of a deceased person, a posthumous son is born to him, there is no devolution of interest on him in the subject-matter of the suit, and R. 10 does not apply to an application made on his behalf that he should be brought on record in the execution proceedings pending before the Court. 1936 S. 166. The "interest" contemplated is any interest which will be vitally affected by the suit. 43 I.C. 811. The 'interest' referred to in R. 10 is the interest of a person who was a party to the suit. It is the transfer by assignment, creation or devolution *pendente lite* of the interest of such a person to the applicant, which entitles the latter to make an application to continue the suit or appeal, as the case may be and not the creation of an independent right in him. A suit was filed by a presumptive reversioner challenging an alienation by the limited owner as not affecting his interest. The period of 12 years for such a suit elapsed before Act II of 1929 came into force. On death of the plaintiff reversioner, a sister of last male holder sought to continue the suit on the ground that she had been included under R. 10, in the line of heirs by Act II of 1929. *Held*, that there was no transmission by assignment, creation or devolution of the interest of a party to the litigation to her within the meaning of R. 10, and that she was not competent to apply for permission to continue the suit. 1936 Lah. 652. Compromise of suit—Decree not passed—Application by purchaser to be added as a party may be allowed in the discretion of

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the Court. 27 C.W.N. 755=1924 C. 188. Proceedings after a preliminary decree for sale or redemption till the final decree is passed are proceedings in the suit, and the private purchaser of the property after such a decree acquires an interest which entitles him to be made a party to the suit. 37 A. 226=27 I.C. 771; 25 Bom.L.R. 308=1923 B. 303; 27 C.W.N. 710=1924 C. 90; 51 I.C. 233=29 C.L.J. 362.

DEVOLUTION OF INTEREST.—These words do not mean devolution by death. 28 C. at 175. See also 1941 O. 495; 27 I.C. 704=20 C.L.J. 107. The devolution spoken of in R. 10 is not confined to devolution in ways other than by death. 64 I.C. 307=17 N.L.R. 81. See also 92 I.C. 520=1926 M. 540. They include devolution of an interest by reason of an adjudication in insolvency and a vesting order thereunder. 25 M. at 413. See 30 B. 257. Where a trustee dies or retires, the estate devolves on the new trustee who can be added under the rule. 92 I.C. 520=1926 M. 540. See also 1928 C. 651=114 I.C. 413. Trustee ceasing to hold office during suit—He can still continue the suit. 109 I.C. 789=1928 M. 607. See also 1941 Rang.L.R. 366. O. 22, R. 10 is applicable to a case where a suit is brought by a deity through the mohunt and shebait and on his death an application is made for the substitution of another as the next shebait and L.R. 139 I.C. 123=36 C. W.N. 816=1932 C. 783. See also 44 C. W.N. 690=1940 Cal. 383. Decision is binding on the institution though successor did not come on record. 108 I.C. 401=1928 M. 246. See also 1930 M. 881. The insolvency of the defendant in a money suit does not affect the devolution of any interest on the Official Receiver. 29 I.C. 30=8 S. L.R. 325; 53 M.L.J. 142=102 I.C. 144=1927 M. 693. See also 1933 N. 6=28 N. L.R. 340; 1937 Cal. 336. There is no devolution of interest where a company goes into liquidation. Only the powers of the directors are transferred to the liquidator. 94 I.C. 380=1926 N. 303. Assumption of superintendence by the Court of Wards involves a devolution of interest within R. 10. 1935 O.W.N. 842=156 I.C. 990=1935 O. 486. An application for substitution by an assignee decree-holder is within R. 10 even though the assignment was obtained not directly but only derivatively from a party to the suit. 26 I.C. 410=20 C.L.J. 107; 20 I.C. 685=18 C.W.N. 450; see also (1941) 1 M.L.J. 22. The words "has come or devolved" connote an interest *in praesenti*. It must be vested in the applicant on the date of the application to implead him a party to the suit and not merely contingent. 1937 M. 200. (1937) 2 M.L.J. 279; (1941) 1 M.L.J. 22. Where a plaint is returned for presentation to the proper Court, any devolution of interest which took place while the proceedings were pending in the first Court must be taken to be a devolution in the course of the suit.

8 L.W. 21=48 I.C. 840=41 M. 510. An adoption is not the creation of an interest within R. 10. 43 I.C. 64=15 N.L.R. 24. But see also 32 I.C. 858=20 C.W.N. 552. Attaching creditor cannot be impleaded under R. 10. 89 I.C. 446=1926 N. 67. See sub-Cl. (2). Gift by father to son—Suit for pre-emption—Right of donee to continue the suit. 25 O.C. 319=1922 O. 289. Where a person whose suit is dismissed in the trial Court assigns his interest to a third party during the period intervening between the passing of the decree and the institution of the appeal, the assignor has no subsisting interest which would entitle him to prefer an appeal. R. 10 has no application to such a case as the assignment does not take place during the pendency of the appeal but before the appeal is instituted. To such a case S. 146 is of no assistance and the appellate Court could not allow the assignee to be made an appellant at the time of hearing the appeal, as S. 146 would become applicable only if the appeal could have originally been filed by the assignor. 1935 L. 119. Similarly an application by an assignee for his substitution as a co-appellant in appeal is not maintainable where the assignment was made during the pendency of the suit in the trial Court and not during the pendency of the appeal. 160 I.C. 801=1936 O.W.N. 183=1936 O. 224. Assignment or devolution of interest in favour of person added, absence of—Effect. 57 C. 170=123 I.C. I.C. 250=1930 C. 113. Creation or devolution of interest—What amounts to—Financing of litigation—Litigant agreeing to let financier take one half of properties as compensation for his trouble and giving him right to join as party and conduct proceedings in suits is not creation of present interest in property—He cannot come in under O. 22, R. 10 on death of litigant. (1940) 2 M.L.J. 337.

EXECUTION PROCEEDINGS.—R. 10 if applies to execution proceedings. See 10 I.C. 405=175 P.L.R. 1911. Also 36 C.W.N. 93=138 I.C. 64=1932 C. 423; 30 C. 961; 74 I.C. 577=1923 L. 560. 39 C. 220=16 C. W.N. 109 O. 22, R. 10 is applicable to execution proceedings. R. 12 of O. 22 does not exclude execution proceedings from the operation of R. 10. 186 I.C. 786=A.I.R. 1940 Pat. 615. O. 22, R. 10, applies to execution proceedings. An order, made under that rule dismissing an application to add a party to the execution proceeding is appealable under O. 43, R. 1 (1), but is not subject to second appeal in view of S. 104 (2), C.P. Code. 43 Bom.L.R. 719. The rule does not apply to assignments after decree. 10 A. 97. An assignee of a decree need not therefore apply under the rule for recognition of his assignment. The law applicable to such a case is O. 21, R. 16. 39 C.W.N. 961. I.L.R. (1937) 2 Cal. 207. But see 71 M.L.J. 385. Whether rule authorizes the addition of a party to suit after decree. 42 C. 72=41 I.A. 251 (P.C.). The mere

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fact that a transferee from the judgment-debtor takes up the position of a representative of the judgment-debtor bound by the decree to the extent of the interest acquired by the transfer does not entitle the decree-holder to proceed against him in execution. 138 I.C. 64=36 C.W.N. 93=1932 C. 423.

PRACTICE AND PROCEDURE.—A judicial order which may possibly affect or prejudice any party cannot be finally made unless the party affected has had an opportunity of being heard. It is based on the plainest principles of justice. An order for substitution may be made *ex parte* without notice and such an order made *ex parte* can be re-called upon objection of parties interested. 16 I.C. 567=17 C.W.N. 862. No order for substitution should be made upon an application which is not supported by affidavit or is not verified. (*Ibid.*) A person may, under this rule, be added or substituted as a party either on his own application or on the application of one of the parties already on the record. 18 A. 285. Deliberate delay in applying for the addition of a party will be a ground for rejecting the application. 43 I.C. 811. See also 71 M. L.J. 307=1936 M. 714. Whether an Official Receiver's successor on the resignation of his office can continue the proceedings, without his name being brought on record. 40 I.C. 170=32 M.L.J. 520. See also 1937 Cal. 360.

LIMITATION.—Limitation for impleading assignees. 27 C.W.N. 710=75 I.C. 255=1924 C. 90. See also 32 C. 612; 30 C. 609; 22 A. 231; 8 C. 837. An appellant should not, after the appeal has abated for not bringing the L. Rs. on record, be allowed to bring the transferee of the defendant on the record when he was not impleaded as a defendant though the plaintiff came to know of the transfer during the pendency of the suit and was not given an opportunity of defending the suit. 149 I.C. 1103=1934 L. 190. See also 1935 L. 112=36 P.L.R. 199. Mortgage suit—Insolvency of—Mortgagor—Addition of receiver—Limitation. 1935 L. 316.

APPEAL.—Order under R. 10 is appealable. 44 M. 919=41 M.L.J. 316 (F.B.). See also 144 I.C. 978=10 O.W.N. 179=1933 O. 207; 43 Bom.L.R. 719; 134 I.C. 307=35 C.W.N. 296=1931 C. 594. An assignee can appeal though the decree was passed *ex parte* against the assignor. 22 A. 380; 35 C.W.N. 296. But see 24 A. 532. An appeal lies under S. 12 of the Letters Patent. 24 M. 252. *Quære*: Where an application for the substitution of the applicant as the L.R. of the appellant was dismissed and the main appeal itself by the plaintiff appellant was also dismissed at the same time, whether an appeal from the interlocutory order alone is competent without an appeal from the order dismissing the plaintiff's appeal. 139 I.C. 123 (2)=36 C.W.N. 816=1932 C. 783. See also 1937 Lah. 615. Applicability—Appeal preferred by

insolvent—Whether can be prosecuted after annulment of adjudication. 1929 B. 202=31 Bom.L.R. 354. *Prima facie* no second appeal lies from an appellate order on an application made under R. 10. 156 I.C. 152=42 L.W. 340=1935 M. 423.

REVISION.—Dispute as to the factum of assignment—Court's power to decide—Whether revision lies. See 51 I.C. 233=29 C.L.J. 362. A wrong exercise of discretion cannot be set aside in revision. 89 I.C. 605=1925 N. 423.

RES JUDICATA.—Order under this rule will operate as *res judicata*, in subsequent proceedings. 144 I.C. 978=8 Luck. 477=10 O.W.N. 179=1933 O. 207.

DISCRETION OF COURT.—The applicant obtained a preliminary decree for partition in 1878. Subsequently however no steps were taken beyond the appointment of a Commissioner who died in or about 1896 having done nothing towards the execution of the Commission. In July, 1932, i.e., some 53 years after the preliminary decree, the plaintiff applied by notice of motion asking among other things that certain names of parties, defendants to the suit, now dead, be struck out and the name of K be substituted in their place and for the appointment of a Commissioner to partition certain properties. *Held*, that irrespective of whether the suit for partition had abated or not the Court had a discretion whether to allow the decree to be resurrected or not. 60 C. 940=1933 C. 696. See also 34 C.W.N. 53; I.L.R. 1940 Cal. 383.

MISCELLANEOUS.—Public trust—Death of trustee—Subsequent trustees impleaded as parties—Defences open to. 45 M. 703=43 M.L.J. 147. Suit under S. 92 for removing Mohant and framing scheme—Mohant abdicating and installing X as Mahant *pendente lite*—Substitution of X in place of Mohant—May be allowed. 44 C.W.N. 690=1940 Cal. 383. Suit against Municipality superseded by Government and administrator appointed before passing of decree—Administrator not brought on record—Decree passed against Municipality—Is nullity. 177 I.C. 389=1938 Lah. 83. Where an Official Assignee has become *functus officio* on account of the property of the insolvent having been vested in the trustees in consequence of which he withdraws from a suit for the cancellation of a transfer pending in a certain Court and the Court dismisses it under O. 9, R. 8 the trustees cannot apply to be made the legal representatives of the Official Assignee and ask for the restoration of the suit. 152 I.C. 380=1934 Pesh. 89. The estate of the deceased had originally vested in trustees who filed a suit. Subsequently the Official Receiver was appointed Receiver of the estate which then vested in him. He refused to be joined as a party to the suit filed by the trustees. *Held*, that there was no objection to the suit being continued by the trustees. Even though the Official Receiver declined to be added as a plaintiff,

11. In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

LOC. AMS.—[CACLUTTA.] In O. 22, after. 11, add the following proviso to r. 11 :—

"Provided always that where an appellate Court has made an order dispensing with service of notice of appeal upon legal representatives of any person deceased under O. 41, r. 14 (3), the appeal shall not be deemed to abate as against such party and the decree, made on appeal shall be binding on the estate or the interest of such party."

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he would be bound. 1933 S. 232. A suit for recovery of money due to an estate instituted by a trespasser cannot be continued by the real owner. 38 I.C. 154=2 P.L.J. 199. The assignees of a right to recover mesne profits given by a decree in a suit ought to apply for continuance of the suit under R. 10. 1 P.L.J. 427=37 I.C. 998. Liability of assignee of a party's right who continues to conduct suit or appeal to pay costs, see 63 M.L.J. 489.

O. 22, Rr. 10 and 4.—It is not competent to a party who has allowed his opportunity to apply under O. 22, R. 4 to go by owing to his negligence, to fall back on O. 22, R. 10. There may be cases in which it is legitimate for one party to apply under R. 10 for substitution in the ranks of the opposite parties, but that is not speaking generally the purpose of R. 10. In ordinary cases of devolution by death R. 4 applies. In cases of assignment, creation of interest or devolution of an interest other than by death, it would normally be the party in whose favour the assignment has been made or the interest created or had devolved who would apply under R. 10. Generally speaking it would not ordinarily be open to the opposite party to apply under R. 10. 1941 O.A. 583.

O. 22, Rr. 10 and 11.—No doubt it is true that parties who have assigned the whole of their interest *pendente lite* cannot ask for judgment in respect of an interest which is no longer theirs. But it does not follow that their assignees are thereby precluded from recovering. 66 I.A. 210=I.L.R. (1939) Bom. 503=43 C.W.N. 869=A.I.R. 1939 P.C. 170=(1939) 2 M.L.J. 366. Under O. 22, Rr. 10 and 11, unless the assignment, creation or devolution referred to in R. 10, has occurred during the pendency of the appeal, the rules would not entitle a person to be impleaded as a party in the appeal; where such party has acquired the suit property as his separate and absolute property by virtue of a partition decree in a suit, during the pendency of the suit and before the filing of the appeal, it cannot be said that he acquired any title during the pendency of the appeal as contemplated by R. 10, read with R. 11. The accrual of exclusive title to the party in respect of the suit property under the partition decree can properly be regarded as the "creation" of an interest within the meaning of R. 10, but if he has failed to make his application to be impleaded during the pendency of the suit (the devolution of interest having been pending the suit), he cannot be allowed to make his

application during the pendency of the appeal from the decree in the suit. A.I.R. 1940 Mad. 876=(1940) 2 M.L.J. 349.

O. 22, R. 11.—The principle recognised in R. 11 applies not only to suits but to revision proceedings as well. 21 I.C. 407=18 C.L.J. 141. A rule issued at the instance of a party who is dead at the time is a nullity. 21 I.C. 407=18 C.L.J. 141. [N.B.—See also under R. 10.] O. 43 R. 1 (k) has to be read with reference to O. 22, R. 11. 17 Pat. 84=18 Pat.L.T. 1014=1938 Pat. 125. Death of respondent pending appeal unknown to Court—Appeal dismissed after hearing—Unsuccessful appellant is not entitled to re-hearing. 123 I.C. 607=1930 M. 719. Right of surviving appellants having a common ground of appeal to continue appeal without bringing on record L. Rs. of deceased appellant. See 15 R.D. 629=12 L.R. (Rev.) 273. Where a decree is for joint possession without specification of shares and there is no mention in it of any specific share to which a co-plaintiff who dies pending appeal is entitled and the appeal has admittedly abated against the deceased co-owner the appeal abates as a whole. (Case-law referred.) 148 I.C. 889=1934 Pesh. 14. Two independent appeals against single decree—Joinder of L. Rs. in one appeal does not enure for the benefit of the other appeal as well—The other appeal abates—To such a case the analogy of appeal and memo. of objections is not applicable. 130 I.C. 764=1931 M. 277=60 M.L.J. 267. See also note under O. 22, R. 4. After abatement of an appeal, the trial Court has no jurisdiction to go on with the proceedings taken in pursuance of an order of the appellate Court which was intended to operate only during the pendency of the appeal. 161 I.C. 212=1936 L. 618.

PROCEDURE.—Where a party is already impleaded both in the appeal and the memorandum of objections two separate applications are not necessary to bring his L. Rs. on the record. 1934 M. 448=67 M.L.J. 222.

O. 22, Rr. 11 and 12.—An appeal from an order in execution proceedings does not stand on a footing different from other classes of appeals, for, O. 41, which provides the procedure relating to appeals does not make any such distinction. Hence R. 11 of O. 22 should apply to appeals falling under S. 47; R. 12 of O. 22 cannot apply to such appeals, for an appeal which arises from execution proceedings cannot be regarded as a 'proceeding in execution'. R. 12

[MADRAS.] In O. 22, after r. 11, add the following as r. 11-A :—

"11-A. The entry on the record of the name of the representative of a deceased appellant or respondent in a matter pending before the High Court in its appellate jurisdiction, except in cases under appeal to the King in Council shall be deemed to be a *quasi-judicial* act within the meaning of S. 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a Judge for disposal."

Application of Order to proceedings.

12. Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.

LOC. AM.—[ALLAHABAD AND OUDH.] At the end of the rule add the words—

"or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit."

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of O. 22 must therefore be construed as referring only to the proceedings in the executing Court and not to those in the appellate Court which hears appeals arising from execution proceedings. I.L.R. 1939 Nag. 119.

O. 22, R. 12.—The rule does not apply to execution proceedings. 87 I.C. 21=1925 O. 448. See also 30 C.W.N. 735=96 I.C. 378. Appeals in proceedings relating to execution of a decree are mere continuation of execution proceedings and there can be no doubt that R. 12, is applicable to such appeals and consequently Rr. 3, 4 and 8 cannot apply. An appeal arising out of an order passed in the course of proceedings in execution of a decree or order does not abate on the death of respondent if the appellant fails to apply to make the L.R. of the deceased respondent a party to the appeal within time prescribed by law. 9 P. 372=122 I.C. 148=1929 P. 565 (F.B.); I.L.R. 1940 Nag. 198. See also I.L.R. (1939) Nag. 119; 1938 N.L.J. 312; 1938 Nag. 528; 1938 Nag. 502; 1933 All. 388. O. 22, R. 12, does not exempt pending appeals from the operation of R. 8 of that order, though the appeals arise out of execution proceedings. An appeal stands on a different footing, in this respect, from an application for execution. R. 12 does not contemplate that, if an appeal has been preferred from an order in execution then also Rr. 3, 4 and 8 would never apply. 15 Luck. 580=1940 O.W.N. 411. R. 12 of O. 22 does not exempt pending appeals even though they arise out of execution proceedings and R. 8 applies to them (1923 L. 560 and 1929 P. 565, Diss. from; 51 M. 858, Ref.) 55 A. 509=1933 A.L.J. 706=1933 A.L.J. 388. See also (1938) Nag. 502. The words "proceedings in execution" in R. 12, mean proceedings provided for in Part II and O. 21 of the Code, that is, they are proceedings in the Court which passed the decree or in the Court to which the decree has been sent for execution. An appellate Court may have to consider the propriety of the orders passed by these Courts but the proceedings in the appellate Court cannot properly be described as proceedings in execution. They are separate proceedings, merely testing the validity of the order made by the executing

Court. 164 I.C. 605=1936 L. 1022. Further, Rr. 3, 4 and 8 apply in terms to suits while R. 11 makes these provisions applicable to all appeals. As no distinction is made in the Code between appeals from orders in execution and appeals generally, and as R. 11 is without qualification or exception, Rr. 3, 4 and 8 apply to appeals in execution matters. 1936 L. 1022. Where pending an application for execution of a decree the decree-holder dies, it is open to his heir and L.R. to continue execution proceedings provided he applies to the Court and obtains an order under O. 21, R. 16. He need not be compelled to resort to a separate proceeding. 134 I.C. 720=33 Bom.L.R. 818=1931 B. 423. (50 M. 1, Foll.; 34 C.W.N. 437, Ref.) But see 60 M.L.J. 628=131 I.C. 610=1931 M. 303. Abatement does not apply to execution proceedings. The result of that is, however, that the heirs need not take steps for substitutions under O. 22, R. 3, but may apply to carry on the proceedings or may file a fresh application. 1938 N.L.J. 99=A.I.R. 1938 Nag. 528. Appeal in execution proceedings—Death of appellant pending—L.R. can be brought on record by the ordinary procedure applicable to appeals. 51 M. 858=1928 M. 772=55 M.L.J. 497. Decree capable of execution without final decree—Substitution of L.Rs. need not be within three months of party's death. 82 I.C. 604=1925 A. 66. Application for execution—No abatement—Substitution of names in pending execution proceeding is permissible. O. 21, R. 16 applies only to substitution along with execution and there is no other rule barring the substitution of names by an executing Court when an execution is pending. 50 A. 621=1928 A. 299.

O. 22, R. 12 (Allahabad).—Amendment, if retrospective. The amendment of R. 12 under which there would be no abatement once a preliminary decree has been passed, does not have a retrospective effect and cannot have the effect of automatically reviving all suits which had abated previous to the amendment. Where the abatement has taken place under the old law the preliminary decree becomes non-existent, and without the abatement having been set aside on a proper application being made within time, no final decree can be prepared. 1935 A. 180.

ORDER XXIII.

Withdrawal and Adjustment of Suits.

Withdrawal of suit or abandonment of part of claim.

1. (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

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O. 23, R. 1: APPLICABILITY OF RULE.—As regards applicability of R. 1, see 132 I.C. 224. O. 23, R. 1 applies to suits and not to defences. A defendant in a previous suit who raises a claim for set-off but withdraws it without the leave of the Court, is not thereby precluded from raising it again in a subsequent suit against him. 1937 O.W.N. 831 = 1937 Oudh 394. The rule clearly contemplates an application by plaintiffs and the decision in the presence of the parties. A mere remark in the judgment cannot be construed to be a permission of the Court. 1937 O.W.N. 1146. This rule does not apply to suits before the Revenue authorities under Act X of 1859. 21 C. 428. See also 21 C. 514. It applies to rent suits in the N.W.P. 5 A. 406. Also to ejectment suits filed under the Agra Tenancy Act. L.R. 6 A. 65 (Rev.). But see 15 R.D. 177 = 12 L.R. 53 (Rev.); 1940 R.D. 364 (applicability to proceedings under U.P. Land Revenue Act); 1940 R.D. 390 (applicability to Agra Ten. Act). O. 23 applies to S. 92. 1925 C. 187. As to application of principles of the rule in case of withdrawal of an application to Court for amendment of specification under S. 18, *Patent and Designs Act* (II of 1911), without leave to apply again, see 61 C. 450 = 38 C.W. N. 729 = 1934 C. 735. As to whether such an order could be made in a suit for judicial separation, when an amicable settlement has been come to after suit, see 9 Beng. L.R. App. at 6. An application under R. 20 of Sch. II can be withdrawn under this rule. 31 C. 516. Second suit is barred even against a sub-tenant, when the latter had raised in the prior suit a plea of rights of a permanent character. 18 R.D. 338 (1) = 15 L.R. 440 (Rev.). See also 18 R.D. 1 = 15 L.R. 1 (Rev.). But the recorded chief tenants are entitled to bring a suit against the recorded sub-tenant even though the previous suit brought by some of them against two persons alleged to be sub-tenants had been withdrawn without permission to bring a second suit. 18 R.D. 338 (2) = 15 L.R. 488 (Rev.). Where proceedings under S. 86 of Agra Tenancy Act were withdrawn without liberty to file fresh suit, *held*, a fresh suit even under S. 121 of the Tenancy Act was barred. 18 R.D. 235 = 15 L.R. 263 (Rev.); 1940 R.D. 390. An application which has been registered as a suit under any of the provisions of the Code can be allowed to be withdrawn with liberty to file a fresh suit. 5 M.H.C. R. 298. When a suit has been dismissed in the lower Court, the appellate Court cannot in appeal allow the plaintiff to withdraw his suit. 11 M. 322. Nor in second appeal. 147 I.C. 441 = 1934 A.L.J. 821 = 1934 A.C.C.M. — 144

214. But see 39 C.W.N. 586. Letters Patent appeal—Permission to plaintiff to withdraw with liberty to bring fresh suit—Not permissible. 1930 P. 410. Withdrawal of suit in appeal—Discretion of Court—Conditions justifying withdrawal. 114 I.C. 557 = 1929 M. 36. See also 41 C.L.J. 186 = 1925 C. 711; 1931 A.L.J. 232 = 132 I.C. 194. Amendment of plaint—Direction to value property and to pay deficit Court-fee—Non-compliance—Prayer for leave to withdraw suit with liberty refused—Subsequent dismissal for default—If bars fresh suit. 40 C.W.N. 1390 = 1935 C. 764. With respect to the application of R. 1, a suit for partition should be treated differently from other suits, and a subsequent suit for partition of the same property involved in the previous suit is not barred under R. 1, by the dismissal of the prior suit, even though no permission to institute a fresh suit was obtained when the prior suit was dismissed as withdrawn on the ground of compromise. The right to bring a suit for partition is a continuing right, and as soon as the defendant fails to carry out the compromise the parties are relegated to their rights as they existed prior to the compromise. 42 L.W. 843 = 1935 M. 909 = 69 M.L.J. 401. Where a previous suit for declaration that certain share in property sold by decree-holder was plaintiff's and hence not liable to execution is withdrawn and subsequently a fresh suit for partition of that property is brought, O. 23, R. 1 is not applicable and the fresh suit is not barred. 41 P. L. R. 594 = 1939 Lah. 148. The Court trying the subsequent suit is not competent to inquire into the propriety or validity of the order granting permission to withdraw the suit. 159 I.C. 678 = 61 C.L.J. 209 = 1935 C. 739. Court of Wards assuming superintendence of plaintiff's estate during pendency of suit—Order granting leave to Deputy Commissioner to continue suit—No appeal filed—Subsequent order allowing application by Deputy Commissioner for permission to withdraw suit—*Locus standi* of original plaintiff to file appeal. 1935 O.W.N. 842 = 156 I.C. 990 = 1935 Oudh 486. Suit instituted in accordance with permission given under this rule can also be allowed to be withdrawn. I.L.R. (1941) Lah. 331 = 1941 Lah. 192.

"AT ANY TIME".—A Court cannot refuse to allow the plaintiff to abandon a portion of his claim on the ground that the petition was filed too late, for R. 1 gives a right to the plaintiff to do so at any time during the pendency of the suit. 116 I.C. 823. The procedure of withdrawal laid down in R. 1 applies only to pending suits and before the decree has been made. (29 B. 13; 35 B.

(2) Where the Court is satisfied —

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs

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261, Foll.) 47 I.C. 817=12 S.L.R. 14. Leave cannot be granted after judgment is pronounced. 24 W.R. 23; 18 M.L.T. 460=31 I.C. 312; 62 I.C. 25; 52 I.C. 870; 55 C. 1067=1929 C. 88. Nor after the suit had abated under O. 22, R. 4. 40 C.W.N. 1019; 1935 A.L.J. 1286=1935 A. 853. Abandonment of part of claim can be allowed even after party is given time to pay deficit Court-fees. 65 C. L. J. 199=1937 Cal. 562. Where after the grant of leave to appeal to the Privy Council the parties compromised the suit and applied to High Court to pass a decree in terms of the compromise: *Held*, that High Court had no power to do so as it would supersede the first decree. 57 B. 369=35 Bom.L.R. 413=1933 B. 244. Leave to withdraw with liberty to sue again cannot be given after an award is filed. 7 C.W.N. 181; 32 I.C. 347. During the course of the suit, by a widow against her husband's brother, etc., for an account of her estate a compromise was alleged to have been entered into by way of family arrangement settling all matters in dispute between the parties to the suit and another *M* (the respondent), also a son of a deceased brother of the plaintiff's husband; *M* filed petitions first to be made a party to the suit and secondly for a decree in terms of the compromise. Some time hence the plaintiff applied to withdraw from suit and *M* opposed it contending that the dismissal of the suit consequent on the withdrawal of the plaintiff would affect the interest derived by him in the subject-matter of the suit as a result of the compromise. *Held*, that though the plaintiff desired to withdraw the suit and the defendants on record did not object to the withdrawal, the Court could still consider whether it should permit a withdrawal under the circumstances of the case. 57 M. 892=1934 M. 337=66 M.L.J. 517. Withdrawal by one co-plaintiff without the consent of others is not permissible. 52 C. 139=1925 C. 637; 57 M. 299=1933 M. 824=65 M.L.J. 693 (Doubts if sub-R. (4) governs sub-R. (1) of section, but holds that permission may be refused if the withdrawal would be prejudicial to non-consenting plaintiffs.) But *see* 14 L.R. 14 (Rev.)=17 R. D. 14; 7 L. R. 135 (Rev.) (Withdrawal of by one appellant). A suit for account is said to be pending until the final order on taking the account is made. 30 C. 609. Where once there has been a preliminary decree ordering the taking of accounts

if the plaintiff desires to withdraw his claim for rendition of accounts but the defendant desires the case to proceed, the proper course is to transfer the plaintiff as defendant and make the defendant plaintiff. 96 I.C. 67=24 A. L. J. 694=1926 A. 582. *See also* 1938 A.L.J. 1231. But defendant would not be entitled to continue the suit, in the absence of a preliminary decree passed in his favour and an award made or agreement or compromise entered into by which the defendant may have acquired the right. 32 L. W. 280=59 M.L.J. 674=1930 M. 867.

CONSTRUCTION OF SECTION—O. 23, R. 1 (2), CLS. (a) AND (b).—The two clauses of sub-R. (2) of R. 1 of O. 23 must be read together. Cl. (a) of sub-R. (2) of R. 1 of O. 23 is illustrative of the "grounds" referred to in Cl. (b), and although the "grounds" in Cl. (b) need not be *ejusdem generis* with the ground mentioned in cl. (a), they must be at least analogous to it. The ground in Cl. (a) requires that the suit must fail by reason of some formal defect; whereas the grounds contemplated in Cl. (b) need not necessarily be fatal to the suit, but must be analogous to a formal defect. The expression "formal" defect must be given a wide and literal meaning and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect is fatal to a suit or not. Where the ground of withdrawal is a defect of substance as distinguished from a defect of form, the suit should not be allowed to be withdrawn. If a Court allows a suit to be withdrawn on the ground of defect of substance arising out of the plaintiff's inability to prove the title on which the claim is based, the Court acts without jurisdiction, and its order can be corrected in revision under S. 115. I.L.R. (1940) Bom. 299=42 Bom. L. R. 143=1940 Bom. 121 (F.B.). The two sub-Cls. (a) and (b) of sub-R. (2) of R. 1 of O. 23 are worded in an entirely different manner and they are intended to cover different circumstances. Cl. (b) is not limited to cases in which the Court thinks that the suit must necessarily fail. There may be other sufficient grounds on which it is proper to allow the plaintiff to withdraw his suit. 1938 Rang.L.R. 270=1938 Rang. 389.

AS TO SCOPE OF SUB-R. (2).—*See* 15 M.L. J. 452; 2 A.L.J. 59. The main object of sub-R. (2) of R. 1 of O. 23 is to prevent the defeat of justice on technical grounds and the words "sufficient grounds" refer to

as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

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some defect in the suit, which had the effect of shutting out a fair trial on the merits and arose out of some error made in good faith by plaintiff or by the Court at the instance of either party which could only be effectively set right by a trial *de novo*. In a case where there was no defect which shut out a fair trial, but the plaintiff's cause of action disappeared and he out of an abundant caution to meet a possible claim by the other side made a request for permission to bring a fresh suit it was *held* that under those circumstances permission ought not to be reserved to the plaintiff to bring a fresh suit. 1941 N.L.J. 382.

SCOPE OF SUB-R. (3).—10 M. 160; 8 C. 871; 9 B. 346; 1928 A. 689; 1939 P. 225=1939 P.W.N. 41; 1941 O.W.N. 692. Sub-R. (3) applies only to withdrawal of suits and not to those of applications. The withdrawal of an application for final decree does not bar a fresh application. 1928 M. 1165=115 I.C. 825. Application by Receiver to be made a party to suit in ignorance of *ex parte* decree—Withdrawal of—Subsequent application to re-open case and to implead him as party is maintainable. 6 R. 494=1928 R. 273; *see also* 1939 O.W.N. 990.

ABANDONMENT OF PART OF CLAIM.—A suit can be withdrawn in part with liberty to sue again in respect of it. But the whole suit cannot be withdrawn with liberty to sue again in respect of part only. When only part of a suit is withdrawn, the remaining part must be proceeded with and if not, it must be dismissed as to it. 5 Bom.L.R. 223; 15 M. L.J. 462. Where plaintiff withdrew part of a claim without permission, his suit for the same is barred. 40 I.C. 408=29 C.L.J. 11. A plaintiff may withdraw his claim against some defendants only at any time before actual judgment. 31 I. C. 312; 62 I. C. 25; 52 I.C. 870; 1940 O. 43=1939 O. W. N. 990=184 I.C. 785; 1937 A.M.L.J. 75. "Formal defect" is not confined to those in pleadings. 34 C.W.N. 578. The phrase "other sufficient grounds" would not cover any ground wholly dissimilar to some formal defect. The words must be taken to mean *ejusdem generis* with the words in cl. (2) (a). 79 I.C. 1033=1925 O. 291; 22 L.W. 535=1925 M. 1268; 21 L.W. 282=1925 M. 617; 94 I.C. 983=23 L.W. 525=1926 M. 863; 1940 M.W.N. 806=(1940) 2 M.L.J. 398; 39 P.L.R. 1010; 1941 Mad. 46; 90 I. C. 217=1926 P. 128; 50 B. 192=28 Bom. L.R. 440=94 I.C. 777; 112 I.C. 312=1928 M. 1085; 1930 L. 175; 1929 A. 683=155 I. C. 210; 1935 P. 251. But *see contra* 36 Bom.L.R. 1110. Where the property of the adoptive father of the minor was under the superintendence of the Court of Wards and after the death of the father the minor sued by his next friend and on objection being taken on the ground that the Court of

Wards ought to have filed the suit applied for withdrawal of the suit. *Held*, that the Court could order the suit to be withdrawn with liberty of file a fresh suit. 145 I.C. 239=10 O.W.N. 314=1933 O. 273. Where a suit in which some of the defendants are minors is referred to arbitration without the leave of the Court and the arbitrators give an award, the Court has no jurisdiction to allow the suit to be withdrawn against the minor defendants with permission to bring a fresh suit against them. O. 23, R. is inapplicable in such circumstances. 40 P.L.R. 498=1938 Lah. 582. Once a suit has been referred to arbitration, so long as that reference stands, the Court which has made the reference has no power to pass any order which in any way would affect the subject-matter of the suit. The Court has consequently no jurisdiction after the suit has been referred to arbitration and as long as the reference subsists, to intervene and give the plaintiff permission to withdraw his suit under O. 23, R. 1, I.L.R. (1938) All. 146=1938 A. L. J. 1163=1938 All. 56. Representative suit—Application by plaintiff to withdraw—Right of persons beneficially interested to continue litigation. 55 A. 687=1934 A. 4. As to what are sufficient grounds for allowing plaintiff liberty, *see also* 13 M.I.A. 160; 9 A. 155; 11 A. 187; 1929 A. 136=50 A. 835=115 I.C. 124. Mistaken view of law no ground for withdrawal. 88 I.C. 512. Liberty would be granted if suit would fail for multifariousness, which is a defect of a formal nature. 40 A. 7=42 I.C. 856; 37 A. 326=28 I.C. 857; 22 Bom.L.R. 1183=59 I.C. 210=45 B. 206; 44 B. 598; 1 P. 600=67 I.C. 530; 35 B. 261=10 I.C. 813; 70 I.C. 484=1922 C. 58. Where the Court held that the parties and cause of action have been improperly combined and the plaintiff thereupon elected to confine the suit to one of the causes of action and gives up the other defendants and the causes of action against them. *Held*, that the suit was non-existent so far as the parties and causes of action given up were concerned, that there is no question of any withdrawal, and that R. 1 did not apply to the case. 158 I.C. 909=42 L.W. 696=1935 M. 696. The dismissal on the ground of misjoinder cannot operate as *res judicata*; and there will be even less scope for the application of R. 1, if the Court is held to have dismissed the suit, for no question of abandonment will then arise. (*Ibid.*) *See also* 1939 All. 584; 1938 Lah. 52; 1938 Rang. 210. A defect which goes to the root of plaintiff's claim is not a formal defect. 21 L.W. 282=1925 M. 617. Omission to obtain permission of Insolvency Court is a formal defect. 2 R. 643=1925 R. 105. Where it is apparent from the plaint and the proceedings in the lower Court that the plaintiff has no clear conception of his rights, leave to withdraw with liberty to file a fresh suit

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

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will be granted. 17 I.C. 396=1912 M.W. N. 1003. Leave was granted when it was not possible for the plaintiff to adduce evidence within the time fixed by the Court. 16 W.R. 100. See also 15 B. 160. But failure to produce evidence in time is no ground for permitting withdrawal. 1925 L. 497. See also 22 L.W. 535=1925 M. 1268; 21 L.W. 282=1925 M. 617; 147 I. C. 776=1934 A.L.J. 450=1934 A. 137; 158 I.C. 280=1935 O.W.N. 1066=1935 O. 495. A plaintiff who has failed to conduct his suit with proper care and diligence, cannot be permitted to withdraw his suit, after his witnesses have failed to support his case. 158 I.C. 263=18 N.L.J. 149=1935 N. 185. Permission to withdraw with liberty to file fresh suit should not be given without proof and indication of formal defect. 34 C.W. N. 912; 117 I.C. 864=32 C.W.N. 1244; 131 I.C. 863=35 C.W.N. 112=1931 C. 336. Suit for declaration as to plaintiff's title to suit property—Evidence closed—Application for withdrawal alleging third party having taken possession decree would be infructuous—*Held* no formal defect existed and withdrawal should not be allowed. 1934 L. 735. Where defects referred to were that certain necessary parties were not impleaded and some properties were not included in the claim, *held*, that defects were not "formal" to sustain an application under this rule. 57 C. L. J. 498. Plaintiff — Suppressing evidence and later applying for leave to withdraw—Refusal of permission is proper. 31 Bom.L.R. 613=119 I.C. 773=1929 B. 320.

SUBJECT-MATTER.—Subject-matter is equivalent to phrase cause of action. 1930 L. 937. And does not refer to suit property. 151 I.C. 458=38 C.W.N. 133=1934 C. 433. This means clearly "the subject of legal action, consideration, complaint or defence, or the fact or facts constituting the whole or a part of a ground of action or defence". (*Ibid.*) See also 21 M. at 37; 21 C. 265; 30 L. W. 562=1929 M. 798; 74 I.C. 56=1924 O. 180; 92 I.C. 358=1926 M. 490. The bar in R. 1 (3) is in respect of the subject-matter and not the cause of action; subject-matter means the series of acts and transactions alleged to exist giving rise to the relief claimed. 1938 A.L.J. (Supp.) 2. Where a suit on a promissory note is withdrawn by the plaintiff without obtaining the permission of the Court to bring a fresh suit in respect of the same subject-matter, a second suit by him on a fresh promissory note, the consideration for which is the same consideration which is embodied in the promissory note which formed the subject-matter of the former suit, is barred by R. 1, sub-Cl. (3) of the Code. The subject-matter of the two suits is the same, the only difference being that it is embodied in different promissory

notes. 156 I.C. 17=1935 O. 434. See also 1938 Rang. 210.

CAUSE OF ACTION DIFFERENT.—O. 23, R. 1 (3) does not bar a suit on a different cause of action. 36 M. 325=23 M.L.J. 658; see also 184 I.C. 808=1939 A.L.J. 892=1939 All. 584; 1929 A. 689; 1934 L. 721=16 L. 27; 1933 L. 943=144 I.C. 864 (first suit by reversioners to declare alienation by widow invalid—Death of widow—Suit withdrawn without permission—Subsequent suit for possession maintainable) (*Ibid.*) See also 9 B. 346 (different title). "Shall" in the rule is not mandatory and is merely directory. 2 O. W. N. 901=1925 O. 699. Withdrawal without leave—Subsequent suit on different ground not barred. 59 I.C. 84. The withdrawal of a suit in which a right of ownership is asserted does not preclude the plaintiff from suing again upon a claim based upon an easement. 2 A.L.J. 59. Where plaintiff withdraws suit without permission with consent of defendant in the hope of the matter being settled out of Court by arbitration but the arbitration proves abortive and he files a fresh suit on the same cause of action, simply because of the arbitration, the cause of action does not alter and the subsequent suit is barred. 156 I.C. 386=1935 C. 157 (2). The withdrawal of a suit instituted by partners who have not been registered as a firm under the Partnership Act is no bar to a fresh suit filed by them on the same cause of action after they get themselves registered as a firm. The later suit is technically a suit by a different plaintiff. 164 I.C. 748=44 L.W. 247 (1)=1936 M. 697.

EFFECT OF WITHDRAWAL.—The withdrawal of a suit bars only the plaintiff and his privies from bringing a fresh suit but not a person who has purchased the plaintiff's interest at a sale in execution under an attachment prior to the withdrawal. 39 I.C. 276. Order granting withdrawal with permission to institute fresh suit will not be binding on heirs of one of the original defendants who were not impleaded and against whom the suit had abated. 1935 A.L.J. 1286=1935 A. 853. Where the defendants have failed to prove that the withdrawal of previous suit, with reference to which the bar under R. 1 has been pleaded, was without permission to bring a fresh suit, the suit is not barred by reason of R. 1. 1935 C. 744. First suit withdrawn while second suit is pending—Second suit not barred unless the conditions of R. 1 are fulfilled. 1930 L. 599 (2); 110 I.C. 818 (2)=1928 L. 710. Withdrawal of suit against some defendants cannot be cancelled — Procedure. 51 L. W. 631=1940 Mad. 765=(1940) 1 M. L. J. 811. Where the Court allows some plaintiffs to withdraw with liberty to file a fresh suit without the consent of the others, the Court acts without jurisdiction and a fresh

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suit is barred. 1 P. 228. Withdrawal by unnecessary plaintiffs from a suit does not necessitate the dismissal of the suit. 60 I. C. 592; 1 P. 228.

NEXT FRIEND.—A next friend can withdraw a suit on behalf of a minor, and any withdrawal by him would have precisely the same effect as the withdrawal of a suit by a person of full age. 10 C. 357. Two plaintiffs—One of them a minor and the other acting as his next friend—The other plaintiff cannot withdraw the suit. 107 I.C. 431 (2) = 1928 M. 496 (1). Suit by one on his behalf and on behalf of his minor brother—Withdrawal of major brother—Appointment of another as next friend to continue suit—*Held* proper. 148 I.C. 1171 = 1934 O. 257. But a withdrawal by him without the leave of the Court is voidable at the instance of the minor. 27 M. 377. As to the courses open to the minor when his next friend has fraudulently withdrawn a suit without leave to file a fresh suit, *see* 10 C. 357.

PRACTICE AND PROCEDURE.—Orders under—Need for exercise of judicial discretion. 1931 A. 19; 42 P.L.R. 785. Where leave to withdraw is granted without express liberty to sue again a fresh suit on the same cause of action is barred. 58 I.C. 271 = 129 P.R. 1919; 40 M.L.J. 126 = 62 I.C. 833; 46 I.C. 913. A Judge cannot give leave to a plaintiff to file a fresh suit upon the dismissal of an earlier suit but only upon its withdrawal. 1941 Rang. 118; *see also* 42 P. L. R. 785. Where a person applies for permission to withdraw his suit and the application is referred to the other side and on the other side stating that they have no objection provided that they get their costs the Court allows the application, it cannot be said that the Court fails to exercise any jurisdiction invested in it. It would be called upon to go into the question whether a formal defect or other sufficient cause exists only if the opposite party denies that there is any such defect or sufficient Cause. 1938 A. L. J. 652 = 1938 All. 450. Order permitting the withdrawal of suit without liberty to bring fresh suit is not warranted by law. The proper order is to dismiss the application and proceed with the suit. 107 I.C. 469 (2) = 1928 C. 273 (1); 1931 A.L.J. 966; 18 R.D. 415 = 15 L.R. 538 (Rev.) = 10 O.W.N. 1102. The power of an appellate Court to allow withdrawal of suit proceeds from S. 107 (2), and it has the same powers as the trial Court. The proper procedure would be for an appellate Court to set aside the decree of the trial Court and then grant permission to withdraw. 39 C.W.N. 586; *see also* 40 Bom. L.R. 895. Where an application signed by the parties and filed in Court by the defendant is not an application under R. 3 but an application under R. 1 for the dismissal of the suit as having been settled out of Court, the Judge is not entitled to examine the plaintiff in regard to the terms of the settlement

they being not relevant to the matter before him. His only course is to dismiss the suit. 150 I.C. 721 = 1934 R. 108.

FORM OF ORDER.—The suit cannot be dismissed with liberty to file a fresh suit. 9 A. 690; 1931 M.W.N. 1008 = 1931 M. 830; and the fact that such an order has not been appealed against will not give it any effect. 11 A. 187 (F.B.). An order cannot be passed directing the plaintiff to institute a new suit. 9 A. 191 = 13 I.A. 134 (P.C.). Where it is clear from the application that the suit was being withdrawn with permission to file a fresh suit but the Court fails to state that such permission has been given, it can be implied, for it need not be in express terms. 1939 A.L.J. (Supp.) 88. There is no distinction between the cases where a suit is simply allowed to be withdrawn and the cases where the Courts though allowing the suit to be withdrawn add that the suit is dismissed. 41 P. L. R. 486 = 1939 Lah. 472. *See also* 1941 Lah. 192. Dismissal of a suit "in the form in which it is brought" does not amount to permission to sue again. 5 A. 595. Application for permission to withdraw a suit with liberty to bring a fresh suit—Court giving permission to withdraw but not giving in terms liberty to bring a fresh suit; *held*, the order should be read along with petition and construed as granting permission to file a fresh suit. 5 P. 23 = 93 I.C. 1001 (1) = 1926 P. 259. *See* 1931 M.W.N. 1148 = 1932 M. 155 (1). *See also* 148 I.C. 879 = 1934 A. 292; 1938 M.W.N. 785. What is important in each case is the terms in which the permission to institute fresh suit is granted. The permission in each case is conditional and the right under the permission cannot be said to have accrued to the plaintiff until the conditions are fulfilled. Hence, where permission is given to bring a fresh suit after payment of the costs of the case, the fresh suit is barred unless costs are paid. 41 P.L.R. 594 = 1939 Lah. 148. *See also* 1941 Lah. 192; 1935 Nag. 56. Prohibition as to a second suit when the first suit is withdrawn without liberty to bring a fresh suit does not apply to ejectment suits by tenants against sub-tenants. Where, however, special rights of a permanent character have been claimed there is a permanent prohibition of ejectment. 15 R.D. 598 = 12 L.R. 344 (Rev.). *See also* 1935 C. 157. Order of the lower Court allowing the suit to be withdrawn with leave to file a fresh suit should be in such terms as to make it possible for High Court to be satisfied that there was *prima facie*, at any rate, proper ground for the Court's order. 1931 A. 19 = 132 I.C. 36. Court cannot pass an order returning the plaint. 7 B. 487. Suit withdrawn to be regarded as never brought. 41 C.L.J. 456 = 29 C.W.N. 755 = 52 C. 894 (F.B.).

NOTICE.—Notice should issue to the opposite party before passing any order under this rule. 6 A. 211.

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COSTS.—Where a plaintiff who has been allowed to withdraw a suit under O. 23, R. 1, C.P. Code, with permission to bring a fresh suit has been ordered to pay costs to the defendant but no time limit has been fixed for such payment, and such payment has not been made a condition precedent to the institution of a fresh suit, the failure of the plaintiff to pay costs is no bar to the maintainability of a fresh suit. I.L.R. (1941) Lah. 331=1941 Lah. 192. See also 41 C.W.N. 1336. When leave to withdraw the suit with liberty is granted, costs must follow the event. See 25 Bom.L.R. 242=47 B. 559=72 I.C. 324; 40 A. 612=46 I.C. 71; 14 I.C. 97=9 A.L.J. 358. See also 15 B. 160; 1 M.H.C.R. 247; 1939 Lah. 472. But see 2 O.W.N. 901=1925 O. 699. Court can extend the time to pay costs when it is absolutely impossible for the party to pay such costs on or before the day so fixed. 29 M. 370. When a suit is withdrawn with liberty to sue again "on payment of costs, and a subsequent suit is filed without payment of costs", subsequent payment cures the irregularity. Court can refuse to proceed with the suit till the costs are paid. 31 C. 965 (968); 157 I.C. 287=31 N.L.R. 266=1935 Nag. 56 (where no date was fixed for payment of costs). On this point, see also 39 C.W.N. 330; 41 C.W.N. 1336; 68 C.L.J. 75; 66 C.L.J. 275; 1939 Lah. 192; 1941 Lah. 192; 1938 Rang. 378=1938 Rang.L.R. 749; 1935 N. 56; 5 P. 306=96 I.C. 942=1926 P. 409; 95 I.C. 875=1926 P. 472; 1929 A. 692; 55 B. 206=33 Bom.L.R. 278=1931 B. 257; 139 I.C. 167=1932 M.W.N. 1244=1932 M. 714. Where the order was that costs "must be paid within one month as a condition precedent to the fresh suit" and the plaintiff did not pay the costs within the time fixed, but paid the same only after the fresh suit was filed, held that the Court would have no jurisdiction to entertain the new suit unless the costs have been paid within the period fixed and payment at a subsequent stage would not confer jurisdiction, although there might be no express order for dismissal on default of the condition attached. 39 C.W.N. 330. Withdrawal of suit with permission on condition of costs being paid before second suit—Costs paid after institution of second suit—Second application to withdraw second suit with liberty allowed. Next day the plaintiff stated that he was unable to pay the costs and prayed that the suit be tried on its merits. Defendant did not object to the disposal on the merits. But first Court dismissed the suit on the ground that the costs had not been deposited in time. On appeal, case was remanded for trial on the merits. Held, that (i) the question whether the deposit was in time was one that depended on the construction of the first order and lower Court was justified in holding that it had been substantially complied with; (ii) the application of plaintiff to have the suit tried on merits can

be treated as one for review and the order restoring the suit by consent of parties was perfectly valid. 1933 A.L.J. 1350=1933 A. 810. But see 38 C.W.N. 133=1934 C. 433, where it was held that non-payment of costs within time ordered, had the effect of revoking the liberty granted for fresh suit.

POWER OF APPELLATE COURT.—Court of appeal has power to grant permission to withdraw a suit with liberty to file a fresh suit. 74 I.C. 894=1924 A. 260; 41 C.L.J. 186=1925 C. 711; 45 I.C. 913; 45 M.L.J. 212=46 M. 811=1924 M. 79; 40 M. 259; 37 I.C. 414=32 M. L. J. 447 (F. B.); 40 Bom. L. R. 895. Before doing so, it must be set aside the decree of the first Court. 95 I.C. 424 (2)=1926 N. 444; 39 C.W.N. 586. Where, however, an appellate Court allows an appeal setting aside the decree of the trial Court without expressly dismissing the suit, and then grants permission to withdraw the suit, the order so granting permission is irregular but not without jurisdiction or illegal. Nor would the findings recorded in the judgment permitting withdrawal operate as *res judicata* in a subsequent suit. 39 C.W.N. 586. On an appeal against an order of remand, the Court can, at the plaintiff's request, allow him to withdraw the suit with liberty to bring a fresh suit under O. 23, R. 1. 38 P.L.R. 319. Where an appellate Court calls for a finding on a new issue, and an application is made by the plaintiff under R. 1, the appellate Court has jurisdiction to pass orders on it. 156 I.C. 799=1935 Mad. 445. The Court must be very cautious in granting permission. 24 A.L.J. 721=96 I.C. 480=1926 A. 548. An appellant is not entitled to withdraw his suit in the appeal Court under R. 1 (1) as a matter of course. 61 I.C. 584=1923 O. 252. R. 1 does not allow a plaintiff who has appealed to get rid of the decree that has been made by the simple process of withdrawing the suit. 47 I.C. 817=12 S.L.R. 14. See also 11 M. 322; 41 C.L.J. 186. An appellate Court has no jurisdiction to allow a suit to be withdrawn under O. 23, R. 1, with liberty to institute a fresh suit after passing an order dismissing the appeal. 42 P.L.R. 785. See also 1941 Rang. 118. In proper cases High Court on appeal can take action under R. 1. 40 A. 7=42 I.C. 856=15 A.L.J. 809.

APPEAL.—An order made by an appellate Court giving permission to withdraw a suit with liberty to bring a fresh suit is not a decree, and is not appealable. 18 C. 322; 88 I.C. 1029 (1)=1926 O. 185 (1); 1939 Lah. 472. No appeal lies against an order passed under R. 1 (1) dismissing a suit as withdrawn by the plaintiff. 1935 O.W.N. 842=156 I.C. 990=1935 Oudh 486. Withdrawal of appeal does not amount to confirmation of lower Court's order. 50 A. 608=108 I.C. 564=1928 A. 679. If such an order is passed by a Court of first instance, and District Court on appeal sets aside the order and dismisses the suit, the order of

2. In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

Limitation law not affected by first suit.

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District Court is a decree and is appealable. 27 C. 362. An order permitting the withdrawal of an appeal is not a decree. 15 B. 370 (373). No appeal lies against an order for costs passed under R. 1. 105 I.C. 733=1927 N. 399; 1939 Lah. 472. Where one of several plaintiffs withdraws from the suit and the Court dismisses the entire suit on the grounds that the other plaintiffs who only derived title from the one who had withdrawn, had no case to go on with, the order is not one under O. 23, R. 1 but a dismissal of the suit on merits. Though a decree is not drawn up in such a case, an appeal lies because the decision amounts to a decree. 1941 N.L.J. 179.

REVISION.—An order granting leave to withdraw without considering or recording any grounds for allowing withdrawal is a wrong exercise of jurisdiction and a revision would lie. 20 A.L.J. 90=64 I.C. 948=1922 A. 185. See also 25 Bom.L.R. 242=47 B. 559; 1941 N.L.J. 179; 1941 O.W.N. 558; 42 Bom.L.R. 143=1940 Bom. 121; 40 A. 612=16 A.L.J. 493; 14 I.C. 97=9 A.L.J. 358; 15 A. 169; 11 M. 322; 85 I.C. 548=1925 A. 272; 87 I.C. 175=1925 A. 466. Where there was proper exercise of jurisdiction by lower Court no revision lies. 19 A.L.J. 47=60 I.C. 899; 13 L. 537=1932 L. 360; 1939 Lah. 472. In certain circumstances an application in revision lies against an order passed by a Court under O. 23, R. 1, and in such a case it is necessary to see whether the Court has been guilty of material irregularity in passing the order. Where a suit dismissed by the trial Court is allowed by the appellate Court to be withdrawn with liberty to file a fresh suit on the ground that there were certain formal defects, when as a matter of fact they were material defects, the lower appellate Court must be held to have acted with material irregularity in allowing the withdrawal of the suit and its order can be set aside in revision. 1941 O.W.N. 558. High Court has power to revise the order granting withdrawal of suit with liberty to bring a fresh one without any formal defect. 41 I.C. 934; 40 I.C. 77; 44 C. 454=39 I.C. 969=25 C.L.J. 455; 35 I.C. 843; 34 I.C. 934; 10 I.C. 346; 27 M.L.J. 480=26 I.C. 57; 3 P.L.J. 460=46 I.C. 179. See also 1925 L. 497; 3 Luck. 403=107 I.C. 887=1928 O. 482; 1934 A.L.J. 42=1934 A. 137. Where a Court passes an order of withdrawal with liberty in a case which is not brought within the specific provisions of this rule it is without jurisdiction and will be set aside in revision. 155 I.C. 210=1935 P. 251. The failure of lower Court to see whether the necessary conditions are existing, entitles High Court to interfere in

revision. (3 P.L.J. 651; 3 P.L.J. 460, Foll.; 34 C. 51, Dist.) 158 I.C. 986=1935 P. 438.

REVIEW.—An order permitting the withdrawal of an appeal can be reviewed. 15 B. 370.

REVIVAL OF SUIT.—If a plaintiff simply wishes to withdraw from suit he can do so without asking for any permission from the Court. But if he wishes to withdraw his suit with liberty to institute a fresh suit in respect of the same subject-matter, he has to ask for permission from the Court, and it can be given only on such terms as it thinks fit. It is clear that the permission relates not to the withdrawal of the suit but to the filing of another suit when once the suit is withdrawn it is no longer pending. After the order is made permitting the withdrawal of the suit on certain conditions, it is not open to the plaintiff to ask the Court to modify or to annul the conditions, the suit having already ended when the order is made. Once the order for permission to withdraw is made and the suit has ceased to exist it is not open to the plaintiff to revive the suit on the ground of non-acceptance of the terms. This should be before and not after the order of withdrawal is formally made. 43 Bom.L.R. 646.

RES JUDICATA.—Where on an application for withdrawal of a suit under O. 23, R. 1, the Court passes an order granting permission to the plaintiff to withdraw the suit with liberty to bring a fresh suit, and also adds that "the suit stands dismissed," these words are really a surplusage and possess no significance whatever, and a fresh suit is not barred by *res judicata*. I.L.R. (1941) Lah. 331=1941 Lah. 192. Where on dismissal of the suit the plaintiff files an appeal and in appeal the appellate Court passes an order that the parties agree that the appeal may be dismissed and further states in the order that the plaintiff is permitted to bring a fresh suit and ultimately concludes the order by stating that the appeal is dismissed, it cannot be said under these circumstances that the suit is withdrawn under O. 23, R. 1 and not dismissed. On the dismissal of the appeal, the suit automatically is dismissed and the Court ceases to have any further jurisdiction in the matter and it ceases to have any power to grant permission to the plaintiff to institute a fresh suit on the same cause of action. A subsequent suit brought by the plaintiff on the basis of such order is barred by principles of *res judicata*. 178 I.C. 319=1938 Lah. 52. See also 1938 Rang. 210.

O. 23, R. 2.—The effect of this rule is that limitation is to apply to the second suit as if it was the first. 29 B. 219; 69 C.L.J.

3. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

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540; 1937 Mad. 438. Limitation for fresh suit. 25 I.C. 188=12 A.L.J. 989. The fact that a suit is withdrawn does not entitle the plaintiff in a fresh suit to any deduction of time during which the former suit had been pending. 20 I.C. 205. See also 23 I.C. 458=163 P.L.R. 1914. Adjustment—Award—Supersession of—Subsequent reference through Court—Effect of. See 24 Bom.L.R. 361=46 B. 854. Plaintiff obtained a decree and in execution certain property was put up for sale. Before the sale was confirmed decree-holder and judgment-debtor made a joint application to Court by which they asked that defendant having agreed to pay the whole of the decretal amount together with interest and costs before a certain date the confirmation of the Court-sale should be held over. If defendants did not pay, the sale was to be confirmed without further delay. The order of Court set out the terms and provided that on that basis the *darkhast* was allowed to be withdrawn and also provided that if judgment-debtor failed to pay, confirmation of sale might be applied for. Held, that no fresh *darkhast* was necessary for the application for confirmation after the default of judgment-debtor. 57 B. 616=35 Bom. L. R. 769=1933 B. 358.

O. 23, R. 2 and Lim. Act, S. 14.—There is really no conflict between S. 14 of the Limitation Act and R. 2 of O. 23, C. P. Code. S. 14 of the Limitation Act applies to a case where the Court by its own order has terminated a suit or proceeding on the ground that it has no jurisdiction to entertain it or that there is some other cause of a like nature which makes it impossible for the Court to entertain it. O. 23, Rr. 1 and 2 apply to a case where the plaintiff on discovering that his suit must fail either by reason of some formal defect or because of some other sufficient grounds for withdrawal applies voluntarily for the withdrawal of the suit and asks for permission to file a fresh suit and the Court grants his prayer. Where a suit is filed in time in the proper Court, but the Court orders its return for presentation to the proper Court, as, the plaintiffs having, by amendment, reduced their claim for interest, the Court ceases to have jurisdiction, there is neither withdrawal of the suit nor abandonment of part of the claim within the meaning of O. 23, R. 1 (2) and O. 23, R. 2 will not apply. S. 14 of the Limitation Act applies to such a case. I. L. R. (1940) 1 Kar. 225=1940 Sind 125. See also 40 Bom.L.R. 377=1938 Bom. 281. The C. P. Code and the Limitation Act are rules of procedure and must

be interpreted strictly. A plaintiff who prays for an order for withdrawal of his suit with leave of the Court under O. 23, R. 1, must face R. 2 of O. 23, and cannot have the benefit of S. 14 of the Limitation Act. In a suit under the High Court the defendant pleaded that they were agriculturists. The plaintiff applied for leave to withdraw the suit under O. 23, R. 1 with liberty to file a fresh suit, and the Court granted the same. Subsequently the plaintiff filed a suit in a Subordinate Court in the *moffussil* and claimed the right to deduct the period during which he was prosecuting the first suit, under S. 14, Limitation Act. Held, that the High Court in the prior suit had jurisdiction to decide the plea raised by the defendant as to their status, and that the case fell under O. 23, R. 2, but not under S. 14 of the Limitation Act, and the plaintiff could not therefore avail himself of the benefit of S. 14, Limitation Act. I.L.R. (1938) Bom. 327=40 Bom.L.R. 377=A.I.R. 1938 Bom. 281.

O. 23, R. 3: APPLICABILITY OF RULE.—As to whether this rule is an exception to S. 89, see 16 P.L.T. 280=1935 P. 243. Non-compliance with provisions of this rule—Effect on decree—If makes decree other than one on compromise—Registration—Necessity. 40 C.W.N. 1176. The rule applies to cases referred to arbitration. 1925 M. 50. The provisions of R. 3 are imperative and the special procedure therein prescribed is not affected by the general procedure laid down in R. 1. The mere circumstance of a person not being actually on record is not a bar to his filing an application under R. 3. If there is a question common to the parties on record and a stranger as regards the subject-matter of the suit or any portion thereof, it should be tried once for all by allowing the stranger to be made a party. 57 M. 892=1934 M. 337=66 M.L.J. 517. See also 1935 L. 168. R. 3 is mandatory in its terms, and if the Court is satisfied that the parties executed the compromise, the terms of which were known to them and which is a perfectly valid and binding document, adjusting the suit or appeal, Court has no option but to order the compromise to be recorded and to pass a decree in accordance therewith. The rule does not provide for an enquiry into disputed facts collateral to the terms of the compromise. A party alleging fraud cannot be allowed to avoid the compromise admittedly executed by him with consent in proceedings started on application under R. 3. Such an enquiry is not within the purview of the rule. If the compromise is lawful, having regard to its terms, Court must give

LOC. AMS.—[LAHORE.] *Substitute for O. 23, r. 3 :—*

“Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit :

Provided that the hearing of a suit shall proceed and no adjournment shall be granted in it for the purposes of deciding whether there has been any adjustment or satisfaction, unless the Court for reasons to be recorded in writing, thinks fit to grant such adjournment, and provided further that the judgment in the suit shall not be announced until the question of adjustment or satisfaction has been decided :

Provided further that when an application is made by all the parties to the suit, either in writing or in open Court through their counsel, that they wish to compromise the suit, the Court may fix a date on which the parties or their counsel should appear and the compromise be recorded, but shall proceed to hear those witnesses in the suit who are already in attendance, unless for any other reason to be recorded in writing, it considers it impossible or undesirable to do so. If upon the date fixed no compromise has been recorded, no further adjournment shall be granted for this purpose, unless the Court, for reasons to be recorded in writing considers it highly probable that the suit will be compromised on or before the date to which he proposes to adjourn the hearing.”

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effect to it forthwith. 57 A. 426=1934 A. L.J. 1183=1935 A. 137. *See also* 1940 Rang.L.R. 237=1940 Rang. 91=189 I.C. 232. Where a decree though it did not set out the text of the compromise either in the body or in any schedule, directed that effect should be given to the whole compromise, it must be taken that the decree has recorded the compromise. A reference to the compromise in the decree is a sufficient compliance with S. 375 of the Code of 1882. 67 I.A. 179=I.L.R. (1940) Lah. 330=1940 P.C. 70=(1940) 2 M.L.J. 769 (P.C.).

MEANING OF WORDS.—“Adjustment,” meaning of. 45 M.L.J. 763=28 C.W.N. 930=1923 P.C. 178 (P.C.). “Award is no adjustment”. *See* 47 A. 637=23 A.L.J. 561 (F.B.). Where a defendant offers to bind himself by the statement of the plaintiff and the plaintiff makes the statement, it follows that the Court is entitled to decree the claim against the defendant, as the only condition laid down by him has been fulfilled. The statement of the plaintiff has to be accepted as an adjustment of the claim and a decree passed accordingly. 1938 A.L.J. 449=1938 All. 353. If in a pending suit the parties go to a private arbitrator without the consent of Court and the arbitrator makes an award there is nothing to prevent the Court from giving effect to the award as if it were an adjustment by common consent and it amounts to an adjustment under O. 23, R. 3. 31 N.L.R. (Supp.) 72=1936 N. 8. The power given by Para. 20 of Sch. II, C.P. Code (*see now* Arbitration Act, 1940) cannot override the general power given to parties under O. 23, R. 3, C.P. Code, to adjust their disputes by a lawful compromise at any time after suit. The award is not entertained as an award but as an agreement between the parties disposing of their dispute and it is this agreement which the Court has power under O. 23, R. 3 to record and pass a decree in terms thereof. In principle there is no difference between an agreement of the parties and an award by arbitrators who are appointed by the parties themselves to settle

their dispute, because in either case the parties are bound by their own agreement. An award therefore assumes the character of an agreement as soon as it is delivered whether the parties accept it or not. 178 I.C. 29=1938 Nag. 492. *See also* 1939 Rang. 300. The landlord filed a suit against the tenant for damages. The tenant also filed a cross suit maintaining that he was the owner himself. They arrived at an agreement that the suit by landlord should be decided according to the decision in the tenant's suit. The parties meant that the issue as to ownership of land should be decided on merits. Tenant's suit was dismissed. *Held*, that such agreements had nothing to do with adjustments of suits within the meaning of R. 3. (1914 M. 449 and 31 M. 1, Diss. from; 1925 A. 271, Foll.) 1935 R. 482. “Proved to the satisfaction of the Court,” meaning of; *see* 24 C. 908 (F.B.). The word “suit” in R. 3 is not used in any narrow sense; it means and is applied to all the proceedings from the beginning of the plaint up to the time when an executable decree has been obtained. 14 P. 488=16 Pat.L.T. 311=1935 P. 385. It includes the appellate stages and execution proceedings following the decree. 62 I.C. 608=6 P.L.J. 253. ‘Lawful’ means lawful within the meaning of the Contract Act. The agreement should be legally though not specifically enforceable. 12 P. 359=145 I.C. 1=1933 P. 306. A compromise affecting the rights of a person who is not a party to it cannot be considered to be lawful, and a decree passed thereon is liable to be set aside. 38 P.L. R. 283. Application to enforce award—Application to record compromise—Distinction—“Agreement”—Meaning of. 16 Pat. L.T. 280=1935 P. 243. The words “In so far as it relates to the suit” are wider than the corresponding term in S. 375 of the old Code. 146 I.C. 145=1933 A.L.J. 728=1933 A. 649 (F.B.). Where a widow who was a party to a partition suit was held by mutual agreement entitled to maintenance from a date prior to the date of the suit, a provision in a compromise between the

[OUDH.] O. 23, r. 3.—*Add the following proviso to r. 3 :—*

“ Provided that no agreement, compromise or satisfaction shall be recorded in a suit instituted under S. 92, Code of Civil Procedure, unless previous notice of the same has been given to the Legal Remembrancer to Government, and the Court, after hearing him, if he desired to be heard decides to accept it.”

[RANGOON.] In r. 3 after the words “ to be recorded ” *add* the following after deleting “ and shall pass a decree in accordance therewith so far as it relates to the suit.”

“ and shall either pass a decree in accordance therewith or shall decree that all further proceedings in the suit shall be stayed upon the terms of the said agreement, compromise or satisfaction with liberty to the party to apply for the purpose of carrying the same into effect.”

and *add* the following *Proviso* :—

“ Provided that before recording and passing a decree in accordance with an agreement compromise or satisfaction in a suit instituted under the provisions of S. 92, Civil Procedure Code, the Court shall direct notice returnable within a reasonable time to be given to the Government Advocate, Burma, or the officer with whose consent the suit was instituted, or the agreement, compromise or satisfaction proposed to be recorded. The Government Advocate or such officer as aforesaid may thereupon appear before the Court and be heard in the matter of such agreement, compromise or satisfaction.”

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parties for payment of mesne profits from that date was a matter “relating to the suit” although no past mesne profits were claimed by the plaintiff in the suit, and could, therefore, be given effect to under O. 23, R. 3. 1938 O.W.N. 348=1938 Oudh 103.

LAWFUL AGREEMENT, ADJUSTMENT OR COMPROMISE.—“Lawful” in R. 3 does not merely mean binding or enforceable. The rule refers to agreements which in their very terms and nature are not “unlawful”, and may include agreements voidable at the option of one of the parties. A compromise is not otherwise than lawful under R. 3, merely because it is alleged that the appellant who is one of the parties to it had given an assurance to the respondent, other party, that no other defendant would file any cross-objection, and that contrary thereto he caused another respondent to file a cross-objection. That does not take the agreement out of the rule, when the agreement has been executed and registered freely and with full knowledge of its terms. Nor can the compromise be said to be not “verified,” simply because one of the parties declines to give effect to it. 57 A. 426=1934 A. L.J. 1183=1935 A. 137. In an application to record a compromise under O. 23, R. 3 the Court has to be satisfied on two points: first, that there was an agreement between the parties, and secondly, that it was “lawful”. The term “lawful agreement” in the rule excludes not only unlawful agreements (the object or consideration for which is unlawful as defined in the Contract Act) but also all agreements which on the face of them are void and therefore will not be enforced by Courts. For this purpose no inquiry is necessary because the terms of the agreements themselves will show the defect. I.L.R. (1940) Bom. 13=41 Bom. L.R. 1290=1940 Bom. 60. “To determine whether a compromise is lawful” it is necessary to consider the facts of the litigation, the terms of the compromise, and the circumstances under which it is entered into. “Where a compromise by a trustee involves a breach of trust, it is not lawful.” 12 M.L.J. 360. See also 60 I.C. 22. An agreement which purports to deal with the

rights of certain minors who are not parties to the suit is not a lawful agreement which can be recorded under R. 3. As it involves and implies injury to the property of minors it is unlawful within the meaning of S. 23 of the Contract Act; and consequently it is void. 61 C.L.J. 88. Mere offer not enough to constitute adjustment. 9 I.C. 426. An agreement between the parties to a suit to abide by the decision which may be made in another proceeding amounts to an adjustment. 8 L.W. 470=51 I.C. 540; 37 M. 408=22 M.L.J. 447. See also 1929 M. 416. A joint petition by both the parties to a suit requesting Court to adjourn the case for enabling the parties to arrive at the terms of a contemplated settlement is not by itself a compromise when nothing further was done by the parties in furtherance of their original intention. A decree based on the original petition itself as if it were a compromise is without jurisdiction. 34 C.W.N. 1068. Court granting adjournment on application stating that parties had agreed to abide by High Court's decision in other suit—Order, if amounts to record of compromise. 1929 M. 416=120 I.C. 742. See also 37 M. 408; 51 I.C. 540. An executory contract comes under term ‘lawful agreement or compromise’ and can form subject of compromise of suit. 166 I.C. 946=1937 Pat. 39. Agreement to abide by the sums fixed by the other side may be good agreement. 25 I.C. 935=8 S.L.R. 91. An agreement by the parties to a suit to abide by the sum to be named by their pleaders is not a lawful adjustment. 19 I.C. 450=6 S.L.R. 166. See also 1930 A. 162. Mortgage suit—Application for final decree for sale—Plea of extension of time for payment—Not an adjustment to which the rule is applicable. 6 R. 285=1928 R. 194. Executable decree for future maintenance can be passed on compromise. 12 P. 359=145 I.C. 1=1933 P. 306. One of the partners cannot compromise suit instituted in the name of the firm even though there may be no fraud or collusion in the same. 144 I.C. 1=1933 L. 618. Although the requirements of O. 23, R. 3 say nothing about any particular form in which a compromise is to be made before the Court is

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to be satisfied of its existence, still the more complicated the compromise, the more desirable it is that its terms should be drawn up into writing, before they could strictly be proved. There must be in the nature of things, compromise about small matters, which may be capable of proof orally, but the Court must always look with some suspicion on cases of elaborate compromises which are sought to be proved purely by oral evidence, when one of the parties to the suit strenuously denies that he entered into any compromise at all. 181 I.C. 54=A.I. R. 1939 Rang. 149.

SUBJECT-MATTER OF THE SUIT.—Whether a particular matter is the subject-matter of or relates to a suit is primarily a question of fact depending upon the circumstances of each case. Although a matter is not strictly the subject-matter of a suit, it may relate to or have reference to the suit if it forms part of the consideration. 1937 P. 232. In a suit by a plaintiff one of whom was a minor, a compromise was arrived at, whereby the plaintiff, in consideration of her giving up her right to an account of the whole property from the defendant manager agreed to facilitate enjoyment, to take her share of the income from only some villages out of the whole property, and also that, in case no agreement could be arrived at on reference to the vakils, the parties had a right to obtain partition from the Court. *Held*, that the arrangement arrived at to 'facilitate management' being in consideration of the plaintiff's giving up her right to an account, was one having reference to the suit within the meaning of O. 32, R. 7 and was therefore the subject-matter of the suit within the meaning of R. 3. 1937 P. 232.

EFFECT OF COMPROMISE AND DECREE.—Intention of parties to have a formal document drawn up will not affect settled compromise. 56 I.C. 26=11 L.W. 179. A compromise is a binding agreement between the parties and none the less so binding, because followed by a decree. 21 I.C. 538=18 C. L.J. 187; 53 M.L.J. 345; 32 C.W.N. 93=1927 P.C. 204 (P.C.). A consent order is only an order of the Court carrying out the agreement between the parties. 29 I.C. 156=19 C.W.N. 565. A consent order or decree is a mere creature of agreement and no greater sanctity can be placed upon the decree than upon the agreement itself. 1930 P. 234. The provisions of this rule, whenever they are applicable, must be given effect to even in cases which are governed by the Dekkhan Agriculturists' Relief Act. 24 Bom.L.R. 88=46 B. 560. *See also* 57 I.C. 751. Effect of decree on rights of absent respondents. 19 I.C. 915. A decree passed under R. 3 in terms of a compromise arrived at between parties to suit becomes final and conclusive if not appealed against. 29 I.C. 156=19 C.W.N. 565; 21 I.C. 538=18 C. L.J. 187; 19 I.C. 915; 40 M. 177=30 M. L.J. 274; 31 I.C. 21. A defendant who is

a party to the suit, but not a party to the compromise is bound by the decree if it is not appealed against. 24 I.C. 491, following 31 M. 474. Effect of decree on compromise, when there has been a misapprehension as to right. *See* 24 I.C. 491. Where a Court which passed a compromise decree orders the compromise to be made part of the decree, but in the operative part of it incorporates only so much of the compromise as related to the actual subject-matter of the suit, it cannot be said that the compromise has been embodied in the decree. Where a relief is required in such a case in respect of a matter omitted in the operative part of the decree, it would not be available by way of execution of the decree. 1939 O.W.N. 936=1940 Oudh 27. A contract of a compromise which has passed into a decree is governed by the same principles as are applicable to the construction of contracts. 12 I.C. 334=35 M. 75=21 M.L.J. 709. Where a compromise decree is made by means of which the whole amount is to be discharged by payment in certain instalments on fixed rates, Court has no power to grant any extension of time for the payment of any of such instalments. 146 I.C. 411=1933 P. 677 (2). The question whether time was of the essence of the contract embodied in consent decree would depend on the facts and circumstances of each case. 1930 P. 234. Setting aside of compromise decree by third party—Procedure. 15 L. 626=1934 L. 393.

POWERS AND DUTY OF COURT.—Under R. 1 Court has to deal with plaintiff alone, but under R. 3 Court has to deal with plaintiff and defendant and has to find out if there is any agreement between them for compromise. 37 I.C. 421. The terms of settlement must be examined with care and caution. 16 I.C. 611. If the compromise is fraudulent, Court may refuse to pass a decree thereon. 52 I.C. 105. Court must be satisfied that the agreement is lawful and it can pass a decree in accordance therewith only in so far as it relates to the suit. 25 C.W.N. 806=34 C.L.J. 96. A Court making a decree by consent is performing a judicial and not a ministerial act. (*Ibid.*) *Also* 50 I.C. 363. Where no injustice of any kind is established and it is established that a suit has been adjusted either wholly or in part by a lawful compromise, it is the duty of Court to record the agreement and pass a decree in accordance therewith. 57 I.A. 133=57 C. 1311=1930 P.C. 158=58 M.L.J. 551 (P.C.). Where a party has no further interest in the property in dispute his agreement to the compromise is not necessary; such a person has no *locus standi* whatever. 148 I.C. 171=1934 L. 34 (2). The Court must satisfy itself by the evidence taken that the agreement or compromise is a lawful one. 23 M. 101. *See also* 17 A. at 532; 24 A.L.J. 210=1926 A. 278. Beyond that, Court cannot examine the terms of the compromise. 91 I.C. 790

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=1926 A. 278. Court has no jurisdiction, except in the case of minors, etc., to investigate the fairness or unfairness of a compromise which has been accepted by both the parties. 43 L.W. 386=1936 M. 347=70 M.L.J. 471. Ordinarily when investigating the fact and lawfulness of a compromise under R. 3 it is irrelevant to examine the strength or weakness of the suit itself. When a compromise is in dispute, the party repudiating it, on whatever ground it may be cannot reasonably ask that the entire suit be re-opened. 12 P. 359=1933 P. 306. Court is not bound to record compromise or adjustment not assented to by all the parties. 86 I.C. 361=1925 L. 280. Compromise effected between parties to suit who are majors—Court need not consider whether such compromise will affect the interests of persons who are not parties to suit and who are not *sui juris*. 55 C. 210=104 I.C. 219=1927 C. 870. Court has jurisdiction to pass a right as well as a wrong decree and if it decides wrongly, the wronged party can only take the course prescribed by the law for setting matters right. 51 I.C. 439. A consent decree wrongly passed owing to some legal or technical defect is not a nullity. (*Ibid.*) Where a compromise effected by the parties is conveyed to Court by pleaders on both sides, the parties cannot object on the ground that the pleaders had no such authority. 60 I.C. 22=12 L.W. 562. Court has power to frame an additional issue to decide whether a lawful compromise has been effected between the parties. 20 B. 304; 19 M. 419. *See also* 8 M. 482; 9 M. 103; 7 B. 304. Where a compromise is filed in Court but repudiated by some of the parties to it, Court must hold an enquiry under R. 3. 1934 P. 582=152 I.C. 288. Unless the parties repudiating establish that they had no knowledge of the terms of the settlement, a decree must be passed on the compromise. 110 I.C. 524 (2)=1929 P. 102. But *see* 38 C.W.N. 648=151 I.C. 661=1934 C. 643. Agreement of compromise filed in Court—Petition of compromise signed by only some of the parties—Communications showing that all parties agreed to the same—Court whether can direct enquiry—Evidence Act, S. 23. 1930 L. 293. A consent decree cannot be challenged on the ground that it is erroneous in law, nor on the grounds on which a contract can be impeached (29 C. 854, Foll.) 35 M. 75=21 M.L.J. 709. Court can decide the fact of settlement out of Court and grant a decree in accordance therewith, if it is established. 36 I.C. 375=21 C. W.N. 366. Arrangement prior to decree to treat it as inexecutable will not be given effect to. 43 M. 725=39 M.L.J. 222. Power of Court to postpone passing of decree—Duty of Court to pass decree at some time. 1930 P. 395=9 P. 314. After an *ex parte* decree had been passed, containing a direction for ascertainment of mesne profits, the parties compromised the

matter and presented a petition to Court obviating the necessity for an enquiry. Court, however, did not pass a final decree in accordance with the same. *Held*, that the decreeholder should not be deprived of the fruits of his action by the omission of the Court, and that he had the right to execute the compromise. 15 Pat.L.T. 457=1934 P. 380.

LEGALITY OF COMPROMISE.—R. 3 does not always compel the Court to pass a decree in accordance with a compromise. 4 P.L.J. 580=53 I.C. 833. Court must see that the compromise is a lawful agreement and will look into the merits when necessary to determine its *bona fides*. 53 I.C. 833. The word "lawful" does not mean merely binding or enforceable. It refers to agreement which in their very terms or nature are not unlawful and may therefore include agreements which are voidable at the option of one of the parties because they have been brought about by undue influence, etc. Court is bound to pass a decree in the absence of any evidence that the compromise is unlawful. 50 A. 748=26 A.L.J. 691 1928 A. 494. *See also* 1932 A.L.J. 509=1932 A. 478; 1937 Pat. 39. Where the claim is beyond the jurisdiction of trial Court, it is not competent to pass a compromise decree. Its duty is to return the plaint under O. 7, R. 10. 66 I.C. 837=16 L.W. 155. The compromise may be regarded as an abandonment of the claim so far as it was beyond the jurisdiction of the Court and the decree on the compromise may be valid. (*Per Coutts-Trotter, J.*) 16 L.W. 155. Compromise is not unlawful merely because the parties do not get the shares to which they would be legally entitled. 55 I.C. 716. An agreement which carries a penal clause such as may be caused by S. 74 of the Contract Act is not "unlawful". 24 A.L.J. 210=1926 A. 278. Nor an agreement to drop an appeal. 18 R.D. 336. The Court in recording a consent decree is bound to consider whether the compromise is a lawful one. 35 M. 75=21 M.L.J. 709; 26 M.L.J. 315=23 I.C. 72; 16 L.W. 155=66 I.C. 837; 55 I.C. 716; 38 C.L.J. 272=1924 C. 159. No compromise can prevent the law of limitation from taking effect. 92 I.C. 732=1926 O. 311. All terms in a contract which are opposed to public policy are invalid and will not be enforced by the Courts. 26 M. at 33. Compromise partly legal and partly illegal—Legal portions, when they form the substantial portion of it, can be accepted and enforced. 109 I.C. 261=1928 P. 495. Compromise in fraud of some of the parties—Not allowed. 1923 O. 252. A Court will not recognise any compromise of an action with the facts of which it is entirely unacquainted or if one of the terms of the compromise is a clear violation of a statutory rule. 55 I.C. 504; 47 I.C. 817=12 S.L.R. 14; 50 I.C. 577=37 M.L.J. 65; 37 I.C. 764; 4 P.L.J. 580=53 I.C. 833. Section 6, Cl. (a) of T. P. Act renders certain trans-

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fers unlawful on grounds of public policy, and the Court cannot allow them to be effected by means of a consent decree. 26 M. 31. So also an agreement by a mahant to transfer the properties of the *mutt* for no necessary purpose. 106 I.C. 645=9 Pat. L.T. 214. Suit relating to public trust—Compromise sacrificing the interest of the trust—If not lawful—Court bound to record such a compromise. 53 M. 398=1930 M. 629=58 M.L.J. 410. Any agreement or compromise as regards the genuineness or execution of a will, if its effect is to exclude evidence in proof of the will, is not lawful. 31 C. 357. The principles of compromise under Divorce Act are considered in 10 A. 559. See also 22 M. 214.

ESTOPPEL.—There is nothing in law to prevent the parties to a suit from agreeing, apart altogether from the Oaths Act, to abide by the statement of a third person. The agreement of the parties to abide by such statement and the statement given in pursuance of the agreement amount in effect to an adjustment of dispute, within the meaning of O. 23, R. 3 and each party is estopped from subsequently impugning the same and from challenging the statement of the referee. 1937 A.L.J. 1066=1937 A.W.R. 801=A.I.R. 1937 All. 701.

MATTERS OUTSIDE SUIT.—The only compromise which Court is bound to enforce is that which adjusts the suit wholly or in part, not one which goes beyond the suit. 13 C. 170. Where a compromise covers both matters relating to the suit and also others extraneous to it, the decree should either recite the whole of the agreement and then conclude with an order relative to that part that was subject of the suit or introduce the agreement in a schedule to the decree. 1941 N.L.J. 207. Under O. 23, R. 3 all terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit or not, become related to the suit and can be embodied in the decree. A.I.R. 1941 Rang. 316. Where a term of the compromise is plainly outside the scope of the suit, Court may refuse to incorporate it. But where it is a consideration of the compromise and so intimately connected with it, Court has the power to include it in the decree, even though the consideration may be entirely outside the scope of the suit. 132 I.C. 434=33 Bom.L.R. 463=1931 B. 295. [7 B. 304; 27 Bom.L.R. 943; 30 M. 478; 35 C. 837; 53 M.L.J. 345 (P.C.), Ref.]. Also 139 I.C. 830=34 Bom.L.R. 849; I.L.R. (1939) All. 435=1939 All. 454.

SO FAR AS IT RELATES TO THE SUIT.—As to the meaning of these words, see 33 Bom.L.R. 1457. See also 146 I.C. 145=1933 A.L.J. 728=1933 A. 649 (F.B.); 1937 Sind 190. These words must be restricted to relief which Court could have given in the suit, and will not include reliefs which could

only have been given in a suit based upon different cause of action. 18 M. 410 (414); 5 M.L.J. 145. See also 5 C.W.N. 485; 22 M. 214; 9 A. 229; 1937 Sind 190; 30 M. 478; 3 P.L.J. 43=43 I.C. 282. Where there is a compromise beyond the scope of a suit and the compromise has not been registered but the parties have acted on it, there is an equitable estoppel and the parties cannot resile from the compromise. 42 C. 801=42 I.A. 1=28 M.L.J. 548=28 I.C. 980 (P.C.). See also 1928 A. 534; 1939 All. 454. Compromise—Decree passed in terms of—Provisions in compromise impliedly incorporated—Compromise whether requires registration. 118 I.C. 395=1929 L. 527. A compromise decree constitutes an estoppel, though it relates to matters outside the suit. 42 I.C. 223=33 M.L.J. 615. Where a compromise goes beyond the subject-matter of the suit, the proper procedure for the Court is to recite the compromise in the decree but to make part of the decree only so much of the compromise as relates to the subject-matter of the suit. 65 I.C. 47. [47 C. 485 (P.C.), Ref.] (1939) All. 435=1938 All. 454; 38 C.L.J. 72; 59 I.C. 344=22 Bom.L.R. 1286; 51 I.C. 273=31 P.R. 1919; 29 O.C. 276=92 I.C. 722; 1928 R. 43; 104 I.C. 810=1928 N. 51; 107 I.C. 525=1928 N. 173. Where a compromise collateral to suit offered by one party in the course of the appeal was accepted by karpardaz of the other party, but the document of compromise was not recorded and a decree was merely drawn up and it was the only document brought into existence, *Held*, that the provisions of O. 23 were not complied with and that the Court should not in pursuance of R. 3 make a decree. 62 I.A. 196=14 P. 545=39 C.W.N. 1185=1935 P.C. 119 (P.C.). Where a petition includes matters not in suit, the Court should pass a decree with regard to matters in suit only and not to reject the petition entirely. 78 P.R. 1917=40 I.C. 675. See also 145 I.C. 441=14 Pat.L.T. 23=1933 P. 176. Where demolition of the wall not in suit was the consideration for the abandonment by the plaintiff of his right to have the wall in suit demolished, the compromise with regard to the wall not in suit should be deemed to relate to the suit within the meaning of R. 3. 1934 L. 623. An objection to the inclusion of a term in a compromise decree, on the ground that it goes beyond the subject-matter, ought to be taken by way of appeal and cannot be urged when execution is sought. 38 M. 959=26 M.L.J. 331=23 I.C. 581; 30 I.C. 263=2 L.W. 608; 53 I.C. 354=1919 M.W.N. 356; 1925 M. 1101=49 M.L.J. 490; 29 O.C. 276. Court should record the entire compromise filed by the parties and draw up a decree giving the parties the right to execute the decree in respect of the matters which properly fall within the scope of the rule. 3 P.L.J. 255 (F.B.); 52 I.C. 20=4 P.L.J. 667; 38 M. 959=26 M.L.J. 331. But even in cases where a part of the compromise does not, strictly speaking, relate to the suit and nevertheless the Court decides that it relates to the suit and

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incorporates it into the operative portion and passes a decree in terms of it, the decree is not a nullity and not one passed without jurisdiction, but would be binding upon the parties to the decree and its validity cannot be questioned in the execution department, nor can any title derived under it be attacked. 146 I.C. 145=1933 A.L.J. 728=1933 A. 649 (F.B.).

PARTIAL COMPROMISE.—Partial compromise to which some of the parties only agree is good as to them. 34 I.C. 518; 123 I.C. 693=1930 S. 217; 12 P. 359=1933 P. 306. But see 38 L.W. 280. Others can object to it on showing good grounds. 85 I.C. 678=1926 C. 193. Partial compromise is not binding on persons not parties to the compromise. 45 I.C. 33.

ORAL COMPROMISE.—The mere fact of an oral compromise having been come to cannot supersede a mortgage unless the Court accepts it and passes a decree in accordance with it. 24 I.C. 93=12 A.L.J. 672. S. 92, Evidence Act, does not prevent oral evidence of the terms of the compromise being given. 29 I.C. 860.

COUNSEL'S AUTHORITY TO COMPROMISE.—Express authority is not needed for a counsel to enter into a compromise within the scope of the suit; and where there is limitation of authority and that limitation is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect. 1 P. 480=67 I.C. 96; 4 P. 766=92 I.C. 179=1926 P. 73. See also 19 A.L.J. 63=60 I.C. 912; 60 I.C. 22=12 L.W. 562; 41 C.L.J. 213=29 C.W.N. 597. Compromise by counsel out of Court without consent of party is not valid. 52 C. 386=29 C.W.N. 566. The implied authority of agents extends only so long as the litigation proceeds in the ordinary way, but they cannot consent to a decree on compromise without special authority. 36 I.C. 375=21 C.W.N. 386. Pleader confessing judgment on party's behalf—Court passing consent decree thereon—Burden of proof as to authority of pleader. 1929 O. 211. Where there is misunderstanding between a party and that party's advocate, the advocate being under the impression that the party was expressly assenting to a compromise on certain terms while the party did not appreciate that she was consenting to a compromise in the same sense, it is open to the Court to refuse to give effect to the compromise. 13 Rang. 319=156 I.C. 665=1935 Rang. 150.

ARBITRATION.—An award made in an arbitration without the intervention of the Court in a pending suit is not a compromise within the meaning of O. 23, R. 3, C. P. Code. All the rules relating to arbitration lie within the compass of the Arbitration Act. If the parties to a dispute purport to go to arbitration but ignore these rules, there can be no award of which the Courts will take notice as such. Nor can there be any adjustment of the dispute by lawful agreement by reason of a submission alone, unless the third party to whom they have recourse brings them in fact to an adjustment by lawful agreement. If, how-

ever, subsequent to the making of the award, the parties agree to accept the award and thus by a lawful agreement arrive at an adjustment of their disputes, the Court would be enabled to record it as an adjustment upon that basis alone. 1939 Rang.L.R. 280=1939 Rang. 300 (F.B.). See also 1938 Nag. 492. Where the parties to a suit for partition compromise it by agreeing to refer the matter to arbitration, there is an end of the suit and the Court cannot supersede the decree and proceed with the suit, if arbitration fails. 33 A. 743=38 I.A. 181=21 M.L.J. 1151 (P.C.). See also 25 Bom.L.R. 452=1923 B. 401; 32 Bom.L.R. 389. Where, in a suit, a reference to arbitration is made by the parties without the intervention of Court and an award is made thereon, it can be recorded as an adjustment and a decree can be passed in terms of the award. 45 B. 245=22 Bom.L.R. 1043. See also 40 B. 386=18 Bom.L.R. 559; 1939 N.L.J. 228; 1937 O. W.N. 1002=1937 Oudh 507; 1937 Rang. 287; 38 B. 687=16 Bom.L.R. 653; 37 B. 639=19 I.C. 786; 49 C. 608=1922 C. 404; 97 I.C. 465=1926 M. 1211; 1927 M. 1126; 30 Bom.L.R. 1539; 107 I.C. 525; 51 M. 800=1928 M. 1025=55 M.L.J. 429 (F.B.). But see 55 C. 538=1927 C. 887; 8 O.W.N. 71; 38 C.W.N. 648=1934 C. 643; 60 C.L.J. 173=1935 C. 239 (*contra*). See however the recent case in 11 P. 237=138 I.C. 82=1932 P. 205 (51 M. 800; 51 B. 908, Foll. 55 C. 538, Not foll.). A mere agreement to refer to arbitration is not an adjustment. 38 B. 687=16 Bom.L.R. 653. When an award made on a reference to arbitration in a pending suit without the intervention of Court is disputed by a party the Court should inquire whether the award which is alleged to be an adjustment or compromise was justly, legally and properly arrived at. 37 B. 639=15 Bom.L.R. 340; 1937 Rang. 287. An informal reference to arbitration in a pending suit cannot be given effect to. 49 C. 608=69 I.C. 808. See also 25 C.W.N. 127=47 C. 6; 34 I.C. 220; 23 C.L.J. 482; 67 I.C. 123; 24 P.R. 1914=25 I. C. 710. Proceedings under R. 17, Sch. II, can be compromised and a decree passed thereon. 23 I.C. 591=69 P.L.R. 1914. Arbitration—Partial award—Decree on—Power of Court to pass. 45 M.L.J. 76=74 I.C. 609=1923 M. 576. A private reference to arbitration in a pending suit followed by a lawful award is a lawful agreement amounting to an adjustment. 26 B. 76; 24 C. 908; 24 M. 326, Foll.; 33 B. 69, Diss.) 23 M.L.J. 290=16 I.C. 478; 36 M. 353=21 M.L.J. 990; 49 I.C. 746; 46 I.C. 902; 25 O.C. 213=1922 O. 189; 5 Bur.L.T. 125=15 I.C. 959; 14 R. 766. See also 133 I.C. 29=1931 A.L.J. 393=1931 A. 557; 131 I.C. 443. But if the plaintiff wants a decree for certain reliefs granted to him under the award, which, according to the tenor of the award, are enforceable under the provisions of the Arbitration Act, and not by virtue of any decree which might be passed in the suit, the application of the plaintiff for the reference and award being recorded as an adjustment of the suit under R. 3 should be disallowed. 158 I.C. 60=

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1935 Sind 184. Where a literate person, having an award explained to him, signs it, he should be taken to agree to it, and the award becomes a compromise. 1929 L. 806. Where the parties have by agreement left the matter to the mediation of third party not during the judicial proceedings but during the arbitration proceedings there is no adjustment independent of the arbitration proceedings but has to be followed and ratified by an award. Where the award turns out to be invalid in view of concurrent judicial proceedings, the oath taking before the arbitrator would stand or fall with the subsequent award. 1934 L. 887=154 I.C. 7.

COMMISSIONER.—After a suit has been referred to a Commissioner to take accounts, a decree can be passed under this rule. 26 B. 76.

EXECUTION PROCEEDINGS.—R. 3 is inapplicable to execution proceedings. 44 I.C. 164; 1925 O. 136. But see 97 I.C. 768. Once a compromise decree has been passed with reference to the rights of the parties to a suit, their further remedy is by way of execution and not by a suit. 52 I.C. 188=151 P. R. 1919. Execution cannot be issued upon a razinamah unless the terms are embodied in the decree of the Court. 2 M.H.C. 305. Executing Court cannot question the validity of the compromise decree. 138 I.C. 786=1932 M.W.N. 623=1932 M. 557.

GUARDIANSHIP PROCEEDINGS.—A guardian appointed by the Court cannot be removed by a compromise. 47 I.C. 817=12 S.L.R. 14. Compromise affecting minors. 20 M. 106. Compromise invalid as against minors is enforceable as against the other parties bound thereby. 1928 L. 792 (2)=112 I.C. 695. Record of compromise by guardian—Decree of Court necessary. 62 I.C. 688.

PROBATE PROCEEDINGS.—A compromise in a probate case is binding only upon the parties to it. 33 I.C. 273=23 C.L.J. 82; 20 C.W.N. 986=1 P.L.J. 377. A compromise in a probate case only makes the case non-contentious but does not take away the Court's duty to grant or refuse probate. 20 C.W.N. 986=1 P.L.J. 377.

TRUST PROPERTIES.—A *bona fide* compromise by the trustee of a public trust relating to trust properties is a lawful compromise. 60 I.C. 22=12 L.W. 562. But see also 12 M. L.J. 360.

PRELIMINARY DECREE.—Application for final decree under O. 34, R. 6—Plea of agreement exonerating personal liability entered into after final decree—If can be gone into. 69 M.L.J. 765 (F.B.). See also I.L.R. (1939) Lah. 313=1939 Lah. 79. The payment of the mortgage money, due on a preliminary decree made out of Court, if certified by the decree-holder, can be treated as an adjustment of the suit under O. 23, R. 3. (2 P.L.J. 533, Foll.) 158 I.C. 419=1935 O.W.N. 1087. See also 1935 O.W.N. 541=1935 O. 313; 1935 L. 168. If the preliminary decree is satisfied in part out of Court, the Court at the final taking of accounts will permit such payment towards the satisfaction of the decree. 40 L.

C. 138=2 P.L.J. 533. See also I.L.R. (1939) Lah. 313=1939 Lah. 79; 58 I.C. 299=2 P.L.T. 38; 43 I.C. 399. In a suit for taking partnership accounts if an appeal is preferred from the preliminary decree the jurisdiction of the original Court to record a compromise under R. 3 is not ousted by reason of the appeal. 52 I.C. 899=13 S.L.R. 135. Until a decree for redemption is passed under O. 34, R. 7 the suit can be adjusted under this rule. 25 M. at 317 (F.B.).

PRACTICE AND PROCEDURE.—The general rule, that evidence should be recorded before a decision is made and not after, should also be followed in cases in which the Court records compromises arrived at between the parties. 29 S.L.R. 437=1936 S. 59. The Court should first pass an order directing the compromise to be recorded and then pass a decree in accordance therewith. 24 I.C. 630=96 P.R. 1914; 33 I.C. 759=43 C. 85; 1928 R. 43. The procedure under O. 23, R. 3 consists of two steps: first the agreement or compromise has to be recorded, and secondly a decree must then be passed in accordance therewith so far as it relates to the suit. When the agreement has been recorded a decree can be passed any time. A. I. R. 1941 Rang. 316. Absence of formal order recording the compromise is not fatal to the validity of the decree passed in pursuance thereof. 111 I.C. 619; 72 C.L.J. 287 (what amounts to recording a compromise). If the compromise that is filed is a valid and lawful one, the Court is bound to pass a decree in terms thereof and cannot add a new party afterwards. 50 M.L.J. 59=92 I.C. 311=1926 M. 341. A Court to whom a petition of compromise is presented should not delay passing order for recording the compromise. Under R. 3, the Court is to pass an order directing the compromise to be recorded and this should be done at once. 15 P. 456=163 I.C. 675=1936 P. 401. The passing of the decree may, if necessary, be postponed till the hearing of the suit if there is a question as to how the interests of other parties to the suit, who have not entered into the compromise, would be affected by it, but this is no reason to defer the actual recording of the agreement of compromise. 15 P. 456.

RECORD OF COMPROMISE.—What is. 29 I.C. 860. Order recording compromise—If consent decree—Appeal—If barred by S. 96 (3). 1936 S. 59. Where the parties enter into a compromise and the suit is decreed in the terms of the compromise, the omission to record the compromise is not fatal to the validity of the decree. The omission to record the compromise does not affect the merits of the case or the jurisdiction of the Court, and the defect, therefore, is cured by S. 99. 1935 A.L.J. 962=1935 A. 738. See also 14 P. 356. There is no specific provision in the Civil Procedure Code or the High Court rules which prevents a defendant from taking out a notice of motion to record a compromise propounded by him. Such a procedure is permissible to the defendant. R. 150 of the Bombay High Court Rules (O.S.) enabling

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the defendant to put in a supplemental written statement, is not sufficient to take away the right which exists in the defendant otherwise to move the Court to record a compromise. 39 Bom.L.R. 1179=1938 B. 85. Scheme of arrangement sanctioned under S. 153, Companies Act cannot be recorded under O. 23, R. 3. 1937 Cal. 381.

SIGNATURE.—A party who is present in Court at the time of compromise and who does not object to it is bound by it though he has not signed it especially if he gets some benefit under it. 242 P.L.R. 1914=25 I.C. 874.

REVENUE PROCEEDINGS.—Rule 3 applies to civil as well as revenue proceedings. 39 I.C. 545=21 O.C. 346.

APPEAL.—An appeal lies against the decree on compromise on the ground that it embodies matters not relating to the suit. 5 M.L.J. 145; 8 P. 528=1929 P. 318. *See also* 36 C.W.N. 1013; 35 Bom.L.R. 127. An appeal lies from the order recording the compromise at the instance of a party who denies the truth of the compromise. 1925 M. 606=48 M.L.J. 249. But *see* 12 P. 359=1933 P. 306; 57 B. 206=144 I.C. 448=35 Bom.L.R. 127=1933 B. 205. Order recording a compromise not open to second appeal. 119 I.C. 422=1929 L. 472; 60 C.L.J. 173. The question as to the validity of consent decree cannot be gone into in appeal against that decree. 9 I.C. 210=13 C.L.J. 16; 33 I.C. 769=43 C. 85; 78 P.R. 1917=40 I.C. 675. Order holding that no compromise is proved is not open to appeal. 73 I.C. 177=1924 L. 248. A decree dismissing the suit on the ground that a plea in bar of the suit on the basis of an alleged compromise is established cannot properly be said to be one made under R. 3. 46 I.C. 775. *See also* 62 I.C. 608. Order rejecting application for recording compromise is appealable. 1928 L. 39=104 I.C. 561; 1929 N. 275=119 I.C. 673. When the parties to the suit request the Court to adopt a certain procedure and to decree the suit in case a certain event happened, and make an endorsement to that effect on the plaint, they cannot afterwards go behind it or appeal against the decree passed in pursuance of that agreement. 1936 M. 856=71 M.L.J. 281. *Quaere.*—Whether the agreement and endorsement of the plaint would amount to an adjustment of the suit under R. 3. (*Ibid.*) Where the Court after deciding the issues as to the validity of the award made by a private arbitrator remarks that "there is no adjustment of claim in suit out of Court as alleged", it amounts to an order refusing to record an adjustment under R. 3, and the order is appealable under O. 43, R. 1 (m). 31 N.L.R. (Supp.) 72=160 I.C. 202=1936 N. 8.

REVISION.—An award in an arbitration whether with or without the permission of Court cannot be recorded as an adjustment by compromise under O. 23, R. 3, and therefore an order superseding an award is not appealable. Nor it is revisable under S. 115, O. P. Code, because there is no 'case' decided. 1941 N.L.J. 333.

MISCELLANEOUS.—As to the power of a Court to grant relief against a forfeiture clause inserted in a compromise decree, *see* 31 B. 15 (F.B.). Even when only a money decree was prayed in the plaint there is nothing in the rule to prevent the Court from making the sum decreed a charge on immovable property. 16 M.L.J. 354=30 M. 478. *See also* 17 M.L.J. 255; 116 I.C. 651. The decree is conclusive only so far as it relates to so much of the subject-matter of the suit as is dealt with by the compromise. 18 M. 410 (414); 30 M. 421. *See* 31 B. 15 (F.B.); 1928 R. 43. A compromise can be set aside in a regular suit on the ground of fraud. 5 C. 27. Even when the party may have been under a mistaken belief and may have failed to exercise due care and caution. 17 M.L.J. 82. Or by review of judgment. 10 C. 612. *See also* 15 B. 594. A suit will also lie to set aside a compromise decree upon grounds other than that of fraud, i.e., on the ground that the pleader engaged by the guardian of a minor compromised the suit against the express wishes of the guardian. 34 C. 83. Also on the ground that the Court sanctioned the compromise under a misapprehension of material facts. 6 C. 687. The rule cannot be extended by analogy to proceedings held under S. 83, T. P. Act. 13 M. 316. A judgment by consent operates as a waiver of any defect or irregularities provided it does not go to the jurisdiction. 35 M. 75=21 M.L.J. 709. This rule does not override the provisions of O. 34, Rr. 3 and 4—Payment out of Court between preliminary and final decrees—Legality. 30 L.W. 551. *See also* 136 I.C. 732=33 P.L.R. 138. A compromise though not recorded as required by R. 3 can still be looked upon as an agreement between the parties and a party taking advantage of such an agreement and getting the suit of another party thrown out is estopped from pleading in a subsequent suit that he was not bound by that agreement. 152 I.C. 263=1934 L. 218. A compromise cannot be recorded under this rule on the basis of a draft compromise petition filed in Court, when it is found that the suit was not really completely adjusted. 61 C. 910=59 C.L.J. 421=1934 C. 846. On passing an order recording a compromise under R. 3, Court is to pass a decree not for the specific performance of the original contract but for the specific performance of the new contract to have the suit disposed of in a particular manner. But the analogy should not be carried far. There is one difference: while the Specific Relief Act gives the Court discretion to refuse specific performance of a contract, no such exception has been made in R. 3. The specific performance of an agreement to end the suit by a compromise decree is different from specific performance of agreed acts to be performed after such decree, which the Court may or may not be in a position to supervise or enforce. If after a compromise decree is passed, the consenting party disobeys the decree, the decree-holder has his remedy under O. 21, R. 32 and where the contract is not specifically

Proceedings in execution of decrees not affected.

4. Nothing in this Order shall apply to any proceedings in execution of a decree or order.

ORDER XXIV.

Payment into Court.

Deposit by defendant of amount in satisfaction of claim.

1. The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

2. Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application.

3. No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof.

Interest on deposit not allowed to plaintiff after notice.

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enforceable the party may claim damages. 12 P. 359=1933 P. 306. On this rule, *see also* 1933 P. 135. Where during the course of an objection to an execution sale the parties made a statement that the sale be set aside and the decree-holder be given possession of one square of land for twenty years but this could not be acted upon for certain reasons, *held*, that there was no adjustment of the decree so as to bar revival of the execution proceedings. 148 I.C. 446=1934 L. 679.

O. 23, R. 3 and O. 21, R. 2.—Relative scope—Powers of Court under. 69 M.L.J. 765 (F. B.). A mortgage suit does not come to an end until the mortgaged property has been duly sold and the sale proceeds dealt with, or if there is a right to a personal decree under O. 34, R. 6, C. P. Code, until that personal decree has been passed, and therefore any agreement of compromise relating to the whole of the subject-matter of the suit which is entered into by the parties before the conclusion of the proceedings in a mortgage suit is an adjustment of the suit which falls to be dealt with under O. 23, R. 3 and not under O. 21, R. 2. A.I.R. 1941 Rang. 316.

O. 23, R. 4.—R. 4 is explicit in its terms and declares O. 23 to be inapplicable to proceedings in execution of a decree or order and an arrangement entered into after decree for payment of the sum decreed in instalments is not binding, and limitation for execution of the decree runs nevertheless. 72 I. C. 477=1924 L. 342; 12 A.L.J. 235=22 I.C. 961; 18 I.C. 81. *See also* 18 C. 515; 18 M. 240; 10 B. 62. This rule does not affect the rule of estoppel. 13 I.C. 81.

O. 24, R. 1.—The word "debt" in R. 1 applies to secured debt as well as to unsecured debt. The language of the rule is wide enough to cover a suit to recover a debt secured by way of mortgage or charge. 10 Luck. 350=11 O.W.N. 1550=1935 O. 93. Payment into a Government treasury is equivalent to payment into Court. 7 M. 211. The deposit must be made unconditionally. 14 M. 49; 97 I.C. 479=1927 C. 72. Defendant's failure to deposit amount admitted—Running interest not stopped. 117 I.C. 687=

C.C.M.—146

1928 C. 874. Money sought to be attached before judgment paid by debtor into Court—Attachment is irregular—Such payment should be considered as deposit under R. 1. *See* 1927 R. 278. Rr. 1 to 3 do not apply to execution proceedings. 97 I.C. 479=1927 C. 72. The provisions of O. 24 do not apply to a case of an infringement of a patent or design. But there is no reason why the principles laid down in that order should not be applied to cases of that nature in which the defendants submit to a decree and admit the claim of the plaintiffs at an early stage of the suit. 41 Bom.L.R. 290=A.I.R. 1939 Bom. 198.

O. 24, R. 2.—Court has a discretion to refuse to allow money to be paid out, but that discretion is to be exercised reasonably. 26 C. 766 (769). What tender causes cessation of interest. 34 M.L.J. 439=45 I.C. 638. Where the amount for the recovery of which the suit has been instituted has been deposited in Court, Court has got a discretion as to the disposal of costs. 13 I.C. 200=(1911) 2 M.W.N. 568; 13 I.C. 188=1912 M.W.N. 38. Where defendant pays money into Court, Court should record a finding as to whether a demand was made or not, so as to determine by whom the costs should be paid. 13 I.C. 188=1912 M.W.N. 38. Where the amount deposited in Court in execution might have been immediately on deposit paid out of the decree-holder in part discharge of his claim, the judgment-debtors may be relieved from paying interest. 40 A. 125=16 A.L.J. 15. Where the deposit made is on the challenge of the plaintiffs and in the presence of the plaintiffs, a separate notice is not necessary and therefore the plaintiff cannot claim interest from the date such deposit is made to the date he gets the formal notice. 1935 M. 342 (2). Where a conditional deposit is made and the decree-holder is under the necessity, if he desires to withdraw the amount, of furnishing security, interest does not cease to run even after the date of deposit. (A.I.R. 1927 Cal. 72, Rel. on.) 39 P. L.R. 858=A.I.R. 1937 Lah. 733.

O. 24, R. 3.—In the case of ordinary money claims not based on mortgage, a tender before

4. (1) Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance ; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

Procedure where plaintiff accepts deposit as a satisfaction in part.

(2) Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pronounce judgment accordingly ; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Procedure where he accepts it as satisfaction in full.

Illustrations.

(a) *A* owes *B* Rs. 100. *B* sues *A* for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, *A* pays the money into Court. *B* accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(b) *B* sues *A* under the circumstances mentioned in illustration (a). On the plaint being filed, *A* disputes the claim. Afterwards *A* pays the money into Court. *B* accepts it in full satisfaction of his claim. The Court should also give *B* his costs of suit, *A*'s conduct having shown that the litigation was necessary.

(c) *A* owes *B* Rs. 100, and is willing to pay him that sum without suit. *B* claims Rs. 150 and sues *A* for that amount. On the plaint being filed *A* pays Rs. 100 into Court and disputes only his liability to pay the remaining Rs. 50. *B* accepts the Rs. 100 in full satisfaction of his claim. The Court should order him to pay *A*'s costs.

ORDER XXV.

Security for Costs.

1. (1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immovable property within British

When security for costs may be required from plaintiff.

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suit of the amount due must be followed by payment into Court in order to stop the running of interest. 55 M. 458=62 M.L.J. 266. In the case of mortgages, the rule is different and a tender alone has the effect, under S. 84, T. P. Act, of stopping interest from the date of tender. 55 M. 458. It is doubtful whether this rule applies to cases where the tender is made direct to the creditor. 3 C. 468. A deposit by the defendant in a suit for arrears of maintenance, charged upon certain property, of the decretal amount after the passing of the preliminary decree, is a deposit during the pendency of the suit under R. 3, and interest therefore ceases to run from the date on which the deposit is made. 10 Luck. 350=11 O.W.N. 1550=1935 O. 93. Where the defendant deposits the amount in Court but stipulates such conditions as will make it impossible for plaintiff to get payment and is thus himself responsible for non-payment to plaintiff, he cannot escape payment of interest from date of such deposit. And R. 3 has no application to such a case. 1936 L. 76.

O. 24, R. 4.—In cases not being suits to

recover a debt or damages, where money is paid into Court, the principle underlying this rule ought to regulate the discretion of Court in directing the payment of costs. 21 B. 502.

"DEBT OF DAMAGES".—What are. 21 B. 502.

O. 25, R. 1: SCOPE OF RULE.—The rule applies to cases where the plaintiff brought a suit for partition of property in which he was entitled to a share, the extent of the share alone being in dispute. 10 Ben.L.R. at 25. The power given under this rule is discretionary. 21 C. at 836. See also 17 C. 610. The discretion is unfettered and unqualified. 63 C. 897=164 I.C. 560=40 C.W.N. 511. The power given to the Court under O. 25, R. 1 is discretionary, and in deciding whether to exercise that power, the Court must have regard to the circumstances of each case, and unless it be shown that an order for security is necessary for the protection of the defendant, it ought not to order security to be taken from the plaintiff. I.L.R. (1938) 1 Cal. 688=42 C.W.N. 270. If a party to a suit or appeal desires to apply for security for costs, he must do so promptly. Otherwise the order

India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1).

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immovable property within British India.

LOC. AMS.—[ALLAHABAD.] In O. 25, r. 1, sub-rule (1) after the words "other than property in suit" add "or that the plaintiff is being financed by a person not a party to the suit."

[MADRAS.] The following shall be inserted as sub-rule (4) :—

"(4) In all cases in which an element of champerty or maintenance is proved, the Court may, on the application of the defendant, demand security for the estimated amount of the defendant's costs, or such proportion thereof, as from time to time during the progress of the suit, the Court may think just."

[NAGPUR.] R. 1 (1).—In r. 1 (1) insert the words "or that any plaintiff is being financed by a person not a party to the suit" between the words "other than the property in suit" and "the Court may."

[OUDH.] O. 25, r. 1, sub-rule (4).—Add the following as sub-clauses (4) and (5) :—

(4) Where the plaintiff has, for the purpose of being financed in the suit, transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and may either

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made on such an application may have the effect of stifling the suit or appeal and should not be passed. 1930 C. 520. Poverty or insolvency of plaintiff is not by itself ground for ordering security for costs. 26 S.L.R. 21 = 140 I.C. 233 = 1932 S. 33. See also I.L.R. (1938) Bom. 743 = (1938) Bom. 510 = 40 Bom. L.R. 1025 (Power to order security for costs in revision application). The rule should not be so applied as to drive away all poor plaintiffs. The Court should see whether at first sight the suit appears *bona fide* and whether the defence is such as is likely to succeed. 6 Bom.L.R. 1072. Liability of person standing surety for security for costs. See 92 I.C. 546 = 1926 A. 657. Security for costs from plaintiff—"Residing out of British India"—Evidence. 1930 B. 220 = 32 Bom.L.R. 411. R. 1 (3) cannot apply to a suit where there are more plaintiffs than one, and only one of them is a woman. A suit in which there is also a male plaintiff cannot properly be described as "a suit in which the plaintiff is a woman", within the meaning of the rule. 63 C. 809. As regards a plaintiff who is a woman, the legislature has specifically laid that security may be taken from her in certain circumstances in a suit for payment of money. *Inclusio unius exclusio alterius*, and therefore security cannot be taken from a female plaintiff in a suit for property. There is no discretion left in the Court for taking security in any case or in any set of circumstances other than those specifically provided for. 1941 A.L.J. 249 = 1941 O.W.N. 628.

PRACTICE AND PROCEDURE.—A Court has power to demand security for costs where

it finds that the plaintiff is not the real litigant but a puppet in the hands of others. 32 I.C. 786 = 18 C.W.N. 119; 20 I.C. 703 = 19 C.L.J. 59; 2 Bur.L.J. 78 = 1923 R. 244. If an insolvent sues as nominal plaintiff for the benefit of somebody else, which somebody is a female minor who is also a party to the suit, he must give security. 27 B. 100. Where the plaintiff has got a substantial interest in the suit, the order for security should not be made nor should it be made merely because the plaintiff is a poor man and cannot pay the costs if he loses. 18 C.W.N. 119 = 19 C.L.J. 59; 75 I.C. 309 = 1923 R. 244; 36 I.C. 320; 10 Bur.L.T. 105; 13 Bom. L.R. 955 = 36 B. 415. Save in exceptional cases security for costs ought not to be required from an infant female plaintiff, nor from her next friend. 23 B. 100. Security for costs of appeal, when to be demanded. 32 I.C. 786; 46 C. 156 = 22 C.W.N. 1018. See also 41 L.W. 135. Security for the defendant's costs cannot be ordered if there are grounds tending to prove that the defence is true. 18 I.C. 217. No order should be made before the written statement is filed. 18 I.C. 217. Suit by undischarged bankrupt for after-acquired property if security for costs can be demanded. 46 C. 126 = 22 C.W.N. 1018. As to how security given is to be realised, see S. 145; also 16 C. 323.

SUIT FOR PAYMENT OF MONEY.—A suit for dissolution of partnership on account and for the recovery of the stridhan property belonging to a female plaintiff is not a suit for payment of money within R. 1 (3). 68 I.C. 607 = 1923 C. 316 (2). So also a suit for administration of an estate consisting largely

of its own motion or on the application of any defendant order such person within a time to be fixed by the Court to give security for the payment of all costs likely to be incurred by any defendant. In case of his default, the Court may dismiss the suit so far as his right to, or interest in, the property in suit is concerned or may declare that he shall be debarred from claiming any right to, or interest in, the property in suit.

(5) If such person declines to be made a plaintiff, the Court may implead him as a defendant and may order him, within a time to be fixed by the Court to give security for the payment of all costs likely to be incurred by any other defendant. In case of his default, the Court may declare that he shall be debarred from claiming any right to, or interest in, the property in suit."

[RANGOON.] The following shall be substituted for O. 25 :—

"Costs and security for costs in special cases.

(1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiff does, possess any sufficient immovable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1).

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immovable property within British India."

2. (1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

Effect of failure to furnish security.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant.

LOC. AMS.—[BOMBAY.] O. 25 r. 2 (4).—Add the following sub-rule :—

"The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule."

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of immovable property. 3 R. 211=1925 R. 300. Suit for declaration of title to movables or their value if suit for money. See 14 I.C. 290=16 C.W.N. 763.

PAUPER PLAINTIFF.—A woman allowed to bring a pauper suit cannot be required to furnish security for costs, as an order of security would mean a refusal of permission to sue as a pauper. 36 I.C. 320=10 Bur.L. T. 105; 13 Bom.L.R. 955=36 B. 415. See also 27 B. 100; 1928 L. 960=113 I.C. 911. Mere poverty is no ground for requiring a plaintiff to give security for costs. 14 C. 533. See also 4 B. 244; 3 M. 66 and 7 A. 542. There is no absolute rule that a pauper plaintiff cannot be asked to furnish security under R. 1 (3). Such order would not be improper where the allegation in the petition praying for security is that the plaintiff is a mere puppet in the hands of her husband and that as the husband does not wish to pay the Government stamp duty nor to be mulcted with costs in case he fails, he had put forward the plaintiff to sue *in forma pauperis* and the circumstances are sufficient to show that she is

bringing the suit for her husband and not *bona fide* on her own behalf. 1935 M. 230=155 I.C. 317=69 M.L.J. 38.

"RESIDING"—The residence intended by this rule is residence under such circumstances as will afford a reasonable probability that the plaintiff will be forthcoming when the suit is decided. 3 B. 227. See 14 B. 541. Temporary residence in British India for purposes of suit is not residence within the rule. 46 B. 589=64 I.C. 703.

APPEAL.—An order passed on the Original Side of High Court requiring plaintiff to give security for costs is a judgment within the meaning of S. 15 of the Letters Patent, and is appealable. 26 M. 502.

O. 25, R. 2.—Next friend of minor plaintiff unable to give security for costs—Suit should not be stopped. 13 Bom.L.R. 480=35 B. 329. The dismissal of suit under this rule is no bar to a fresh suit. 26 B. 637. Appeal. See 8 A. 108 (F.B.). The Court has power to enlarge time for furnishing security. 11 I.A. 7=10 C. 557 (P.C.); 17 I.A. 1=17 C. 512 (P.C.).

[NAGPUR.] New R. 3. *After r. 2, add the following new rule :—*

"3. (1) Where any plaintiff has, for the purpose of being financed in the suit, transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit, if he consents, and may either of its own motion or on the application of any defendant order such person, within a time to be fixed by it, to give security, for the payment of all costs incurred and likely to be incurred by any defendant. In the event of such security not being furnished within the time fixed, the Court may make an order dismissing the suit so far as his right to, or interest in, the property in suit is concerned or declaring that he shall be debarred from claiming any right to, or interest in, the property in suit.

(2) If such person declines to be made a plaintiff the Court may implead him as a defendant and may order him, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any other defendant. In the event of such security not being furnished within the time fixed, the Court may make an order declaring that he shall be debarred from claiming any right to, or interest in, the property in suit.

(3) Any plaintiff or defendant against whom an order is made under this rule may apply to have it set aside and the provisions of sub-rules (2) and (3) of r. 2 shall apply, *mutatis mutandis*, to such application."

(Notifications Nos. 2563 and 2564 dated the 21st March, 1929)

[RANGOON.] *Substitute for r. 2 and add the new rule 3.*

R. 2. Where it is proved to the satisfaction of the Court that the plaintiff is deriving assistance from, or is being maintained by a person in consideration of a promise to give to such person a share in the subject-matter or proceeds of the suit, or in consideration of having transferred his interest in the subject-matter of the suit, the Court may, either of its own motion or on the application of any defendant—

(a) award costs on a special scale to be decided by the Court, and approximating to the actual costs reasonably incurred by the defendant;

(b) at any stage of the suit, order the plaintiff within a time fixed by it, to give security for the payment of the estimated amount of such costs or such proportion thereof as the Court may think just.

R. 3. (1) In the event of security demanded under r. 1 or r. 2 not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff is permitted to withdraw therefrom.

(2) Where a suit is dismissed under this Rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the order of dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The order of dismissal shall not be set aside unless notice of such application has been served on the defendant.

ORDER XXVI.

COMMISSIONS.

Commissions to examine witnesses.

1. Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

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O. 26, R. 1: SCOPE OF RULE.—O. 26 amplifies and explains S. 75. 3 L. 209=1922 L. 47. Examination of witnesses on commission is in the discretion of the Court. 46 M. 574=44 M.L.J. 202. See also 32 C.W. N. 128. A Court acts judicially and not administratively when it appoints a Commissioner and fixes his remuneration under O. 26. If it has acted according to rules laid down, and the High Court is unable to interfere under S. 115, C. P. Code, the High Court could not interfere at all. 1940 N.L.J. 93. Court should not allow witness to be examined on commission without

adequate reason, and the grounds on which a commission can issue are ordinarily those specified in R. 1, O. 26. 42 B. 136=43 I. C. 729. Especially so when he is a material witness or a plaintiff or defendant. 39 C. W.N. 595. As to the obligation of a Court to issue a commission, see 8 Beng.L.R. App. at 16. A commission to examine witnesses may issue when a case is referred to arbitration. 7 Bom.L.R. 560. See also 8 Beng.L.R. App. at 16; 18 W.R. 230; 15 C. 775. There is nothing in O. 26 which prevents a Court from accepting evidence on a debatable point between the parties where a Commissioner has been appointed to

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examine and report on the accounts. 53 A. 54=1932 A. 128. There is nothing in law to authorize a commissioner to try the issue referred to him with the aid of assessors. 1932 A.L.J. 117=1932 A. 264.

MEANING OF TERMS.—The word "may" means "is given authority to". 46 M. 574=44 M.L.J. 202.

ILLUSTRATIVE CASES.—In the case of a witness not under the control of the party who resides beyond the limits fixed, commission should issue as a matter of right, unless the Court is satisfied that the party is merely abusing the Court's power. 46 M. 575=44 M.L.J. 202=1923 M. 321. Court ought to issue commissions for the examination of witness at the instance of a party if all the conditions requisite therefor are fulfilled, irrespective of whether that party will be ultimately benefited thereby. 12 I. C. 74=21 M.L.J. 889; 46 M. 574=44 M.L.J. 202. If a *pardanashin* lady can be examined in Court in her *palki*, no commission need be issued. 18 W.R. 230. See also 15 C. 775. But see *contra* 86 I.C. 513=1925 M. 905. A *pardanashin* lady should not be compelled either to appear in Court personally or attend Court even although she may have failed to observe the restraints of the *parda* system on previous occasions. She should, therefore, be examined on commission. I.L.R. (1941) 2 Cal. 155. Court has no power to insist that a *pardanashin* lady must attend and give evidence in Court. It is the right of a *pardanashin* lady to refuse to attend the Court and to say that if she is to be examined, her statement should be taken on commission. She cannot be compelled to attend the Court either as a party or as a witness and a Court acts wrongly in insisting on the personal attendance of a *pardanashin* lady in Court. The Court has no such power under O. 5, R. 3 or O. 10, R. 4. (56 C. 865, Diss.) 55 A. 666=1933 A.L.J. 1384=1933 A. 551. Where the allegation that a *pardanashin* lady examined on commission was being tutored by somebody behind the *parda* is established, the Court has the discretion to exclude the evidence. But there is no justification for Judge to insist on the attendance of the *pardanashin* lady in Court. (*Ibid.*) A *pardanashin* woman cannot claim to be examined on commission as a witness at a place of her own choice. 48 C. 448. Where however on an application filed by the defendant *pardanashin* lady who was living beyond the jurisdiction of the Court, for her examination on commission at K (her place of residence), as she was ill, the Court insisting on her examination on commission at R (place of suit), rejected her application. Held, that the order was bad and could be set aside on revision. 166 I.C. 729=1937 P. 21. The mere fact that a woman lost her husband a few months ago does not justify the issue of a commission. 14 B.

584. Issue of commission to Hindu lady recently widowed—Witnesses being old as a ground for examination on commission—Principles applicable—Erroneous order—Interference in revision. See 1927 M.W.N. 218=1927 M. 524. In the case of an old man of feeble health the Court can order an examination on commission at his own house. 85 I.C. 619=1925 C. 1118. A commission should issue to examine the head of a *Mutt* who is an ascetic; 28 M. 28; as to a religious preceptor, see 42 B. 136. A commission will not issue for the examination of an infant of tender years. 23 B. 626. A commission will not be issued for the examination of a plaintiff on his application except under very strong circumstances. 1 Ind. Jur. N. S. 357; 57 I.C. 955=13 Bur. L.T. 33. But the case is different when the application is made by a defendant. 57 I.C. 955. See also 1935 P. 220 (as to principles governing the issue of commission for examination of plaintiff and defendant). In the case of a defendant outside jurisdiction the Court will not regard the case with the same strictness as the case of the plaintiff who has instituted his suit in a forum of his choice though he resides beyond the jurisdiction of such Court. [*Ross v. Woodford*, (1894) 1 Ch. 38 and *New v. Burns*, 64 L.J.Q.B. 104, Ref.]; 35 C.L.J. 78=68 I.C. 9=1922 C. 42; 73 I.C. 923=1924 L. 475. See also 46 M.L.J. 131. Where the witness is the servant of the party applying, it is not reasonable to issue a commission. 20 W.R. 253. Where an application is filed to examine on commission a witness which is a company, the Court can direct the party to name the individual, as distinguished from a company, whose evidence is desired to be taken. The Court can also insist on the documents to be produced being specified. But such application cannot be refused on ground of lapse of time. 1934 A. 37 (2)=154 I.C. 391.

PRACTICE AND PROCEDURE.—Mere inconvenience or great distance from the Court to the plaintiff's place of residence is not a sufficient ground. 57 I.C. 955=13 Bur. L.T. 33. Remand order for examining expert in handwriting—Discretion to issue commission. 120 I.C. 335=1930 N. 27. Where commission is issued to examine a specific witness and a witness not named is examined, Court would ignore such evidence. 59 I.C. 539=47 C. 583. When handwriting expert is to be examined on commission by written interrogatories, the Court acts without jurisdiction if it orders the defendants to file cross-interrogatories. The defendant can insist on an opportunity to cross-examine the witness orally. 150 I.C. 788=1934 P. 60. There is nothing prohibiting the granting of copies of cross-interrogatories to the opposite party before a commission is issued for the examination of a witness and it is reasonable that each side should know the questions the other desires to put. 39 I.C. 944=10 S.L.R. 210. Com-

2. An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

3. A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute it.

Persons for whose examination commission may issue. 4. (1) Any Court may in any suit issue a commission for the examination of—

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missioner's report—Objection to, should be heard by the Court. 14 L.W. 620=68 I. C. 469. Order as to issue of commission—Power of succeeding Judge to modify. A Judge has the power to alter an order of his predecessor with regard to the issue of a commission. Such an order is not a final one and it relates more to the routine of the case than to the merits of the case. 1930 R. 315. Objections to Commissioner's report—If can be taken for first time in appeal. 114 I.C. 232=1929 M. 492.

DELAY.—Long unexplained delay would be a ground to disallow an application for examining a witness on commission. 35 C.W. N. 705. As a general rule, the plaintiff is within his rights if he refrains from giving his evidence, assuming it is otherwise possible for him to do so, before the settlement of issues and the production of all the documentary evidence. An order refusing to issue a commission for the examination of the plaintiffs on the ground of lapse of one year since the filing of the suit is not therefore just and reasonable. 1934 A. 37 (2)=154 I.C. 391. See also 67 M.L.J. 878.

WITNESS IN NATIVE STATE.—There is no law by which witnesses in a Native State which have made arrangements for mutual service of processes with British India can be compelled to obey the processes, i.e., punished if they fail to do so. If the witnesses so summoned fail to appear the only way to take their evidence is by commission. The rule as to 200 miles is not applicable in such a case. 1933 M. 366=63 M.L.J. 334. See also 1924 Lah. 475; 1938 Mad. 646= (1938) 1 M.L.J. 769; 21 Pat. L. T. 197.

APPEAL.—An order refusing to issue a commission to examine a witness whose personal attendance cannot be enforced is a judgment within the meaning of S. 15 of the Letters Patent, and is appealable. 30 C. 143. But see *contra* 35 M. 1; 3 R. 293=1925 R. 290; 152 I.C. 264=36 Bom.L.R. 272=1934 B. 168.

REVISION.—An order refusing a commission cannot be the subject of revision. 9 M. 256; 1927 S. 267. Interlocutory order appointing Commissioner is not open to revision. 74 I.C. 812. Court has jurisdiction to dispose of the application for examination of witnesses on commission. An order rejecting the application cannot be

said to be without jurisdiction nor can the Judge be considered to have exercised it illegally or with material irregularity only because he took an erroneous view on a question arising in the case. An interlocutory order like the one in question cannot be said to amount to a "decision" of the case within the meaning of S. 115. 1934 A. 37 (2)=154 I.C. 391.

O. 26, R. 2.—Rule 2 does not say that the application for commission must be supported by the affidavit of the party or of the witness, but only says that the application of a party or of a witness is to be supported by affidavit or otherwise. 103 I.C. 141=1927 R. 175. Court can issue a commission to a person directing him to hear a woman singer and her musical talents. 139 I.C. 804=1932 A.L.J. 117=1932 A. 264.

O. 26, R. 3.—Where a defendant who has made a counter-claim applies to be examined on commission the mere advantage of observing the defendant's demeanour in the box is not a sufficient reason for refusing a commission. Failure to distinguish between applications of the plaintiff and of the defendant in such matter is an irregular exercise of jurisdiction in which High Court can interfere in revision. 57 M. 705=1934 M. 399=67 M.L.J. 95.

O. 26, R. 4: SCOPE OF RULE.—This rule is exhaustive and provides for all cases in which the legislature intends that a commission should issue. 28 M. 28. The issue of a commission to examine a witness is matter of judicial discretion and will not be granted unless the application is made *bona fide*. 19 I.C. 643; 103 I.C. 141=1927 R. 175. The power of Court to issue commission is not more restricted under R. 4 than under R. 1. 114 I.C. 843=1929 M. 192. Examination of a witness on commission as provided under R. 4, stands on a slightly different footing from the issuing of summons to a witness under O. 16, R. 1. In the former case the matter is in the discretion of the Court, whereas in the latter case summonses are to be issued as a matter of course though the Court may not permit an adjournment of the case if the application is made too late. 51 A. 341=113 I.C. 266=1929 A. 449. In cases under this rule a distinction has been observed between an application by a plaintiff asking for commission to examine himself and an application

- (a) any person resident beyond the local limits of its jurisdiction ;
 (b) any person who is about to leave such limits before the date on which he is required to be examined in Court ; and
 (c) ¹[any person in the service of the Crown] who cannot in the opinion of the Court, attend without detriment to the public service.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

5. Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place

Commission or Request to
examine witness not within
British India.

not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

LEG. REF.

¹ Substituted for "any Civil or Military officer of the Government" by A.O., 1937.

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by a defendant asking for a commission to examine himself. 35 C.L.J. 78=1922 C. 42. See also 21 Pat.L.T. 197; 3 P. 863=84 I.C. 993=1925 P. 125. Where the defendant is his own sole witness and applied for a commission to have himself examined as he was living more than 200 miles away in a Native State, the application should be allowed. 73 I.C. 923=1924 L. 475; 16 I.C. 750. See also 21 Pat.L.T. 197. An application for the issue of a commission to examine the applicant's witnesses residing in Bangalore in the Native State of Mysore falls within the ambit of R. 5 of O. 26. O. 26, R. 4 has no application to such a case. If the Court thinks that the evidence of those witnesses is necessary, it has no further discretion in the matter, it must order the commission to issue as a matter of course. If the Court in such a case refuses to issue a commission, the High Court would, under S. 115, interfere with the order in revision. 47 L.W. 656=A.I.R. 1938 Mad. 646=(1938) 1 M.L.J. 769. "It is a very unusual thing to grant a *second commission* and it ought never to be allowed except upon substantial grounds". 7 Times Rep. 653. See also 1939 Pat. 270. A *de bene esse* examination of a witness about to leave the jurisdiction of the Court must be taken by the Court unless the parties consent to the evidence being taken on commission. 5 B. L.R. 252. A commissioner for the examination of witness is entitled to note his observation as to the demeanour of the witnesses examined by him. 48 I.C. 561=28 C.L.J. 306. Report of a commissioner appointed by an Assistant Collector in a suit for profits under S. 164 of the Agra Tenancy Act cannot be admitted in evidence. 39 A. 694=42 I.C. 720. Where what was required was a decision on the question as to whether what was asserted by one of the parties, namely, that certain structures stand-

ing on the land were recent and not old structures, was a true assertion or not and the Court issued a commission for local investigation, *held*, that the appropriate procedure was under O. 39, R. 7 and not under R. 4 or 9 of O. 26. 37 C.W.N. 143=144 I.C. 870=1933 C. 475. A Court of appeal should exercise great caution when invited to interfere with an order of trial Court made with jurisdiction in the exercise of its discretion as to granting a commission. 35 C.L.J. 78=1922 C. 42. The provisions of O. 26, R. 4, are not applicable to execution proceedings and have not been made so by S. 141. O. 26, R. 4 empowers a Court to issue a commission only in any suit. An application in execution proceedings by the transferee of a decree to be brought on record as the transferee-decree-holder is neither a proceeding in a suit nor an original proceeding within the meaning of S. 141. 49 L.W. 549=A.I.R. 1939 Mad. 578=(1939) 1 M.L.J. 724.

APPEAL.—A party asking for the issue of a commission to examine witnesses is not entitled as of right to such an order and an order refusing the issue of a commission to examine witnesses is not a "judgment" within Cl. 15 of the Letters Patent, and no appeal lies from such an order. [35 M. 1 (F.B.); 1920 C. 894; 3 R. 293; 3 R. 605, Foll.; 2 I.C. 157, Expl.] 152 I.C. 264=36 Bom.L.R. 272=1934 B. 168.

O. 26, R. 5.—Ordinarily a defendant residing abroad should be permitted to be examined on commission. The mere fact that he was within the jurisdiction of the Court about a month before the presentation of the application to examine him on commission, is not a sufficient reason for a departure from the ordinary rule. A.I.R. 1937 Mad. 24. The costs of a commission to England should be taxed on the same scale and principle as would be adopted in England. 15 B. 209. Proper procedure for examination of witnesses in England would appear to be the issue of a commission in accordance with the provisions of Statute 22 Vict., Ch. 20, as laid down in

Court to examine witness pursuant to commission.

6. Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

7. Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit.

When depositions may be read in evidence.

8. Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless—

(a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is ¹[a person in the service of the Crown] who cannot, in the opinion of the Court, attend without detriment to the public service, or

(b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

LEG. REF.

¹ Substituted for "a Civil or Military office of the Government" by A.O. 1937.

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Para. 1, Part E, Ch. 10 of the Rules and Orders of the Lahore High Court, Vol. I, 1930. Of course, the issue of a commission for examination of a witness in a distant country is bound to cause delay and a Court will be fully justified in satisfying itself that the evidence is really relevant and necessary for the purposes of the case before issuing process. But a party cannot obviously be deprived of the opportunity of producing his evidence merely on the ground that it may involve some delay. Such a procedure would be nothing short of denial of justice. 39 P.L.R. 345=1937 L. 73. See also 1924 Lah. 475; 1938 Mad. 646= (1938) 1 M.L.J. 769.

O. 26, R. 6.—A party who has not joined in a commission is entitled to cross-examine the witnesses who are examined under it. 14 W.R.O.C. 17.

O. 26, R. 8.—The evidence taken on commission does not *ipso facto* become evidence in a case. It has to be offered by the party who has examined the witness on commission and it has to be accepted by the Court after hearing the opposite party and unless it is tendered by the party and accepted by the Court it is not to be considered as evidence in the case. 37 C.W.N. 1045. Where the witness who is examined on commission, is beyond the jurisdiction of the Court, the consent of the party is not necessary to make it admissible. Even if a party objects, it is of no use. 1938 N.L.J. 392=A.I.R. 1938 Nag. 530. In the case of

consent of the parties, it would not be necessary that the conditions and limitations prescribed in R. 1 of O. 26 should exist. It will appear from R. 8 of O. 26, that with the consent of the parties, the evidence of a person in cases where the conditions and limitations laid down in R. 1 or Cls. (a) and (b) of R. 8, do not exist may be admissible in evidence. I.L.R. 1938 All. 370=1938 A.L.J. 390=A.I.R. 1938 All. 266. When a defendant examines a witness on commission and the commission is returned to the Court, the plaintiff in opening his case is entitled to treat the evidence as part of the record, without treating it as his own evidence. 26 C. 591. That the evidence was given in the absence of the other side is not enough to make the deposition of a witness taken on commission inadmissible. 10 W.R. 236. A Court may refuse to hear read in evidence the deposition of a defendant taken on commission, where there is no evidence to prove that the defendant was unable to attend personally at the time of the trial. 22 W.R. 331. A party, who wishes to rely on evidence taken on commission, must either obtain the consent of the party against whom he offers it, to its being read as evidence in the suit, or have it read as evidence in the suit after complying with one of the conditions laid down in R. 8 (a) or persuade the Court in its discretion to dispense with the proof of any of the circumstances mentioned in R. 8 (a) and to authorize the evidence being read as evidence in the suit, notwithstanding the want of proof of the existence of such circumstances. Each of the alternatives involves a request to have the evidence read

Commissions for local investigations.

9. In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

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as evidence in the suit. 122 I.C. 396=1930 S. 89. See also 63 C. 914. Evidence taken on commission, until tendered and admitted as evidence in the suit, cannot be made use of by either party. 30 C. 999 (1003); 9 C.W.N. 794. On this point, see also 1926 S. 34; 44 C.L.J. 288=1927 C. 43; 32 C.W.N. 128. Deposition of sick person admitted without objection—Appellate Court should not reject deposition. 1929 C. 591. Where a witness is examined on commission on the ground that he is ill, the case falls within the exception referred to in Cl. (a) of R. 8 of O. 26, and the evidence so taken on commission can therefore be taken into account. 21 Pat.L.T. 340=A.I.R. 1940 Pat. 563. A Court has no power under O. 26, R. 8 to reject the report and evidence in a commission enquiry. 14 R.D. 548. The expression "beyond the jurisdiction of the Court" in O. 26, R. 8, C.P. Code, has reference to the question whether or not the witness is in reach of the compelling or disciplinary powers of the Court in his capacity of a witness or potential witness; and the matter would therefore fall within the purview of O. 16, R. 19, C.P. Code, under which no witness is to be ordered to attend in person unless he is resident within a certain distance from the Court. 63 C. 914.

O. 26, R. 9: APPLICATION OF RULE.—The rule applies to proceedings under S. 158 of the Bengal Tenancy Act. 17 C. 277. There is no error of law when a judge does not direct a local investigation of his own motion in a case where he is not moved to do so by the parties. B.L.R. (Sup.) Vol. 358. It is within the discretion of the Court to order or refuse a local inquiry. 12 W.R. 76. The issue of commission is a matter in the discretion of Court, and if the discretion is wrongly exercised, the question ought to be raised, before Court of first appeal. It cannot be agitated for first time in second appeal. 1933 P. 542. Application for local investigation by Court on the day set down for trial would not be granted. 13 I.C. 194. The local investigation pre-supposes the existence on record of independent evidence which requires to be elucidated. 16 M. 350. The rule does not authorize Court to delegate to a commissioner the trial of any material issue which it is bound to try. 16 M. 350. Object of local investigation is to obtain evidence which from its peculiar nature can only be obtained on the spot. 2 N.-W.P. 196. A commission for local investigation cannot be issued

after the evidence is closed and the case is ready for judgment. 51 I.C. 399. Where a party to a local investigation goes on with the trial he cannot at the last moment ask for giving fresh evidence against report of such investigation. 16 I.C. 39. Restitution—Commissioner appointed to ascertain mesne profits—Commissioner taking evidence as to possession and recording finding—Court acting on the same is illegal and *ultra vires*. 9 Pat.L.T. 258=1928 P. 278. On this rule, see 37 C.W.N. 143=144 I.C. 870=1933 C. 475, cited under R. 4, *supra*.

WHO CAN BE APPOINTED TO MAKE LOCAL INVESTIGATION.—A Judge from whose decision an appeal is pending, is a most unsuitable person to make a local investigation. 17 W.R. 300. A Judge may make a local inspection in person at his discretion. Under the present Code, a Judge may issue a commission in any case where he deems it fit to do so irrespective of his own convenience. 44 M. 640=40 M.L.J. 554. The District Judge can appoint a Munsiff to be Commissioner. 11 C.L.R. 533. For instance of improper appointments, see 6 W.R. 81.

OBJECTIONS TO REPORT.—Parties are entitled to object to the Commissioner's report and prove their objection by examining the Commissioner or other witness. 42 I.C. 221=164 P.W.R. 1917; 38 I.C. 491; 19 C. L.J. 87=18 C.W.N. 697; 72 P.L.R. 1914=22 I.C. 526. It is within the discretion of a Judge to accept the report of a Commissioner. 47 I.C. 650=28 C.L.J. 203. A defendant who does not appear before a Commissioner cannot ordinarily object to his report. 60 I.C. 434. Court has a discretion to permit or refuse a party to examine the Commissioner. 47 I.C. 650=28 C.L.J. 203. Objections to the report of a Commissioner cannot be raised for the first time in second appeal. 27 I.C. 598=70 P. L.R. 1915.

SUPERSEDING COMMISSIONER.—A local Commissioner appointed by consent of parties cannot be superseded simply on the ground that he is incompetent to go into the accounts being ignorant of the language. 27 I.C. 598=70 P.L.R. 1915.

SECOND INQUIRY.—When an inquiry is being carried on, a second inquiry should not be ordered without setting aside the first. 23 W.R. 93; 120 I.C. 737=1930 M. 236. But see 1937 Pat. 670. Where the result of a local investigation is unsatisfactory the Court is not bound to order another inquiry. It can decide the case on the evidence. 50 I.C. 301. See also 18 Pat. L. T. 837=1937

Provided, that, where the Provincial Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

LOC. AM.—[Calcutta.] *Omit* the proviso to rule 9.

10. (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him to the Court.

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Pat. 670. When a Judge has ordered his successor should not interfere with the order but should carry it out. 1 W. R. 102. The appellate Court should not order local investigation where the parties refused to have one in the lower Court. 12 C. 45. Practice in Malabar of issuing successive commissions in cases under Malabar Compensation for Tenants' Improvement Act, for arriving at valuations is not regular. 55 M. 656=1932 M. 482=62 M.L.J. 629.

O. 26, R. 9 and S. 99.—O. 26, R. 9 does not provide for the presence of the parties when a commission is issued and merely leaves it to the discretion of the Court. But natural justice requires that such acts should not be done without notice to one of the parties. S. 99, C. P. Code, provides a decree could not be varied or reversed because of an irregularity in the proceedings which does not affect either the merits of the case or the jurisdiction of the Court. If there has been no prejudice, the decree could not be attacked. 1938 N.L.J. 392=A.I.R. 1938 Nag. 530.

O. 26, Rr. 9 and 10.—In this case their Lordships of the Privy Council remarked that the following is a correct statement of the principle to be adopted in dealing with the Commissioner's report. Interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be depreciated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task is proved by his report and who has not blindly adopted the assertions of either party. 42 Bom.L.R. 387=51 L.W. 135=1940 P.C. 3 (P.C.).

O. 26, R. 10.—[N.B.: See also under R. 9]. A commission issued to an Amin to hold local investigation is not a process within the meaning of Cl. (1) of S. 20 of the Court-Fees Act. 17 C. 281. When a Commissioner is appointed to prepare a map of a locality, statements of village officers made to him with regard to the right in suit are admissible in evidence. 24 B. 43. Commissioner for ascertainment of mesne profits may rely on local inspection but must record witnesses' evidence. 47 M. 800=1925 M. 145=48 M. L. J. 89=92 I. C. 792. Evidence taken should only be with reference to points for the determination of which local inspection is required. 9 W.R. 83. See also 17 W.R. 282. A

Commissioner should give to the parties notice of the time when the local investigation is to be held. 12 M. 139; 17 W. R. 236. See R. 18. Commissioner's report is only evidence and not binding on the Court—If report is not satisfactory Court can order another commission. 7 Pat.L.T. 795=96 I.C. 327=1926 P. 462; 157 I.C. 530=1935 A.L.J. 427=1935 A. 422. It is in the power of the trial Court, when it is dissatisfied with the report of the first Commissioner, to send out a second or even a third commission; and when all the materials are before the Court, it may, at the time of delivering judgment, attach very little or no weight to the first Commissioner's report; but it is not necessary that before issuing a second or third commission, the Court should wipe the previous Commissioner's report off the record, and treat it as not being evidence at all. There is nothing in O. 26, R. 10, C. P. Code, to justify such a contention. 18 Pat.L.T. 837=1937 P.W. N. 862=A.I.R. 1937 Pat. 670. See also 23 W.R. 93; 1930 Mad. 236. A second commission should not be issued by the Court for the same purpose for which the first was issued, unless the Court is dissatisfied with the report of the first, in which case, the Court should not take into consideration the report of the first Commissioner. 54 M. 239=1931 M. 73=60 M.L.J. 450. See also 1939 Pat. 270. An appellate Court rejecting a Commissioner's report, is not bound in law to issue another commission. In every case the superior Court is to see whether the subordinate Courts have exercised their discretion judiciously or capriciously. 180 I.C. 134=1939 Pat. 270. Decree based on incomplete report of Commissioner can be set aside. 104 I.C. 369=9 Lah. L. J. 339. Evidence of possession recorded by a Commissioner who is appointed in a suit for possession of land, not for the purpose of examining witnesses, but for the purpose of relaying the settlement boundaries and to ascertain and determine whether the suit land was within a particular patta, is not admissible in evidence in the suit to prove the possession of the land. 40 C.W.N. 582. The report submitted by a Commissioner after a local investigation is not admissible in evidence without the the Commissioner's verification in Court. 1935 R.D. 319. Under R. 10, the Commissioner's report is evidence in the suit and shall form part of the record. A party to the suit is, therefore, entitled to have the report, for what it

(2) The report of the Commissioner and the evidence taken by him (but Report and depositions to not the evidence without the report) shall be evidence in the suit and shall form part of the record ;

but the Court or, with the permission of the Court any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

Commissions to examine accounts.

11. In any suit in which an examination or adjustment, of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

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is worth, considered by the Court before it reaches its conclusion on any issue. 163 I. C. 36=1936 M.W.N. 935=1935 M. 918. The report of a Commissioner in a previous suit is not admissible in evidence in a subsequent suit, unless its accuracy be proved. 12 C.L.R. 50. The report cannot be rejected in case the Commissioner's remuneration has not been paid. 17 C. 281; and his report is evidence only on the point to which the commission refers. 14 W.R. 493; 24 W.R. 208. After receipt of the report, a day should be fixed for hearing objections, and notice given to the parties. 21 W.R. 2. The time fixed for the return of the commission can be extended. 9 B. 250. A pleader who is appointed Commissioner for the purpose of relaying a large number of *dags* of a very old *chitta* having no bearings on the Field Book but giving only the lengths of the different *dags*, will not be disentitled to any fee, merely because the work done by him is found to be inaccurate, in the absence of any finding that he has done his work carelessly or negligently or that he was actuated by improper motives or that he was incompetent to do that kind of work. 40 C.W.N. 928.

APPEAL.—No appeal will lie from an order directing a local investigation. 7 W.R. 425. See also 12 W.R. 76.

O. 26, R. 11: [N.B.: See also under R. 9].—This rule merely entitles the Court to appoint a Commissioner to examine accounts when it is necessary to examine the accounts, but it has first to be shown that it is necessary to examine them. When in a suit on a promissory note the defendant puts in no defence, it is impossible to say whether it is necessary to examine the accounts or not. 1937 N. 136=I.L.R. (1937) Nag. 266. As regards the procedure to be adopted in taking accounts, see 7 C. 654. See also 6 C. 754; 14 C. 147; 87 I.C. 764=1926 C. 349; 91 I.C. 766=1925 S. 265. It is not open to a Court to refer for decision to a Commissioner for accounts, an issue as to whether there was a mutual, open and current account between the parties. Such

procedure is unauthorized by O. 26. All that can be referred to the Commissioner is an enquiry into the nature and course of dealings and the amount, if any, due. The further question whether the dealings constituted in law a mutual account is one of law and cannot be referred to a Commissioner. 177 I.C. 442=A.I.R. 1938 Rang. 270. Commissioner is to determine only the quantum and not the factum of a liability of an agent. 52 C. 766=1925 C. 1069. Court cannot delegate all its powers and functions in the matter of taking evidence and determining issues to a Commissioner. 89 I.C. 333. See also 89 I.C. 343=1925 P. 576; 53 A. 190=58 I.A. 173=1931 P.C. 136=61 M. L.J. 665 (P.C.). Where in a suit for dissolution and settlement of accounts of a partnership business, a dispute arises as to which of the parties is in possession of the account-books, the Court should not leave it to the Commissioner, who is appointed to examine accounts and to submit a scheme for the winding up, to decide that question as it does not fall within his ordinary duties. It is the duty of the Court to record the evidence and to decide that question itself, and not to appoint a commissioner for that purpose. 160 I.C. 642=1936 L. 458. Decree based on incomplete report of Commissioner can be set aside. 104 I.C. 369=9 L.L.J. 339. The remuneration of a Commissioner appointed to examine accounts should, as a rule, be a definite amount, and not a monthly allowance. 3 M. 259. No objection can be taken to the order of a Judge appointing a Commissioner for taking accounts from a guardian of property. 1929 P. 626.

MIXED QUESTIONS OF FACT AND LAW.—It is as a rule expedient to refer to a local Commissioner mixed questions of fact and law, e.g., whether a particular business was of a gambling nature. The distinction between contracts which are legitimate and genuine trading transactions of a speculative character and contracts which are simply gaming and wagering transactions is frequently a narrow one and difficult of determination even after the examination of the parties

12. (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

Court to give Commissioner necessary instructions.

Proceedings and report to be evidence.

Court may direct further enquiry.

(2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.

Commissions to make partitions.

13. Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

Commission to make partition of immovable property.

14. (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorised thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

Procedure of Commissioner.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

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concerned, the course of the business and the nature of the contracts. It certainly is not a question which can safely be left to the decision of a local Commissioner. 58 I.A. 173=53 A. 190=1931 P.C. 136=61 M.L.J. 665 (P.C.).

O. 26, R. 13.—The intention of the rule R. 9].—Although Commissioner's report should have very great weight attached to it, it is not absolutely binding. 6 M.H.C.R. 36. See also 6 M.H.C.R. (A.C.) 149 and 1 I.A. 346; 72 P.L.R. 1914=22 I.C. 526 (Suit for dissolution of partnership). Commissioner's report and the opinion he expressed on the evidence is merely a piece of evidence to be considered by Judge. It is the duty of Judge to consider every objection of fact or of law made by the parties to the report, to show the nature of the objection in his judgment and his grounds for allowing or dismissing it. 27 S.L.R. 194=1933 S. 327. As to what Commissioner's report should contain, see 3 B. 161. When a Commissioner makes a report, Court of first instance and Court of appeal should consider it before accepting a decree in accordance with it. 5 C.W.N. 692. Commission for

examining accounts—Report—Party whether can adduce evidence to rebut—Duty of Court to give time to party to adduce evidence and then decide. 1929 L. 782=119 I. C. 490.

O. 26, R. 13.—The intention of the rule is that, upon the first hearing Court shall determine whether plaintiff is entitled to a partition, and shall ascertain who the several persons interested in the property are. 7 C. 318. See also 18 M.L.T. 145=2 L.W. 693. Proceedings taken under this rule are proceedings in suit itself, and not proceedings in execution of a decree. 22 C. at 432. Court has no power under this rule to order its Amin to cause a wall to be built separating portions of property of which partition has been decreed. 19 A. 194. The word "person" has been used in the singular to meet the rulings in 29 A. 235 (F.B.); 6 Bom.L.R. 586. Powers of Commissioner appointed to make a partition—Difference between Commissioner and arbitrator. 1927 P. 135=95 I.C. 321=7 Pat.L.T. 739.

APPEAL.—No appeal lies from an order appointing a Commissioner. 16 M.L.J. 21.

O. 26, R. 14: SCOPE.—Application for partition by compromise is not application

LOC. AM.—[PATNA.] O. 26, r. 14.—*Substitute the following for sub-rules (2) and (3) :—*

“(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if necessary) by mete and bounds. The Commissioner or Commissioners shall append to the report, or where there is more than one, to each report, a schedule showing the plots and areas allotted to each party and also unless otherwise directed by the Court, a map showing in different colours, the plots or portions of plots allotted to each party. In the event of a plot being sub-divided, the area of each sub-plot shall be given in the schedule and also measurements showing how the plot is to be divided. Such report or reports with the schedule and the map, if any, shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied and, when drawing up the final decree shall incorporate in the decree the schedule and the map, if any, mentioned in sub-rule (2) above, as confirmed or varied by the Court. The whole report or reports of the Commissioner or Commissioners shall not ordinarily be entered in the decree. When the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

General Provisions.

15. Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

NOTES.

for execution. 2 L.W. 693=30 I.C. 380. A casting of lots for the purpose of allotting shares to the parties is not opposed to R. 14. 29 I.C. 245=2 L.W. 430. The most equitable way by which properties could be assigned to coparceners will be to draw lots after dividing the properties with reference to the number of shares. 29 I.C. 245=2 L.W. 430. Commissioner cannot prepare a number of schemes and ask the Court to accept one. 6 Bom.L.R. 586. Commissioner, allotment by—Approved by order of Court—Effect. 14 M.L.T. 157=20 I.C. 908. Objections are entertainable to the report of the Commissioner under R. 14. 25 I.C. 277. In dealing with the objections to the report of a Commissioner an appellate Court has the same power as the original Court. 56 I.C. 972=12 Bur.L.T. 228. A party cannot be heard in the appellate Court unless he had filed his objections in the original Court. 56 I.C. 972=12 Bur.L.T. 228.

APPEAL.—An application under this rule for the appointment of a Commissioner is not a matter coming within the scope of S. 47 and appeal lies from an order made on it. 17 M.L.J. 144. But no appeal lies against an order of Court confirming or varying a report of a Commissioner made in a partition suit under R. 14 (3). 91 I.C. 317=1926 O. 195.

PRACTICE AND PROCEDURE.—R. 14 entitles the parties to substantiate their objections to the report of the Commissioner, but in such cases as a rule of practice the Commissioner should first be examined with reference to the objections, if any, and if it appears from the statement of the Commissioner that there is ground for further enquiry into any matter which is raised in the objections, then the parties should be allowed to produce evidence or the Commissioner directed

to amend the report accordingly. 157 I.C. 480 (2)=1935 L. 501.

O. 26, R. 15.—Court has got power to impose any terms that it chooses as condition precedent to granting prayer for local investigation. 104 I.C. 814=1927 C. 907.

SELECTION OF COMMISSIONERS—REMUNERATION—PRINCIPLES GOVERNING.—Thorough competence should be the sole criterion in the selection of commissioners and fees fixed should not be oppressive. Judge should not, in the exercise of his discretion, alter behind the backs of the parties, fees to which they had agreed. 1933 P. 681. As to the fee for execution of a Civil Court commission, Court is to fix a sum commensurate with the difficulty and importance of the work done. If only nominal or worthless work has been done, manifestly there can be no payment at all. There is always the understanding that the commissioner possesses the knowledge and puts forth the exertion requisite to execute the commission efficiently and has in fact executed the same in workmanlike manner. The remuneration is not for labour expended or for days spent but for an efficient piece of work. If he fails in the respects mentioned and merely executes the commission nominally, he is not entitled to any fees, whether he is a pleader or professional surveyor. It is incumbent on Court scrupulously to protect the person who has deposited money towards commissioner's fee and all the more since he is powerless to protect himself against the commissioner. And where a commissioner has already taken payments provisionally, he must refund them if it is subsequently found that they have not been earned by real work but that the commissioner has executed the commission only nominally. 150 I.C. 630=15 P.L.T. 320=1934 P. 316 (2). The Court should also take into account the return which the party has got for

LOC. AM.—[MADRAS.] *Re-number* the existing r. 15 in O. 26, as r. 15 (1) and *insert* the following as sub-rule (2):—

“(2) Before executing and returning any commission issued by foreign Courts under the provisions of S. 78, the Court or the Commissioner required to execute the commission may levy such fee as the High Court may from time to time prescribe in this behalf in addition to the fees prescribed for the issue of summons to witnesses and for expenses of such witnesses under r. 2 of O. 16.”

16. Any Commissioner appointed under this
Powers of Commissioners. Order may, unless otherwise directed by the order of appointment,—

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him ;

NOTES.

his money paid towards commissioner's fees. 63 C.L.J. 563=40 C.W.N. 1216. The commissioner is not a party to the suit, and an order directing one of the parties to pay a certain sum to the commissioner cannot be made a part of the decree. If at the end of an enquiry there is money due to the commissioner, then that is due to non-observance of the provisions of O. 26, R. 15 by the Court and the failure of the commissioner to look after his own interests, because a sum sufficient to cover the commissioner's expenses ought to be deposited in the Court before the commission is taken. A.I.R. 1938 Rang. 254. See also 1937 P. 614. On the application of the petitioner, A was appointed commissioner for local investigation in a suit; he did not finish the work within the time fixed by the Court, and time was therefore extended to him on several occasions. Ultimately after taking further time, he died without submitting any report at all to the Court and the Court had to direct a fresh local investigation. A's widow having applied to the Court for payment to her of the balance of the fees due to A who had already drawn Rs. 700 out of Court during his lifetime, out of the amount deposited by the petitioner prior to the issue of the commission under R. 15, the Court directed the petitioner to deposit into Court a sum of Rs. 2,050. The value of the property in suit was Rs. 7,800. *Held*, in revision, that the Court, in view of the facts, was not justified in making the order summarily, calling on the petitioner to deposit the amount, and that therefore the order must be set aside without prejudice to the rights of the widow to take such steps as were open to her under the law to recover any excess amount which might justly be due to her husband A, in respect of the work done by him. 63 C.L.J. 563=40 C.W.N. 1216.

COMMISSIONER'S FEES.—Under R. 15, Court has to order the parties to make the deposits for the necessary remuneration of the Commissioners and as it has to be entered in the decree, it is necessary to determine the fee of the Commissioner before the final disposal of the case. 57 I.C. 291=1 P.L.T. 170. There must be some confidence reposed in the Commissioners, who are pleaders and officers of the

Court, and their report. 47 I.C. 291=1 P.L.T. 171. It is not proper that the Commissioner should be left to realise his fees by execution. 9 I.C. 313=15 C.W.N. 221. See also 52 C. 269=1925 C. 57. The proper course is to call on the plaintiff to deposit the full amount in Court and refuse to draw up the decree before the sum is so deposited. 9 I.C. 313=15 C.W.N. 221. If the defendant also is liable to pay a share, the plaintiff ought to be made to deposit it in Court and such sum ought to be allowed to the plaintiff in the decree. (*Ibid.*) The Court will not order the costs of a commission to examine a defendant who is a parda lady, to be paid by her. 5 C. 866; 10 C.W.N. 234. The Court has power to grant the examination of witness on commission, on condition of the applicant depositing the costs of the other party in attending the commission. 159 I.C. 179=1936 P. 33. But the money should not be paid directly to the party but must be deposited in Court as security for such costs as may be payable to the opposite party in the matter of commission. 159 I.C. 179=1936 P. 33.

SUIT.—A Commissioner can sue for the recovery of his remuneration. 4 M. 399. But cannot seek to recover it by way of execution. 10 M.L.J. 241. Where money is not deposited in Court, an order passed on the Commissioner's application directing payment to him is covered by S. 36 and is a decree under S. 47. 52 C. 269=1925 C. 57=84 I.C. 724.

EXECUTION.—Court has jurisdiction to pass an order demanding commission fee after the return of the commission and such order can be executed by the Commissioner. 147 I.C. 784 (2)=34 P.L.R. 1043=1934 L. 46. The order of a Court directing the parties to a partition suit to deposit the Amin's fees is not capable of execution. 21 I.C. 191. See also 9 I.C. 313=15 C.W.N. 221. District Judge has no power to disallow a portion of the remuneration claimed by a Commissioner for local investigation in connection with a suit pending in the Court of the Subordinate Judge. 44 I.C. 496=23 C.W.N. 295. On this rule see also 3 M. 259; 17 C. 281 and 15 B. 209.

O. 26, R. 16.—R. 16 (a) has nothing to do with the question of title of the parties to shares other than those admitted in the pleadings or declared in the preliminary

(b) call for and examine documents and other things relevant to the subject of inquiry ;

(c) at any reasonable time, enter upon or into any land or building mentioned in the order.

17. (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of witnesses before commission of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this order whether commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court.

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

18. (1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence.

LOC. AMS.—[ALLAHABAD AND OUDH.] In O. 26, r. 18, sub-rule (1) after the words "by their agents or pleaders," substitute a comma for the fullstop and add the following words:—"and shall direct the party applying for examination of the witness, or in its discretion any other party to the suit, to supply the Commissioner with a copy of the pleadings and issues."

[RANGOON.] The following shall be substituted for O. 26, r. 18, sub-r. (1):—

"When a commission is issued under this order, the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders, unless otherwise directed by the Court, within fifteen days."

The following shall be added as rr. 19 to 26 of O. 26 respectively. (This was added before the amendments of rr. 19 to 22 by the Indian Legislature in 1932, Act X of 1932.)

"Fees to Commissioners for Local Investigation and Commissioners for partition or to take accounts or for the examination of witnesses."

19. Civil Courts in issuing commissions will be guided by the provisions of r. 15, and subject to the provisions of r. 23 will exercise their own judgment in fixing a reasonable sum for the expenses of the Commission.

NOTES.

decree. 146 I.C. 353=1934 P. 32. Where a case is remanded to lower Court for taking accounts the latter Court has jurisdiction to appoint a Commissioner for such purpose. 1934 P. 35. An Amin appointed to hold a local investigation has power to examine witnesses relative to the matter he has to inquire into. 1 B.L.R. (S.N.) 2. The Commissioner cannot deal with the case as if he is the judge or arbitrator. If the report does not show what the accounts are, it is waste paper. 6 C.L.J. 105. The delegation of power to Commissioner by Court cannot extend to the delegation to the Commissioner of the Court's duty of deciding questions which have been raised or which are sought to be raised as definite issues in the suit. 159 I.C. 23=42 L.W. 574=1935 M. 888. Where statements recorded on commission were not read over to the witness they are admissible in evidence and it is open to the Court to grant sanction for perjury in respect of such statements. 74 I.C. 445=1923 O. 119.

O. 26 Rr. 16 and 17.—The provisions of

O. 26, R. 16 are permissive in the sense that they vest a discretion in the Commissioner to examine or not to examine a witness. But when once the Commissioner has decided to examine a witness, then the mandatory provisions of R. 17 come into play which in their turn attract the provisions of O. 18 of the C.P. Code and of S. 138 of the Evidence Act. As such it is certainly not permissible for a Commissioner to record the statements of witnesses secretly and in the absence of parties. 1938 A.L.J. 131=A. I.R. 1938 All. 215.

O. 26, R. 17.—See 23 C. 404. Examination of witness on commission—Death of party during examination—Commissioner proceeding with examination and returning commission—Legality—Examination to be taken out afresh and not continued. 115 I.C. 240=10 P.L.T. 51=1929 P. 101.

O. 26, R. 18.—O. 26, R. 18 is mandatory and the Court cannot issue an *ex parte* commission. 40 L.W. 358=151 I.C. 941=1934 M. 548. A party refusing to appear before an Amin is not at liberty afterwards to take any objection to his report. 6 W.R. 130.

20. Under Government of India, Resolution in the Home Department (Judicial No. 101101, dated the 21st July, 1875) Judicial Officers are prohibited from accepting any remuneration for executing commissions issued by Courts of other provinces.

21. It is to be understood that no part of the fees sent for the execution of a commission is to be accepted, either personally or on behalf of Government. The execution of a commission is an official duty which Judicial Officers are bound to perform when called upon, and is not work undertaken for a private body.

22. In all cases the unexpended balance, which remains after all charges have been deducted, should be returned to the Court issuing the commission.

23. The following fees are to be allowed to Commissioners of Partition or to take accounts or for the examination of witnesses, namely :—

Commissioners' fees for every effective meeting shall not exceed three gold mohurs for the first two hours and one gold mohur for each succeeding hour.

Fees to Commissioners for administering an oath or solemn affirmation to a declarant of an affidavit.

24. When under the orders of a Court in the town of Rangoon, or of a District Court, an oath or solemn affirmation is administered to a declarant of an affidavit at his request elsewhere than at the Court, a fee of Rs. 16 shall be paid by the said declarant : provided that—

(a) the administration of the oath or of solemn affirmation elsewhere than in Court shall be authorized by the Court by order in writing ;

(b) if more than one affidavit is taken at the same time and place, the fees shall be Rs. 8 for each affidavit after the first ;

(c) in no case shall the fees for taking any number of affidavits at the same time and place exceed Rs. 80 ;

(d) in pauper suits and appeals, when the affidavit of a pauper is taken, no fee shall be charged.

25. Affidavits taken under r. 24 shall be taken out of Court hours. The fees shall be retained by the Commissioner for administering the oath or solemn affirmation.

26. No fees shall be charged for the administration of an oath under the order of any Court other than those specified in r. 24."

O. 26, r. 26.—After r. 26, insert the following headings and rules, namely :—

Commission issued at the instance of Foreign Tribunals.

27. (1) If a High Court is satisfied—

(a) that a foreign Court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it ;

(b) that the proceeding is of a civil nature ; and

(c) that the witness is residing within the limits of the High Court's appellate jurisdiction, it may, subject to the provisions of r. 28, issue a commission for the examination of such witness.

(2) Evidence may be given of the matters specified in cls. (a), (b) and (c) of sub-rule (1)—

(a) by a certificate signed by the consular officer of the foreign country of the higher rank in India and transmitted to the High Court, through the Governor-General in Council ; or

(b) by a letter of request issued by the foreign Court and transmitted to the High Court through the Governor-General in Council ; or

(c) by a letter of request issued by the foreign Court and produced before the High Court by a party to the proceeding.

28. The High Court may issue a commission under r. 27—

(a) upon application by a party to the proceeding before the foreign Court ; or

(b) upon an application by a law officer of the Local Government acting under instruction from the Local Government.

29. A commission under r. 27 may be issued to any Court within the local limits of whose jurisdiction the witness resides, or where the High Court is established under the Indian High Court's Act, 1861, or the Government of India Act, 1915, and the witness resides within the local limits of its ordinary original civil jurisdiction to any person whom the Court thinks fit to execute the commission.

30. The provisions of rr. 6, 15, 16, 17 and 18 of this Order in so far as they are applicable shall apply to the issue, execution and return of such commission, when any such commission has been duly executed, it shall be returned, together with the evidence taken under it, to the High Court, which shall forward it to the Governor-General in Council, along with the letter of request for transmission to the foreign Court."

¹[*Commissions issued at the instance of Foreign Tribunals.*

Cases in which High Court may issue commission to examine witness.

19. (1) If a High Court is satisfied—

(a) that a foreign Court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,

LEG. REF.

¹ The heading and rules 19 to 22 were added

by Act X of 1932.

(b) that the proceeding is of a civil nature, and

(c) that the witness is residing within the limits of the High Court's appellate jurisdiction,
it may, subject to the provisions of r. 20, issue a commission for the examination of such witness.

(2) Evidence may be given of the matters specified in clauses (a), (b) and (c) of sub-rule (1)—

(a) by a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the Central Government, or

(b) by a letter of request issued by the foreign Court and transmitted to the High Court through the Central Government, or

(c) by a letter of request issued by the foreign Court and produced before the High Court by a party to the proceedings.

Application for issue of commission. 20. The High Court may issue a commission under r. 19—

(a) upon application by a party to the proceeding before the foreign Court, or

(b) upon an application by a law officer of the Provincial Government acting under instructions from the Provincial Government.

21. A commission under rule 19 may be issued to any Court within the local limits of whose jurisdiction the witness resides, or, To whom commission may be issued. where, ¹[* * * * *] the witness resides within the local limits of ²[the ordinary original civil jurisdiction of the High Court] to any person whom the Court thinks fit to execute the Commission.

22. The provisions of rules 6, 15, 16, 17 and 18 of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and when any such commission has been duly executed it shall be returned, together with the evidence taken under it to the High Court, which shall forward it to the Central Government along with the letter of request for transmission to the foreign Court.]

LOC. AMS.—[MADRAS.] After O. 26, insert the following :—

Add as r. 23 in O. 26 :—

Application of order to execution proceedings

" R. 23. The provisions of this Order and of O. 26 (A) shall apply, so far as may be, to proceedings in execution of a decree or order."

[Fort St. George Gazette, Part II—19th December, 1939—P. 1318.]

" ORDER XXVI-A.

1. The Court may in any suit issue a commission to such person as it thinks fit to translate accounts and other documents which are not in the language of the Court.

2. The report of the Commissioner shall be evidence in the suit and shall form part of the record.

3. Before issuing any commission under this order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued."

ORDER XXVII.

Suits by or against ³[the Crown] or Public Officers in their official capacity.

1. In any suit by or against ⁴[the Crown] the plaint or written statement shall be signed by such person as ³[the Crown] may, by general or special order, appoint in this behalf, and shall be verified by any person whom ³[the Crown] may, so appoint and who is acquainted with the facts of the case.

LEG. REF.

¹ The words " the High Court is established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and " were omitted by A.O., 1937.

² Substituted for " its ordinary original civil

jurisdiction " by A.O., 1937.

³ Substituted for " the Government " by A.O., 1937.

⁴ Substituted for " the Secretary of State for India in Council " by A.O., 1937.

2. Persons being *ex officio* or otherwise authorized to act for ¹[the Crown] in respect of any judicial proceeding shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of ²[the Crown.]

3. In suits by or ²[against the Crown] instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert ³[the appropriate name as provided in S. 79, or, if the suit is against the Secretary of State, the words "the Secretary of State"].

⁴[4. The Crown pleader in any Court shall be the agent of the Crown for the purpose of receiving processes against the Crown issued by such Court.]

5. The Court, in fixing the day for ³[the Crown] to answer to the plaint, shall allow a reasonable time for the necessary communication ^{4a}[with the Crown] through the proper channel, and for the issue of instructions to ⁵[the Crown Pleader] to appear and answer on behalf of ⁶[the Crown] or the Government, and may extend the time at its discretion.

LOC. AM.—[MADRAS.] For O. 27, r. 5, substitute the following rule :—

"5. The Court in fixing the day for Secretary of State for India in Council to answer the plaint shall allow not less than three months' time from the date of summons for the necessary communication with the Government through the proper channel and for the issue of instructions to the Government Pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government and may extend the time at its discretion."

6. The Court may also, in any case in which the ⁵[Crown pleader] is not accompanied by any person on the part of ⁷[the Crown] who may be able to answer any material questions relating to the suit, direct the attendance of such a person.

7. (1) Where the defendant is a public officer and, in receiving the summons, considers it proper to make a reference to ⁷[the Crown] before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel.

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary.

8. (1) Where ⁷[the Crown] undertakes the defence of a suit against a public

LEG. REF.

¹ Substituted for "the Government" by A.O., 1937.

² Substituted for "against the Secretary of State for India in Council" by A.O., 1937.

³ Substituted for "the Secretary of State for India in Council" by A.O., 1937.

⁴ This rule was substituted by A.O., 1937.

^{4a} Substituted for "with the Government" by A.O., 1937.

⁵ Substituted for "Government pleader" by A.O., 1937.

⁶ Substituted for "the said Secretary of State or India in Council" by A.O., 1937.

⁷ Substituted for "the Secretary of State for India in Council" by A. O. 1937.

NOTES.

O. 27, R. 2.—In a Government appeal the vakalat was signed by the Personal Assistant to the Collector on behalf of the latter. It appeared from the Government notification that the Personal Assistant and the Collector had been authorised to sign vakalats in such suits. *Held*, that the vakalat was not in proper form but that it could be altered after the appeal has been disposed of. 105 I.C. 84=1928 M. 96.

O. 27, R. 4.—See I.L.R. (1939) All 392=1939 A.L.J. 154=1939 All. 277 (as to who is agent for Secretary of State in respect of cases concerning East India Ry.).

Procedure in suits against public officer. officer, ¹[the Crown pleader] upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits.

(2) Where no application under sub-rule (1) is made by the ¹[Crown pleader] on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties :

Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

* [8 -A. No such security as is mentioned in rules 5 and 6 of Order XLI shall be required from the Crown or, where the Crown has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

Definition of "Crown" and "Crown pleader."

8-B. In this Order "Crown" and "Crown pleader" mean respectively—

(a) in relation to any suit by or against the Secretary of State or the Central Government, or against a public officer in the service of that Government, the Central Government and such pleader as that Government may appoint whether generally or specially for the purposes of this Order ;

(b) in relation to any suit by or against the Crown Representative, or against a public officer employed in connection with the exercise of the functions of the Crown in its relations with Indian States, the Crown Representative and such pleader as he may appoint, whether generally or specially, for the purposes of this Order ; and

(c) in relation to any suit by, or against a Provincial Government or against a public officer in the service of a Province, the Provincial Government and the Government pleader, or such other pleader as the Provincial Government may appoint, whether generally or specially, for the purposes of this Order.]

LOC. AM.—[ALLAHABAD.] Add the following as r. 9 :—

"9. In every case in which the Government pleader appears for the Government as a party on its own account, or for the Government as undertaking, under the provisions of r. 8 (1), the defence of a suit against an officer of the Government, he shall in lieu of a vakalatnama, file a memorandum on unstamped paper signed by him and stating on whose behalf he appears. Such memorandum shall be, as nearly as may be, in the terms of the following form :—

Title of the suit, etc.

I, A.B., Government Pleader, appear on behalf of the Secretary of State for India in Council (or the Government of the United Provinces, or as the case may be), Respondent (or etc.), in the suit ; or, on behalf of the Government [which, under O. 27, r. 8(1) of (Act V of 1908), has undertaken the defence of the suit] respondent (or etc.), in the suit."

ORDER XXVIII.

Suits by or against Military ³[or Naval] Men ⁴[or Airmen].

Officers, soldiers, sailors or airmen who cannot obtain leave may authorise any person to sue or defend for them. 1. (1) Where any officer ⁵[soldier, ⁶(sailor) or airman] actually ⁷[serving under the Crown] in ⁷[such] capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead.

LEG. REF.

¹ Substituted for "the Government Pleader" by A. O. 1937.

² Rr. 8-A and 8-B were added by A.O., 1937.

³ Inserted by Amending Act XXXV of 1934.

⁴ Inserted by Repealing and Amending Act X of 1927.

⁵ The words "soldier or airman" were substituted for the words "or soldier" by Act X of 1937.

⁶ The word "sailor" inserted by Act XXXV of 1934.

⁷ Substituted for "serving the Government" by A.O., 1937.

⁸ Substituted for "a military or air force" by Act XXXV of 1934.

NOTES.

O. 28, R. 1.—The written authority must be filed in the suit. 6 Bom.H.C. 20.

(2) The authority shall be in writing and shall be signed by the officer ¹[soldier, ²[sailor] or airman] in the presence of (a) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or (b) where the officer ¹[soldier, ²(sailor) or airman] is serving in military, ²[naval] ³[or air force] staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed in Court.

(3) When so filed the counter-signature shall be sufficient proof that the authority was duly executed, and that the officer ¹[soldier, ²[sailor] or airman] by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

Explanation.—In this Order the expression “commanding officer” means the officer in actual command for the time being of any regiment, corps, ⁴[ship], detachment or depot to which the officer ¹[soldier, ²(sailor) or airman] belong.

2. Any person authorized by an officer ¹[soldier, ²(sailor) or airman] to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer ¹[soldier, ²(sailor) or airman] could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer ¹[soldier, ²(sailor) or airman].

Person so authorized may act personally or appoint pleader.

3. Process served upon any person authorized by an officer ¹[soldier, ²(sailor) or airman] under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person.

ORDER XXIX.

Suits by or against Corporation.

1. In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

Subscription and verification of pleading.

LEG. REF.

¹ The words “soldier or airman” substituted for “or soldier” by Act X of 1927.

² This word was inserted by Act XXXV of 1934.

³ Inserted by Act X of 1927.

⁴ Inserted by Act XXXV of 1934.

NOTES.

O. 29, R. 1: SCOPE OF RULE.—O. 29, R. 1, is only a permissive rule and does not exclude the operation of O. 6, Rr. 14 and 15 of the Code. A plaint signed by the constituted agent of a party, who holds a power of attorney is properly signed. I. L.R. (1939) Bom. 295=41 Bom.L.R. 530=A.I.R. 1939 Bom. 347. R. 1 comes into operation only after the proceedings have been validly started and cannot be utilized to authorize an unauthorized person to institute suits on behalf of the corporation. 158 I.C. 346=1935 L. 345. Under O. 29, R. 1, the Secretary of a Municipality can sign and verify the written statement, and the fact that he has been generally empowered to institute and defend suits is enough to authorize him to engage a counsel to defend actions against the Municipality. Defending an action is certainly different from instituting an action. The latter step

requires initiative which should certainly come from the Municipality itself and not from its agent. Hence a special authorization by the Municipality is not necessary as is required for instituting suits. A.I.R. 1941 Pesh. 76. Where the manager of a Bank is authorised by the Articles of Association to file a suit with the previous sanction of the executive board, a suit instituted by him without such sanction is instituted without proper authority and the fact that the act of the manager was ratified by a resolution of the Board of Directors after the expiry of the period of limitation, is of no avail. 37 P.L.R. 446. Rule is clearly permissive and not imperative in its terms and it lays down mere procedure. The rule, however, does not exclude the operation of Rr. 14 and 15 of O. 6. 38 Bom.L. 894=1936 B. 418. R. 1 requires that a suit against companies should be framed, so as to describe them by the proper names. 43 C. 441=22 C.L.J. 241; 22 I.C. 674=20 C. L.J. 39. See also 49 C. 524; 25 Bom.L.R. 1081=1924 B. 155; and that a pleading filed by a Corporation should be verified by a principal officer of the Company. But there is nothing to suggest that the heading of the plaint should contain any further particulars

LOC. AMS.—[MADRAS.] Insert the following as r. 1-A of O. 29.—

"1-A. In suits against a Local Authority the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance."

NOTES.

showing the name and description or place of residence of the person who represents such Corporation. 26 S.L.R. 431=142 I.C. 361=1933 S. 102. Suit against unregistered body—All members must be impleaded. 47 A. 342=23 A.L.J. 37. The plain terms of O. 6, R. 14 do apply to a company, which is a party to an action; under that rule the pleading must be signed by the party, but where the party is a company and therefore unable to sign, having regard to the words "or for other good cause" the last part of the section applies in the case of a company. The company can, therefore, always authorise some person to sign on behalf of the company. If the company does not choose to do that, it can act under R. 1, i.e., it can rely on that order as in fact constituting an agent to sign without the necessity of giving an express authority. In that way O. 29 is read as merely permissive and not mandatory. 32 Bom.L.R. 1305. But see 32 P.L.R. 655 (O. 29, R. 1 is permissive and O. 6, R. 14 applies to the case of companies as well as private persons. A plaintiff which satisfies the requirements of O. 6, R. 14 should be taken to have been properly signed. See also 134 I.C. 1170=1931 S. 178. Suit to recover possession of property by Secretary of Brahma Samaj—Need for permission of Court. 49 C.L.J. 357=1929 C. 445.

A STATE BANK IN A NATIVE STATE which is not a corporation as distinct from the State or Maharaja cannot sue in a British Indian Court through its Secretary or manager. 143 I.C. 348=34 P.L.R. 470=1933 L. 456.

"CORPORATION".—The term "corporation" is used with reference to S. 41, Companies Act. 12 C. 41. The corporation contemplated by this rule is a corporation as known to English law, that is, a corporation created with the express consent of the Sovereign, or of such antiquity that the consent of the Sovereign may be presumed. 20 A. 167. A corporation duly created according to the law of one State may sue and be sued in its corporate name in the Courts of other States. 30 C. 103. The Cantonment Committee of Poona is a body corporate. 14 B. 286.

RAILWAY COMPANY.—Suit against Railway Company in the name of agent, if proper. See 90 I.C. 680=5 P. 128=1926 P. 40. Form of suit against Railway Company. 64 I.C. 125=2 P.L.T. 679; 52 C. 783=29 C.W.N. 614=1925 C. 716.

WHO CAN SUE OR VERIFY PLEADINGS.—Permission to enable a principal officer of a corporation to verify a plaint or written statement is not necessary. 22 C. 268. In a suit by corporation a plaint signed by principal officer who is also an *Am-Mukhtar* is

good. 22 I.C. 674=20 C.L.J. 39. See also 100 I.C. 450=1927 S. 263; 26 S.L.R. 431=1933 S. 102; 1927 C. 773; 1927 C. 780=31 C.W.N. 1030. An attorney appointed by the company has no power to sign and verify a plaint on its behalf. 100 I.C. 450=1927 S. 263. Rule does not require a principal officer to verify from actual personal knowledge. He may do so on his information and belief. 9 C.W.N. 608. Secretary of a non-proprietary club cannot sue in his own name for goods supplied to a member. 14 M. 362. See also 6 A. 284. Director of company—Authority to sign pleadings. See 130 I.C. 843=1931 R. 54. See also Companies Act, S. 86.

UNREGISTERED SOCIETY.—All members must be made parties. 103 I.C. 45 (1)=1927 A. 789.

PAUPER SUIT.—It is open to a company in liquidation to sue *in forma pauperis* through its liquidator. 41 M. 624=34 M.L.J. 421.

PRACTICE AND PROCEDURE.—Plaintiff is bound to serve notices after amendment of plaint has been made and the suit properly constituted. 43 C. 441=22 C.L.J. 241. In the case of a suit by a corporation all that the law requires is that the plaint should be verified by a principal officer and that he should be able to depose to the facts of the case. But it is not necessary for the plaintiff corporation to state in the body of the plaint or by affidavit that the person verifying the plaint is a principal officer of the corporation able to depose to the facts of the case. There is nothing in the Code which requires this. 38 Bom.L.R. 894=1936 B. 418. It is no doubt open to the defendant to object to the verification as insufficient and to show that the person who has verified the plaint is not a principal officer, or if he is such, that he is not able to depose to the facts of the case, either by cross-examination or otherwise. (*Ibid.*) Where in a suit on behalf of a registered company the secretary verifies a plaint under authority obtained from the Articles of Association of the plaintiff company which empowers the Secretary to do all acts necessary for the conduct of suits and inasmuch as there is averment in the plaint to that effect. *Held*, that no affidavit was necessary to establish such authority for verification. (22 C. 268 and 22 C. 60, Foll.; 1927 C. 758, Dist.) 1935 C. 770=40 C.W.N. 930. A suit on behalf of a company incorporated under the Companies Act is properly instituted, if the plaint is duly signed and verified by the secretary who has a letter from the chief officer of the company expressly authorizing him to conduct and defend suits on behalf of and against the company, when such officer is given by the Memorandum and Articles of Association extensive powers to manage and conduct the

2. Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—
 Service on corporation.

(a) on the secretary, or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business.

3. The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit.
 Power to require personal attendance of officer of corporation.

ORDER XXX.

Suits by or against Firms and Persons carrying on business in names other than their own.

1. (1) Any two or more persons claiming or being liable as partners and

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affairs and business of the company and also to appoint and employ for such purposes a secretary or secretaries with such powers and duties as he should think fit. 39 P. L.R. 173=1937 Lah. 751.

O. 29, R. 2.—The service of summons on a junior assistant of a company which acted as agents of the primary company is not sufficient service on the principal company. 108 I.C. 660=1928 S. 111. "The place where the corporation carries on business" in R. 2 (b) refers to the principal place of business of the corporation in British India. (*Ibid.*) Where a corporation is sued as a defendant plaintiff should be accompanied by a separate application under O. 29, R. 2 or O. 30, R. 3 duly stamped stating where and in what manner and on whom the plaintiff wishes the summons to be served. 26 S.L.R. 431=142 I.C. 361=1933 S. 102.

O. 30: GENERAL.—The policy underlying O. 30 is no more than to afford facilities in the joinder of parties who may be numerous. 1937 A.W.R. 1142. O. 30 does not only deal with the question whether the subsequent disclosure of the names of the partners in the plaint is a case of misdescription or non-joinder, but on the contrary it gives legislative sanction to suit being filed and decided by or against firms without disclosing the names of partners, subject however to certain limitations. (1928 B. 191, Not Foll.) 1935 S. 225. The Code does not allow the firm to sue or to be sued. It only allows the individuals constituting the firm to sue or to be sued in the name of the firm. The privilege is given to persons, but the Code does not treat the firm as a *juristic person*. A suit by or against a firm is therefore really a suit by or against a group of individuals, and the name of the firm is the collective name of the individuals. 158 I.C. 25=16 P.L.T. 649. The word "partner" in O. 30 applies to persons who are partners by contract and not by virtue of their personal law, and the word "firm" means a business carried on by persons who have contracted to do so and does not include a Hindu joint family business. 1936

N. 292=I.L.R. (1937) Nag. 423. See also 19 Pat.L.T. 686=1938 Pat. 270; 1937 A.M.L.J. 41. There is no rule of law which lays down that a suit brought in the name of a joint Hindu family business should be brought in the name of the firm. O. 30, C. P. Code, does not apply to a joint Hindu family firm as the rights and liabilities of such a firm are not exclusively regulated by the Contract Act. Such a firm must sue and be sued in the name of its members. 40 P.L.R. 456=A.I.R. 1938 Lah. 563. By virtue of Explanation added by the Punjab Chief Court to R. 1 of O. 30, C. P. Code, that rule is made applicable to a "joint Hindu family trading partnership". In the Punjab, therefore, a joint Hindu family firm can sue and be sued in its "firm name", like any other contractual partnership. 42 P.L.R. 418=A.I.R. 1940 Lah. 425. See also 42 P.L.R. 278=1940 Lah. 256. If a suit is brought under O. 30 against a partnership firm, where a minor has been admitted to some kind of benefit, the minor can in no sense be regarded as a party to the suit. When all the owners of the firm happen to be minors there is no partnership as contemplated by the Partnership Act, and the procedure prescribed by O. 30 cannot apply, so as to make the minors liable under a decree passed in a suit in the firm name. 44 L.W. 310=1936 M. 707=71 M.L.J. 373. Although O. 30 permits of a suit being filed by or against a firm in the firm's name if such firm carries on business in British India and is silent with regard to a suit by or against a foreign firm carrying on business outside British India, it does not follow that a suit by or against a foreign firm is not instituted or not deemed to have been instituted, until and unless the partners of such firm are placed on the record or that until that is done limitation runs against the plaintiffs. 1935 S. 225.

O. 30, R. 1: SCOPE OF.—87 I.C. 992=1925 S. 298; 8 L. 1=1927 L. 115; 9 P. 717. A firm need not sue or be sued only in the form prescribed in this rule. A plaintiff bringing a suit against a firm may implead all the members of the firm as defendants

carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

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in that suit. Conversely, such members could sue jointly in their individual names. 42 P.L.R. 278=A.I.R. 1940 Lah. 256. The position of a firm is materially different from that of a registered company when it sues or is sued. O. 30 makes it clear how far a firm, as distinguished from a registered company, can be represented by its individual partners. 55 A. 719=145 I.C. 812=1933 A.L.J. 1264=1933 A. 523. It is implicit in O. 30, R. 1, that a suit can be brought in the name of a firm only where the firm consists of more than one person. Where a firm consisted of a sole or single proprietress a suit brought in the name of the firm, the addition of the words 'through Mst. Munia, proprietress' was held to remove the defect in the frame of the suit. A. I. R. 1940 Oudh 443=1940 O. W. N. 901. A Hindu joint family is not a firm in the name of which proceedings may be commenced under R. 1, that rule being confined to firms of merchants carrying on business in British India. 35 Bom. L. R. 569=1933 B. 304. See also 1937 A.M.L.J. 41. O. 30 only applies to a firm or a contractual partnership and does not apply to a joint Hindu family business; and an undivided Hindu family carrying on business is not entitled to sue as a firm. 61 C. 975=152 I.C. 991=38 C.W.N. 914=1934 C. 810. See also 1936 N. 292; 1938 Lah. 563; I.L.R. (1941) Lah. 39; 7 Cut.L.T. 21; 1940 Lah. 425; 1940 Lah. 256. In the case of a firm of father and son who form a joint Hindu family, the father as manager can act on behalf of the family by signing and verifying a plaint. 1935 A.W.R. 32=1935 A.L.J. 260=1935 A. 280. Any company, partnership or association unregistered in violation of the Companies Act is an illegal body and its existence cannot be recognised by law and a suit is, therefore, not maintainable against it. The provisions of O. 30 evidently assume that the so-called "firm" is legally constituted and do not have any bearing on the question of the maintainability of a suit against an "illegal" association. 36 P.L.R. 149=1934 L. 882. The provisions of R. 1 are not applicable to foreign firms. 36 Bom.L.R. 983=1934 B. 467. See also 1935 S. 225 (noted under 'O. 30—General,' *supra*). Although the firm consisted of two partners at the time when the cause of action arose, a suit cannot be lodged in the name of the firm, where there is only one partner left, the other partner having severed his connexion before the institution of the suit. The defect in the form can however

be easily removed by a slight amendment and the suit should not be thrown out on the technical ground. 1934 L. 157 (1). As to proper parties in a suit relating to a partnership transaction, see 132 I.C. 860=1932 S. 78. In cases of suits by or against firms properly represented, the addition of the names of individual partners is not obligatory and the suit can proceed even in the absence of the partner's names. A. I. R. 1938 Lah. 823. One person carrying on business in the name of a firm cannot sue in the name of the firm. 25 I.C. 131=12 A. L.J. 1020; 1930 B. 216=32 Bom.L.R. 212; 1940 O.W.N. 901=1940 Oudh 443; 16 Luck. 357; 140 I.C. 519=34 Bom.L.R. 1112=1932 B. 516; 159 I.C. 138=1935 R. 240. He may be sued, but unless there are two or more persons in the firm the plaintiff cannot sue in the firm name. 38 Bom.L.R. 529. Suit by foreign firm represented by one of its partners—Not maintainable—Amendment so as to join other partners as plaintiffs can be ordered on payment of costs up-to-date of amendment to defendants. 30 Bom. L.R. 117=109 I.C. 99=1928 B. 191. Two or more persons carrying on business in the name of a firm in British India are liable to be sued in British India in the name of the firm and would be amenable to the jurisdiction of any competent Court in British India irrespective of whether they are British subjects or foreigners. 28 N.L.R. 118=140 I.C. 63=1932 N. 114. Suit against firm and partner personally—Procedure. 27 Bom.L.R. 998=1925 B. 494. A firm must consist of two or more persons and one partner can sign and verify the plaint in a suit by the firm. 25 I.C. 131=12 A.L.J. 1020. The mere recital of the firm's "vilsam" before the name of the agent of the firm who is the plaintiff, does not suffice to make the suit one by the firm. 17 M.L.J. 116. Where the plaint describes the plaintiff himself as the "firm X, situate in Y, etc., through B, proprietor of the said firm" and the plaint is signed by B, as the plaintiff cannot be deemed to be suing in the firm's name but in his own name, the mere fact of the firm's name being mentioned, in no way affects the matter. 161 I.C. 516=1936 P. 140. The correct way of bringing a suit under R. 1 is to bring it in the name of the firm as plaintiff, and no other name should be mentioned as plaintiff at the head of the plaint, but in the signature and verification of the plaint, the person signing and verifying should describe himself as one of the partners of the firm which brings the suit. 157 I.C. 166=1935 R. 209. The firm's

(2) Where persons sue or are sued as partners in the names of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

Loc. Am.—[Lahore, N.W.F.P. and Sind.]—To r. 1 of O. 30, the following explanation shall be added :—

“Explanation.—This rule applies to a joint Hindu family trading partnership.”

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name is a mere expression and not a legal entity. 49 C. 524=1922 C. 408; 25 Bom. L.R. 1081=1924 B. 155. When a suit is brought against a firm “by its managing partner” it cannot be said to be against the managing partner personally. 134 I.C. 397=1931 S. 121. Where a suit is in the name of a firm, the plaint may be signed by one of the partners in such capacity. 1932 N. 137. Where a corporation is sued as defendant, the plaint should be accompanied by a separate application under O. 29, R. 2 or O. 30, R. 3 duly stamped stating where, in what manner and on whom the plaintiff wishes the summons to be served. 26 S.L.R. 431. Firm carrying on business in different places—Identity, determination of. 65 I.C. 98=1922 A. 367. Suit by one of several partners in his own name—Maintainability. 8 L. 1=100 I.C. 721=1927 L. 115. Under R. 1, it is competent for one partner alone to sue in the firm's name even though the other partners refuse to sue. Such a suit is a good suit; to such a suit the other partners who refuse to join are not necessary parties. 40 C.W.N. 824=1936 C. 353. Suit by some of the members of the firm—Addition of others—Limitation. 28 I.C. 210=2 L.W. 239; 15 S.L.R. 152=65 I.C. 26. A suit against a firm is maintainable, even if one of the partners of the firm is dead on the date of the institution of the suit. 27 A.L.J. 73=112 I.C. 715. Firm—Insolvency of one firm—Effect of—Right of remaining partners to sue for money due to firm. I.L.R. (1937) N. 28. As to what amounts to misdescription of a firm's name, see 44 I.C. 283=155 P.L.R. 1917. Suit in firm name by *sole proprietor*, verifying the plaint himself as a *partner*—Objection to frame of suit—Amendment can be allowed on payment of costs. 35 C.W.N. 432=134 I.C. 1200=1931 C. 770. A suit contemplated by O. 30 may be brought by or against a firm in the firm's name even though the firm may have been dissolved before the date of the suit provided the cause of action arose before the dissolution. 67 I.C. 10=34 C.L.J. 405; 49 C. 394=69 I.C. 236=1922 C. 390. See also 1937 Nag. 314. Service of summons on the manager of the firm is service on all partners of the firm. 12 I.C. 629; 49 C. 394=69 I.C. 236. See also 1926 S. 75. Firm including a minor partner—Reference of suit to arbitration—Sanction of Court is not necessary. 68 I.C. 750=1923 L. 103; 5 L.L.J. 5=1923 L. 212. Where a suit is brought by one firm against another through their representatives they can agree to refer the dispute to arbitration. 5 L.L.J. 5=1923 L. 212. But see also 48 A. 239=24 A.L.J. 235=1926 A. 238. It is permissible in India as it is in England to sue only the solvent members of a firm when a decree is sought against it. 41 M. 923=35 M.L.J. 581. See also I.L.R. (1937) Nag. 28. A bank being a limited company can be sued only in its own corporate personality and not in the name of its manager; the manager is not personally liable. 40 I.C. 549=1917 M.W.N. 359. Single man firm—Suit against firm—Death of person carrying on business during pendency—Decree passed after death—Nullity—Power of executing Court not to give effect to it. 34 C.W.N. 36=57 C. 931=1930 C. 327. Plaintiff while suing partnership firm can implead all members of firm as defendants. 1930 P. 239=9 P. 717.

SUIT BY PARTNER—LOCUS STANDI, IF CAN BE QUESTIONED BY THIRD PARTY.—Partners can bring suit for the benefit of the firm, and although they may be prosecuting the litigation on their own responsibility, the benefit goes to the concern, and it is no business of third parties to question their *locus standi*. 155 I.C. 1006=1935 Pesh. 44.

PROCEDURE.—Partner refusing to join as plaintiff should be made defendant. 92 I.C. 569=1925 L. 504. But see 40 C.W.N. 824 (noted *supra*). Where a party elects to go against a firm, the question whether a particular person is, or is not a partner of such firm, and is bound by the decree or the award as the case may be is a question which can be dealt with either in execution proceedings or in a separate suit. 140 I.C. 761=1932 B. 375=34 Bom.L.R. 737. Procedure to be adopted in suit against firm and partner personally. See 94 I.C. 969=1925 B. 494=27 Bom.L.R. 998.

ARBITRATION.—Authority of one of the partners to refer matters to arbitration. 140 I.C. 519=34 Bom.L.R. 1112=1932 B. 516.

PAYMENT OF DECREE AMOUNT TO ONE PARTNER in a suit filed in the name of a firm gives valid discharge. 92 I.C. 387=1926 S. 167. But see 57 M. 692, *infra*. One of the joint decree-holders cannot, though they are partners, give a valid discharge by receiving decree amount out of Court without concurrence of the other decree-holders. Payment to one of them may under the general law relating to partnership be valid and binding on the firm but that circumstance is not enough to validate the payment made to one of them against the other joint decree-holders. 57 M. 692=1934 M. 330=66 M. L.J. 656.

SET-OFF.—Decree in favour of partners in individual capacity—Cross decree against

2. (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:

Provided that all the proceedings shall nevertheless continue in the name of the firm.

Service.

3. Where persons are sued as partners in the name of their firm, the summons shall be served either—

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firm, if can be set-off. 29 Bom.L.R. 396=1927 B. 255.

EXECUTION.—When a suit is brought against a firm and judgment obtained against it, the action is really against the persons who constitute the firm and the judgment is really a judgment against the individuals. 42 C.W.N. 310=A.I.R. 1938 Cal. 316. O. 21, R. 50 should be read subject to the provisions of O. 30. It is not open to a partner, against whom execution is applied for of a decree obtained against the firm, to deny in the first instance that he is a partner and then if it be found against to plead in the alternative that none of the partners had any authority to enter into the transaction which gave rise to the liability. 36 Bom.L.R. 617. A firm is dissolved by the death of one of the partners but a decree passed in its favour is nonetheless executable at the instance of the surviving partners. 33 P.L.R. 290. A decree obtained by a firm consisting of one partner only cannot be executed by the son of the decree-holder without the production of a succession certificate. 140 I.C. 519=34 Bom.L.R. 1112=1932 B. 516.

APPEAL.—In the case of a decree against a firm where the decree-holder is entitled to recover money due under it, jointly and severally from the individuals composing the firm any member of the firm could appeal against the decree as against the firm. 1939 A.L.J. 1016=1940 All. 81.

O. 30, Rr. 1 and 4.—R. 1 is merely permissive. If it is followed, R. 4 applies but not otherwise. So where the defendants, though members of a firm, are sued individually, it is necessary, in the event of the death of one of them to implead his legal representatives. 14 L. 543=34 P.L.R. 11=1933 L. 356 (2).

O. 30, R. 2.—Under R. 2 once partners have been declared, they are to be regarded parties to the suit. There is however nothing to prevent a party from making a further declaration the effect of which might afterwards fall to be considered by the Court. But if it is made after the period of

limitation it will have no effect and the Court would regard the suit as being one by the parties whose names were originally declared. 60 C. 1217=37 C.W.N. 1105. A firm is not a legal entity or a "person" capable of becoming, as a firm, a partner in another firm. But at the same time, once a declaration of partners has been made under R. 2, a suit for dissolution can proceed although the plaintiffs in the first instance had described themselves as a firm. It is true that a firm is nothing but an association of individuals; but that is no obstacle or bar to a partnership suit instituted in the name of the firm; there is no reason why two or more individuals should not be allowed to have their shares separated in one lump if they so desire. 157 I.C. 1113=37 P.L.R. 663. Plaintiff furnishing only initials of partners—No objection by defendant—Suit, not bad for non-joinder of parties. The duty of the trial Court at most was to stay the case until the names of the partners had been properly furnished and the case could not be dismissed for non-joinder of parties. 171 I.C. 622=1937 Rang. 137.

O. 30, R. 2 (3).—R. 2 is applicable only to plaintiffs—Whether R. 2 (3) controls O. 21, R. 50, see 29 Bom.L.R. 921. Provisions not contradictory. 48 C.L.J. 357=114 I.C. 156=1929 C. 11. Suit by firm—Plaint affirmed by Munim of firm—Application by partner to re-affirm plaint—Maintainability. 32 Bom.L.R. 56=1930 B. 150 (1).

O. 30, R. 3.—The provisions of R. 3 refer to a time anterior to the decree and are not applicable to an award which has been filed and which has become enforceable as a decree. The omission, therefore, to give notice of the filing of the award to the individual partners of a firm does not destroy the operative character of the filed award or make it inexecutable against a partner who has not been served with such notice. 62 C. 833=61 C.L.J. 515. Although R. 3 provides that there must be individually the service of summons upon a person who was a partner of a dissolved partnership, it cannot be said that the decree

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there, as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India:

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable.

4. (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether

Right of suit on death of partner.

NOTES.

cannot be both against the firm and the partner personally. The question is to be decided by the form of the plaint. If in the plaint the plaintiff sues not only the firm but also a partner personally, then there may be decree not only against the firm but against the partner individually in his personal capacity. 30 S.L.R. 296=165 I.C. 907=1936 S. 206. O. 30 contemplates a suit against a firm as such, and even if the firm be dissolved before the institution of the suit, there may still be property of the firm against which execution may proceed, and merely because the partnership has been dissolved, the whole form and nature of the suit is not altered. Where the partner appears not only on behalf of the firm but also in his personal capacity and puts in a personal defence, the Court is entitled to pass a decree not only against the firm but also against him. (*Ibid.*) When a corporation is sued as a defendant, the plaint should be accompanied by a separate application under O. 29, R. 2 or O. 30, R. 3 duly stamped stating where, in what manner and on whom the plaintiff wishes the summons to be served. 26 S.L.R. 431=142 I.C. 361=1933 S. 102. The rule has no application when the suit is against the partners of a firm individually. 88 I.C. 489=1925 C. 1136. Summons to be served at the place of the business of the firm on manager or managing partner—Service effected by affixing summons at managing partner's residence by affixing—Not proper service. See 95 I.C. 149=1926 S. 208. Suit against firm—Service of process—Liability of partners not personally served. 27 Bom.L.R. 541=87 I.C. 1051. Suit against firm—Firm dissolved before institution of suit—Service of summons on one of the partners individually—Limitation. 105 I.C. 854=1928 S. 97=23 S.L.R. 54. Appearance under protest. 99 I.C. 495=50 B. 665. A person who has been served as a partner and entered appearance under protest is not entitled to file a written statement on his own behalf denying that he is a partner. 54 C. 1057=31 C.W.N. 1004=1927 C. 758. See also 140 I.C. 40=1932 S. 199. Suit against firm—Service on agent of partners authorised to act not only on behalf of the firm but also

on behalf of each partner individually must be deemed to be service on each partner. 108 I.C. 528=1928 L. 528. Whether enlarges scope of O. 21, R. 50 (2). 57 M.L.J. 344=52 M. 885 (F.B.).

"AS THE COURT MAY DIRECT."—Where service has in fact been made upon a partner of a firm, the service is not merely bad because the directions of the Court under R. 3 have not been first obtained. 59 C. 496=138 I.C. 637=1932 C. 541.

O. 30, R. 3, Proviso.—All that the proviso to R. 3 requires is that the summons shall be served upon every person whom it is sought to make liable which means every person "whom it is sought to make personally liable." It must be read along with and in the light of O. 21, R. 50, and so far as the property of a dissolved firm is sought to be made liable, there is no need for serving each and every partner of that firm. Therefore, it is not open to a person to challenge the decree passed against his dissolved firm as a nullity on the ground that he was not personally served, or on the ground that the property of the firm was not liable for the decree. 161 I.C. 324=1936 S. 34. A decree obtained against a firm after service of summons upon one of the partners only is a good decree against the firm, although the plaintiff had notice of the dissolution of the partnership and he had not served all the partners individually. The only effect would be that it could not be executed individually against the partner who had not been served, nor could the plaintiff get leave under O. 21, R. 50, to have it executed against him personally. 42 C.W.N. 820. In a summary suit against a firm where several partners have been served individually and leave to defend is granted to some and not to others, a decree can be passed against those partners to whom leave is refused and also against the firm. 187 I.C. 373=A.I.R. 1940 Sind 19.

O. 30, Rr. 3 and 8.—Suit against firm—Parties—Joinder of—Person not served but claiming to be interested in firm though denying to be partner—Right to intervene and defend suit on merits—Court's power to add without plaintiff's consent. 40 C.W.N. 677.

O. 30, R. 4.—R. 4 applies only to a case

before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

5. Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served

Notice in what capacity served.

shall be informed by notice in writing given at the time of such service, whether he is served as a partner

or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.

NOTES.

where the suit is brought in the name of the firm. 48 I.C. 309=28 C.L.J. 268; 21 I.C. 509=17 C.L.J. 648. See also 91 I.C. 573=1926 S. 81; 20 S.L.R. 238. And only to such firms as are owned by two or more persons. But where a sole proprietor dies and the firm ceases to exist, it is necessary to bring on record the L. Rs. of the deceased sole proprietor under the provisions of O. 22, R. 3. 103 I.C. 142=1927 L. 556. The surviving partner of a firm is entitled to maintain a suit under O. 30, R. 4, without joining as parties to the suit the legal representatives of the deceased partner or partners of the firm; and a suit by such a partner cannot be dismissed on the ground of non-joinder of the legal representatives of the deceased partner or partners. 1937 M.W. N. 1312. Applicability—Suit by surviving partner to recover debt—L. Rs. of deceased partner whether necessary parties. Defect in title of the suit cannot affect the substance of the suit. 77 I.C. 476=1923 B. 368; 44 I.C. 283=155 P.L.R. 1917. Defect of parties. Effect of. 48 I.C. 309=28 C. L. J. 268. In a suit by or against a firm trading in different names if one of the partners be dead, it is not necessary to join the representatives of the deceased as a party. O. 30, R. 4 contains a modification of S. 45 of the Contract Act. 21 I.C. 509=17 C.L.J. 648; 1930 A.L.J. 913=52 A. 964=1931 A. 65. A person who sues some of the partners in their individual capacity cannot change his front and sue for a relief against them as partners. 76 P.R. 1915=31 I.C. 209. The L.R. of a deceased partner is not a necessary party in suits by the surviving partner for recovery of the debts due to the firm, but they may apply to Court to be joined as parties. 7 Bur.L. T. 261=24 I.C. 268. Suit against firm, liability of partners. 1926 S. 75. Where the suit was by the individual owners of a firm and a decree having been passed the defendants appealed and one of the plaintiffs-respondents died during the pendency of that appeal, but his L. Rs. were not impleaded in time, *held*, that the decree being a joint one the appeal abated *in toto*. *Held*, also, that R. 4 was inapplicable since the suit was not in the firm name. 135 I.C. 245=1932 A.

L.J. 219. Suit by two members of firm—Compromise decree—Death of one member subsequently—L.Rs. not impleaded—R. 4 makes them unnecessary as parties—No abatement. 48 C.L.J. 357. See also 148 I.C. 462. O. 30, R. 4, does not apply to a *joint Hindu family firm*. "Partner" is one who is a partner by contract and not by virtue of his personal law, and "firm" means a business carried on by persons who have contracted to do so and does not include a Hindu joint family business. If one of the defendants sued as a joint family firm dies, his legal representatives must be brought on record, and if no application for substitution be made within the time limited, the suit must be held to abate as against him; and if the continuation of the suit would result in conflicting decrees, the suit abates against the other defendants as well. I.L.R. (1937) Nag. 423.

LEGAL REPRESENTATIVE.—The whole scheme of O. 30 is against the theory that a suit against a firm is a suit against the L. Rs. of a deceased partner. R. 4 must not be carried any further than what it expressly states. If it is sought to fix liability on the private estate of the deceased partner, apart from his interest in the partnership assets, then his L.Rs. must be added. In such a case the L.Rs. of the deceased partner are served with the summons though not added as parties, leave cannot be obtained to issue execution against them under O. 21, R. 50 (2) of the Code. See 29 Bom.L.R. 1296=105 I.C. 305=1927 B. 581.

O. 30, R. 5.—The concluding words in R. 5 lay down a definite rule of law that service on a person without notice is equivalent to service as a partner. 19 C.L.J. 581=19 C.W.N. 1008. The provisions of O. 30 are applicable to suits only and do not apply to proceedings of an arbitrator under Arbitration Act. 115 I.C. 536=1929 L. 228. Guardian *ad litem* in suit—If continues as such for execution. 1930 N. 185=26 N.L. R. 173. Minors represented by father before arbitrator substantially fair—Minors whether can repudiate award—Manager whether can refer partition suit to arbitration. 30 L.W. 868=1930 M. 38.

6. Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.
 Appearance of partners.
7. Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.
 No appearance except by partners.
8. Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared.
 Appearance under protest.

NOTES.

O. 30, R. 6.—Under R. 6, in a suit against a firm in the name of firm name, the appearance of one partner is appearance of the firm, i.e., of all partners of the firm. 62 C. 510=39 C.W.N. 606. It implies the right of any partner who has been sued against in the name of a firm to appear in the suit. If any partner considers that his rights will not be adequately represented by the other partner who has been impleaded, or that his interest is adverse to that of the other partner it is just and fair that he should be allowed to appear individually and resist the claim. 1930 A.L.J. 1212=52 A. 951=1930 A. 701 (2). It entitles a plaintiff suing a firm to know who the persons are who constitute that firm and the information cannot be withheld. 78 P.R. 1918=47 I.C. 422. The word "individually" in R. 6 is not synonymous with "in person". (*Ibid.*) No partner can be forced to appear in person, but, in his absence, after service of summons, he will be dealt with *ex parte*. (*Ibid.*) See also 108 I.C. 528=1928 L. 528. In an ordinary suit against the firm, each partner has a right to come in and defend. He has an individual right to come in and defend although he defends on behalf of the firm. Each partner may file separate defences, one partner may defend, while another admits. Though not clearly stated this is involved in O. 30, R. 6. 42 C.W.N. 820. Under O. 30, R. 6, after appearance all steps in the suit must be in the name of the firm. Though the appearance in such circumstances is individual by each partner, that appearance is an appearance on behalf of the firm. Hence where a warrant of attorney is given by one partner to enter appearance on his behalf, the warrant of attorney is and is intended to be on behalf of the firm. A.I.R. 1938 Cal. 377. Suit against firm—Summons on a person as partner—Defence in partner's name but containing nothing individual—There is technical flaw which can be corrected by Court even at argument stage. 1929 S. 192.

PRACTICE AND PROCEDURE.—Where some only of a large number of partners who have been sued under the name of the firm put in appearance, the fact will be duly recorded; and if appearance has not been put in by all

the partners, the case will be one in which some only of the partners have appeared and others have not. The suit being one in which the entire firm is sued, the liability of each partner is not several but a collective liability, unless any particular partner is impleaded for some reason in his individual capacity, in which case he should figure as party wholly apart from his capacity as a partner. Each of the partners who has entered appearance as such has precisely the same rights as regards the conduct of the case as one of several defendants having a common defence. The name of the firm is only a compendious description of the partners in reference to the common interest which they possess in a certain concern. When the firm is arrayed as a defendant, all the partners should be deemed to be in the array of the defendants in their capacity as partners. 55 A. 719=1933 A.L.J. 1264=1933 A. 523.

O. 30, R. 7.—R. 7 must be read subject to R. 5 and it contemplates a case where service is on a manager. 19 C.L.J. 581=19 C.W.N. 1008.

O. 30, Rr. 7 and 8.—In a suit against a firm and its partners, there is nothing in law to prevent the Court from arriving at a finding in the suit itself, that a particular person is a partner in the firm, although such person appears in protest and although his protest is not struck off. 30 S.L.R. 296=1936 S. 206.

O. 30, R. 8.—Appearance under protest. 64 I.C. 688=23 Bom.L.R. 1249. A person served as a partner, who enters an appearance under protest denying that he is a partner, is not entitled to dispute the liability of the firm, and cannot therefore obtain an order for an issue to try the question of his partnership before the other issues in the action. 42 Bom.L.R. 935=A.I.R. 1940 Bom. 390. Where plaintiff files a suit against the firm, the alleged members of which put in their appearance under protest, he has the option of applying to strike out their appearance under protest. If he does not do so but simply obtains a decree against the firm, the defendants are entitled to apply to Court for provision to be made for their costs of appearance in the event of the plaintiff not applying for leave to issue execution against

9. This order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.

10. Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this order shall apply.

NOTES.

them within a reasonable period or so applying but failing to prove they were partners. 138 I.C. 777=34 Bom.L.R. 640=1932 B. 269. A surety bond executed in a partnership suit enures for the benefit of all those who eventually get a decree. 4 I.C. 436.

O. 30, R. 9.—The scope of R. 9 is not to lay down when and under what circumstances suits can be laid as between partners. It only lays down the possibility of such suits and the procedure to be followed therein. 45 I.C. 36=34 M.L.J. 408. Each of the parties to a partnership suit is really in turn plaintiff and defendant and in both capacities comes before the Court. 42 I.C. 436. No suit lies as between partners or between firms having common partners for recovery of money without asking for accounts. 45 I.C. 36=34 M.L.J. 408. A suit lies by one firm against another firm notwithstanding that the firms have common partners. 44 I.C. 428=34 M.L.J. 32. Where an individual happens to be a common partner in two houses of trade or firms, no action can be brought by one firm against the other upon any transaction between them while such individual is a common partner. 163 I.C. 579=38 Bom.L.R. 486=1936 B. 246. This rule, however, is subject to an exception in equity in certain cases where it might be possible to ascertain the rights and liabilities of a member of a firm when all the parties are before the Court, and provided all interested parties are before the Court either as plaintiffs or as defendants, the Court would adjust and determine their rights. 1936 B. 246. This equitable exception cannot be extended to a case which cannot be adequately dealt with merely by a declaration of a right to a credit in the partnership accounts. A suit for specific performance of an oral agreement for a lease entered into between a firm and one of its partners is a suit to which the equitable principle cannot be applied. Nor does R. 9 entitle the firm to institute such a suit on such an agreement. Such a suit is therefore not maintainable in law. 1936 B. 246. An action for balance of a settled account is not barred merely because there are other unsettled accounts between the partners. Where, therefore, a partner of a firm is doing business with the firm on his own behalf and has struck a balance in favour of the firm after settling his account, a suit by the firm for the

balance is maintainable. 164 I.C. 832=38 P.L.R. 857=1936 L. 648. The provisions of R. 9 which provide that execution will not be taken without the leave of the Court and that the Court may order all accounts to be taken and give such directions as it considers just are sufficient to safeguard the interest of the defendant. (*Ibid.*)

O. 30, R. 10: SCOPE OF RULE.—R. 10 of O. 30 simply justifies the introduction of the assumed name instead of the real name of the defendant but does not absolve plaintiff from his liability to propose a proper guardian, if the defendant represented by such a name is really a minor. 57 M. 973=1934 M. 386=66 M.L.J. 609. R. 10 is subject to the same restrictions as R. 1. The case of a single proprietor doing business in a name other than his own who has to be treated as a firm for the purpose of O. 30, is covered by R. 1, which requires that the firm should be carrying on business in British India. Consequently, if a person carries on business outside British India in a name other than his own, a suit against him in the name of the firm is not maintainable. 36 Bom. L. R. 983=1934 Bom. 467. See also 149 I.C. 998=1934 L. 147; 1939 Sind 172.

APPLICABILITY OF RULE.—A plaintiff is entitled to sue a defendant, in the name of the firm, in respect of a firm transaction under R. 10; his residence is of no importance to determine jurisdiction. 10 I.C. 895. Death of sole proprietor of firm—Suit in the name of firm when can be instituted. 89 I.C. 22=23 A.L.J. 961. When a firm is only of one person a suit in the name of the firm is incompetent and will not lie under O. 30, R. 10. I.L.R. (1939) Kar. 275=A.I.R. 1939 Sind 172. See also 158 I.C. 25. When a person is sued not in his own name but in the name which he adopts for the purpose of dealings, this does not mean that another person who also has used that name either independently or by transfer of business before the suit, *ipso facto* has made himself liable for the debts incurred by the first person. A.I.R. 1940 Sind 191. One man cannot constitute a firm and a person trading as a firm under his own or an assumed name may be sued in his trading name under R. 10 but he cannot sue in that name. 140 I.C. 519=34 Bom.L.R. 1112=1932 B. 516. (25 Bom.L.R. 7, Foll.) 158 I.C. 25=16 P.L.T. 649. When such a person dies leaving sons who are all minors, if the business

ORDER XXXI.

Suits by or against Trustees, Executors and Administrators.

1. In all suits concerning property vested, in a trustee, executor or adminis-

Representation of benefi-
ciaries in suits concerning
property vested in trustees, etc.

trator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made parties.

Joinder of trustees, executors
and administrators.

2. Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them :

Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside British India, need not be made parties.

NOTES.

is carried on by another adult person as guardian or agent in the old name of their father, the name becomes the name of the minors. They are not, however, partners, which relationship can be created only by contract. A *hundi* drawn in favour of the business name is really in favour of the minor sons; and if the *hundi* becomes payable when they are still minors, they can avail themselves of S. 6 of the Limitation Act, and bring a suit on it after the minority ceases. The mere fact that there was a manager who could have sued during their minority cannot make any difference. Nor will the fact of the *hundi* being in a name not their own disentitle them to the benefit of S. 6, Limitation Act. 158 I.C. 25=16 P.L.T. 649. See also 160 I.C. 893=1936 O.W.N. 221=1936 O. 245. Business conducted by guardian on behalf of minors in firm name. A decree obtained *ex parte* in a suit instituted against the firm in the firm name is not a decree against the minors and cannot be executed against them or their property, because the minors are not parties to the decree. 44 L.W. 310=1936 M. 707=71 M.L.J. 373. Sole proprietor of firm, death of.—Suit in name of the firm, when can be instituted. 1926 A. 161 (2). See also 149 I.C. 998=1934 L. 147. Suit under—Right of defendant to set up counter-claim—Counter-claim whether need be given separate title. 32 Bom.L.R. 212.

O. 31, R. 1: SCOPE AND APPLICATION OF RULE.—R. 1 is not applicable to a suit for a declaration of the plaintiff's right to worship in a temple and for an injunction restraining the defendant from interfering with his right. 63 I.C. 963=13 Bur.L.T. 183. See also 2 Pat. L.J. 306=39 I.C. 779.

TRUSTEE.—Under R. 1 a beneficiary is not a necessary party to a suit as he can be represented by his trustee. 18 I.C. 959=17 C. L.J. 233. Where the interest of the trustees is adverse to that of the beneficiaries, the beneficiaries must be added as parties. 13 M. 197. See also 12 M.L.J. 355.

BENEFICIARIES.—In suits between beneficiaries of property vested in trustees of executors and third persons, beneficiaries must be

represented by trustees or executors. 50 I. C. 509=11 Bur.L.J. 249. Where an administratrix creates a mortgage without sanction of Court, beneficiaries are necessary parties to the same. 51 B. 16=98 I.C. 915=1927 B. 49.

SHEBAIT.—*Shebait* of an idol can sue for possession of property belonging to the idol. 18 I.C. 959=17 C. L. J. 233. In a suit against a temple all the trustees are necessary parties even though there is an agreement between them authorising one of them to represent the temple. 1922 M. 405=77 I.C. 942.

EXECUTOR.—No one but an executor is competent to prosecute a suit as representative of the deceased. 55 I.C. 504.

ADMINISTRATION SUIT.—In an administration suit by a legatee the executor is the only necessary party. The other legatees need not be joined as parties defendants. It would suffice for a decree to be made and the other parties either brought on record or notice given to them if that would suffice at the time of the reference if their interests were likely to be affected. 58 C. 77=132 I. C. 904.

ADMINISTRATOR.—One of co-administrators of an estate can sue to recover rent with consent of the other administrators who are impleaded as *pro forma* defendants. 53 I.C. 478 (1).

O. 31, R. 2.—Where a suit is instituted against a trustee, all the trustees should be impleaded. If not, no decree can be made against any of the trustees. O. 1, R. 9 which provides that no suit can fail for non-joinder of parties does not mean that only one trustee may be sued in contravention of O. 31, R. 2, and a decree passed against the trustee singled out for the suit. 55 A. 687=1933 A.L.J. 1393. Where a suit is not one by or against trustees, executors or administrators, but a suit against the Idol, it seems doubtful whether O. 31, R. 2 has any application, for it cannot be said that the property in such a case is vested in a trustee executor or administrator. 1939 O.W.N. 346=A.I. R. 1939 Oudh 145.

Husband of married executrix not to join.

3. Unless the Court directs otherwise, the husband of a married trustee, administratrix or executrix shall not as such be a party to a suit by or against her.

ORDER XXXII.

Suits by or against Minors and Persons of Unsound Mind.

1. Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

NOTES.

O. 32; R. 1: APPLICATION OF RULE.—O. 32 has no application when the minor happens to be a ward under the Court of Wards, and a Civil Court in which such a minor is sued has no power to appoint a guardian *ad litem* for him or to remove a guardian who has been acting for him. 15 Pat. 667=17 Pat. L.T. 899. O. 32 does not directly apply to proceedings in execution. 64 I.C. 25=35 C.L.J. 9. See also 104 I.C. 357. Therefore, in determining whether the minor is sufficiently represented in the execution proceedings, Court is at liberty to look at the substance of the transaction. 109 I.C. 521; 64 I.C. 25=35 C.L.J. 9; 1929 M. 275.

SCOPE OF RULE.—This order lays down the form in which a minor should appear as a party and this form should be strictly followed. 5 C. 450. Where plaintiff is really a minor, case could not be proceeded with until a next friend comes on record. 3 R. 239=1925 R. 325. Suit by minor *in forma pauperis*—Next friend need not be a pauper. 37 C.L.J. 394=1923 C. 656. Suit must be brought in name of minor and not in name of next friend as representing the estate of the minor. 11 C.L.R. 15; 14 C. 159 (F.B.). See also 13 M. 480; 19 M. 127. General rule is that, although a minor may appear by an attorney or pleader, he can only plead or conduct the suit by his guardian. 16 M. 344. Consent of a minor to institution of a suit by next friend is immaterial. 3 M. 34. Suit filed against minor as major—*Ex parte* decree—Objection raised in execution—Restoration of suit—Guardian *ad litem* appointed and suit decreed—Suit taking effect from date of original filing. 1930 A. L.J. 938=1930 A. 644. Suit on behalf of alleged minor—Plaintiff found to be major—Procedure to be followed. See 1938 O.W. N. 779. There is no true analogy between the position of a *de facto* guardian of a minor under the Mahomedan Law and the position of a next friend or guardian *ad litem* under O. 32, C.P. Code. The next friend or guardian *ad litem* under O. 32 is not a party to the suit in the true sense of the word. He is there to look after the interests of the minor. Though a *de facto* guardian as such cannot give a valid discharge, if he is the next friend or guardian *ad litem* in the suit, he can, with the leave of the Court, give a valid discharge or settle or compromise on behalf of the minor. I.L.R. (1940) Kar. 200=190 I.C. 253.

EVIDENCE.—Question whether a person is a minor or not should be decided by positive evidence, and not by his appearance. 1864 W.R. 304. A certificate of guardianship is not evidence of minority, nor a horoscope. 17 C. 842.

COSTS.—Court may direct costs to be paid by next friend personally in proper cases. See 1927 M. 1023=106 I.C. 131.

DEMAND OF SECURITY FOR COSTS.—There is no provision in Code for calling upon next friend to provide security for costs though it is open to Court to make an order, after the hearing, for costs against a next friend and to call on him to provide security in the event of his retiring. [O. 32, Rr. (4) and 8 (1)]. Interest of the other parties to the suit are sufficiently protected by the power they have in a proper case of moving the Court either to stay the suit as not being for benefit of the infant, or if there is a just cause other than the poverty of the next friend, to have him removed. It is undesirable to call on the next friend to provide security for costs. 1934 A. 458 (1).

ILLUSTRATIVE CASES.—Where Court appointed a person other than a certificated guardian, the next friend of the minor, defective service of notice upon the guardian under R. 4 (2) is only an irregularity and the minor is properly represented. 13 I.C. 594. When plaintiff although a minor sues in her own name, and defendants take no objection till suit has been disposed of by appellate Court, they cannot raise any objection in second appeal, and after plaintiff has become a major. 19 M. 127. Objection as to minority cannot be taken after remand, if the point was not urged in appellate Court. 13 C. 189. Guardian *ad litem*—Gross negligence—Effect. 33 I.C. 481. Where a minor files a plaint and before it is put up before the Court, attains majority, and applies to be allowed to proceed with it, the plaint must be deemed to have been properly presented on the day of application to proceed with the plaint. 46 I.C. 747=16 A.L.J. 737. Appeal by an infant not represented by a guardian *ad litem* is not entertainable. 52 I.C. 985=29 C.L.J. 419. It is no doubt open to the minor on attaining majority to drop the suit as not properly instituted, but he is not bound to do so; he could affirm the previous proceeding and continue the suit. 44 M.L.J. 515=1923 M. 553. To reject the plaint filed by a minor without a next friend is improper. Court has to grant time for next

LOC. AM.—[LAHORE AND N.-W.F.P.] To O. 32, r. 1, the following paragraph shall be added:—

“Such person may be ordered to pay any costs in the suit as if he were the plaintiff.”

2. (1) Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

Where suit is instituted without next friend, plaint to be taken off the file.

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit.

Guardian for the suit to be appointed by Court for minor defendant.

3. (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

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friend to come in, 4 L. 490=75 I.C. 1028. Decree against a properly represented minor is binding upon him, but if he has not been properly represented, the decree is a nullity. 15 I.C. 903=9 A.L.J. 653. Certificated guardian of a minor must be appointed guardian *ad litem* unless for special reasons Court thinks that some one else should be appointed in the interests of the minor. 22 I.C. 240. Decree obtained on behalf of a minor cannot be set aside merely on the ground of non-compliance with R. 3 (1) and (2). 49 I.C. 954. Minor attaining majority during pendency of suit—Decree based on compromise passed with guardian *ad litem* as party—Minor can set aside the same. 1928 M. 294=55 M.L.J. 374=51 M. 763.

O. 32, R. 2.—R. 2 applies to cases under the Punjab Tenancy Act. 35 P.L.R. 428. When suit is brought by a minor as a major and it is found that plaintiff is a minor, Court can allow a next friend to come in and proceed with the suit. 16 M.L.J. 13. See 13 B. at 11. See also 3 R. 239=1925 L. 325. Where suit is instituted by a person who is not the proper next friend of a minor, Court must take the suit off the file and should not proceed to try other issues in the suit. 115 I.C. 456. Minor cannot be next friend of other minors. 1925 O. 178. As to how the question whether a person is a minor or major is to be decided, see under R. 1. As to when objection is to be taken, see 19 M. 127 and 13 C. 189. Where a suit is filed by a minor, it is open to the defendant to apply to have the plaint taken off the file under O. 32; R. 2. But if he fails to avail himself of this, he cannot be heard afterwards to say that the proceedings were null and void because the plaintiff was a minor. 1939 N.L.J. 577=A.I. R. 1940 Nag. 99. Persons sued as members of firm—Minor member impleaded as major—Decree in suit not bad. 27 A.L.J. 204=114 I.C. 881=1929 A. 148.

O. 32, Rr. 2 and 15.—Where a suit was instituted in the name of joint family firm consisting of R and his minor son by N. holding a power of attorney on behalf of R, and it was found during the pendency of the suit

that R was of unsound mind but was not so at the time the suit was instituted. Held, that in the absence of any finding that the suit had not been properly instituted, Court had no power to order the plaint to be taken off the file. Held, further, that the rules relating to suits on behalf of minor could not be strictly applied under R. 15 to the circumstances of the case and that R. 2 did not apply as the suit was properly instituted. 161 I.C. 646=1936 L. 7.

O. 32, R. 3: MEANING OF WORDS.—“On being satisfied” meaning of. 16 M. 344. See 14 C. 204 (209). Also 17 C. 849, under R. 1. “Proper person”. 24 A. 386. The words “any guardian of the minor appointed or declared by an authority competent in that behalf” in sub-r. (4) apply to a guardian appointed under a will of a Hindu father. 31 B. 413; 14 C. 212.

SCOPE OF RULE.—Provisions of this rule are imperative, and if not substantially complied with, any decree passed against the minor is a nullity. 28 A. 137; 30 C. 1021 (P.C.); 151 I.C. 1066=11 O.W.N. 1036=1934 Oudh 475; 29 A. 328; 29 A. 290; 28 A. 416; 11 C. at 405; 24 C. 25; 30 C. 613; 1929 C. 586; 139 I.C. 113=1932 L. 521; 1937 Rang. 126. Before it is competent for Court to appoint a guardian, there must be a suit in which the minor is a defendant in existence. 11 C. at 405. Suit against minor—Absence of appointment of guardian *ad litem*—Decree is a nullity as against him. See 55 C. 124; 57 M. 973. But see 10 Luck. 293=11 O.W.N. 1403=1935 Cudh 183, where it was held that the absence of a formal order by the Court appointing a guardian *ad litem* for a minor defendant is only an irregularity and not an omission fatal to the suit. See also 1935 N. 235; 100 I.C. 468=28 Punj.L. R. 627; 92 I.C. 241=1926 N. 267; 15 I.C. 903=9 A.L.J. 653; 22 I.C. 240; 61 P.R. 1915=31 I.C. 45; 1940 A.L.J. 85=1940 All. 202. Where a person acts as the *de facto* guardian *ad litem* of a minor defendant, the mere absence of an order formally appointing him as guardian *ad litem* is not fatal to the validity of the proceedings. 40 P.L.R. 403=A.I.R. 1938 Lah. 709.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

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Where the defendant in a suit is a minor that Court has to see not merely that a guardian is appointed, but also that the guardian has consented to act. Where notices are served on minor defendants through their mothers as guardians, but no appearance is made on their behalf, nor any order of Court passed appointing the mothers as guardians, or showing that the proposed guardians consented to act as such on behalf of the minor defendants, the decrees passed in the suits against the minors must be held to be mere nullities. 16 Pat. 632=19 Pat.L.T. 259=A.I.R. 1938 Pat. 97. Though mere absence of recording or formal order of appointment does not vitiate proceedings; where minor had good defence but no such defence is raised and guardian's interest is adverse, the proceedings may be vitiated. 55 C. 1241=32 C.W.N. 665=1928 C. 844; 57 M. 973=1934 M. 386=66 M.L.J. 609. Setting aside decree—Grounds—Notice not served to all parties—Wrong entry of nature of suit in notice—Guardian appointed and minor represented—Decree whether liable to be set aside: 113 I.C. 829=26 A.L.J. 834=1928 A. 621. A guardian must be appointed by the Court, even in cases, when a guardian has been appointed under the Guardian and Wards Act. 24 C. 25. See also 1930 C. 455. The rule contemplates a case where the guardian appointed under the Guardian and Wards Act sues to have it declared that the minor was not adopted by her husband. 30 C. 613. The provisions of O. 32 relating to "suits by or against minors" are not directly applicable to proceedings in execution. 64 I.C. 25=35 C.L.J. 9. See also 104 I.C. 357; 143 I.C. 228=1933 Pesh. 63. R. 3 applies to the institution of suits and not for the mere service of notices. 15 L.R. 8 (Rev.). R. 4 and other rules as to appointment of guardian must be read with R. 3. 36 I.C. 794=4 L.W. 362. O. 32 is not exhaustive and Court can dismiss a suit filed by a next friend, if it is not in the interests of minor. 25 I.C. 738=1 L.W. 875. R. 3 does not apply to commutation proceedings under Bengal Tenancy Act. 100 I.C. 146=1927 C. 374. As to applicability to proceedings under U. P. Encumbered Estates Act; see 1939 A.L.J. 411. Where a minor is not in any way prejudiced by not having a guardian during the comparatively short period of three months when he was a minor, suit does not fall under R. 3. 149 I.C. 986=15 L. 645=36 P.L.R. 315=1934 L. 274 (2). Where a suit is instituted against certain persons on the footing that they were minors the Court, by appointing guardian *ad litem* under O. 32; R. 3; must be taken to have arriv-

ed at a finding of fact of their minority and the onus of proving that they were majors at the time of the institution of the suit is on the persons alleging it to be so. A.I.R. 1938 Rang. 468. A decree passed against a minor girl for restitution of conjugal rights is a nullity. (31 A. 572 (P.C.); Rel. on.). 170 I.C. 532=A.I.R. 1937 Rang. 226.

OBJECT OF RULE.—The object of Rr. 3 and 4 is that the minor in suit should be represented by a fit person so that his interests will be properly guarded. 7 O.L.J. 219=56 I.C. 313. It is obligatory on the Court under R. 3 (1) to appoint a proper person to be guardian of a minor defendant for the suit. 34 C.L.J. 293=26 C.W.N. 781. See also 26 A.L.J. 777; 1927 L. 861. Where a person purposed as a guardian *ad litem* appeared and represented the minor in the proceedings against him, the absence of a formal order appointing him as guardian would not be much material. 69 C.L.J. 288=43 C.W.N. 519=A.I.R. 1939 Cal. 471. See also 1938 Lah. 709=40 P.L.R. 403. Where decree is obtained against a minor without having a guardian appointed for him or with a disqualified person so appointed the result is if the minor was not represented, that the decree must be regarded as a nullity. But where a qualified person was appointed guardian but there was some irregularity in the proceedings or where, on account of the fraud of the opposite party, the appointment of one person as guardian was obtained instead of another who would have conducted the case better on behalf of the minor; the decree is not *ipso facto* a nullity. In such a case, the irregularity or fraud must be shown to have prejudiced the minor before he is entitled to appropriate relief. 134 I.C. 188 (2)=1931 M. 674. (Case-law reviewed.) The appointment of guardian by a Court of First Instance enures not only for the term of the proceeding in that Court but also for purposes of appeal. 22 M. 187; 39 C.L.J. 590; see also 59 C. 1108=1932 C. 888; and for purposes of execution proceedings. 41 C.W.N. 531=1937 C. 259. Defective appointment—Representation of minor in suit—No order appointing guardian—Compromise by person professing to act as guardian—Invalid. 35 A. 487=40 I.A. 182=25 M.L.J. 492=21 I.C. 288 (P.C.); 33 I.C. 805=14 A.L.J. 589; 26 O.C. 113=74 I.C. 409. Where a father acted as the guardian *ad litem* of his minor son, the fact that there was no formal order of Court appointing him will not vitiate the proceedings, if the minor was in no way prejudiced thereby. 74 I.C. 821=1924 O. 178; 26 O.C. 113; 74 I.C. 409=1923 O. 206; 4 Pat.L.J. 213=48 I.C. 245; 35 I.C. 868; 33 I.C. 941. Where no formal

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order was made appointing a guardian *ad litem* as required by R. 3; and no sanction was sought; or granted by the Court to the compromise as required by R. 7, the irregularities are very serious, and the compromise is not binding upon the minor. The fact that the minor was near his majority, that he took an active part in the proceedings and that he was effectively represented by his grandmother although no order of appointment was made, will be of no avail. 39 P.L.R. 125=170 I.C. 831. Absence of formal order—Reference to arbitration—Minor substantially represented in proceedings by guardian—Award not a nullity. 71 I.C. 7. *See also* 152 I.C. 839; 42 P.L.R. 114 (Filing award against minor). Representation of minor member of a joint Hindu family by the manager. *See* 53 A. 427=129 I.C. 560=1931 A. 136; 143 I.C. 228=1933 Pesh. 63. A decree based on the award was held to be not binding on the minor if he was not properly represented as required by R. 3 and the irregularity cannot be condoned. 44 B. 202=22 Bom.L.R. 266. Mere fact that leave of Court was not obtained for a reference to arbitration on behalf of a minor will not vitiate the reference and the award where the interests of the minor have in no way been prejudiced. 71 I.C. 7. The appointment of father as guardian *ad litem* without his consent and who does not appear and passing decree *ex parte* even against the minor is illegal. 52 I.C. 636; 38 A. 315=35 I.C. 707=14 A.L.J. 353; 25 I.C. 620. A father should not be appointed guardian of his minor son, where there is a clear conflict of interest between them. 15 C.L.J. 446=17 C.W.N. 219. *See also* 26 A.L.J. 777. The fact that a respondent decree-holder was not properly represented at the instance of the appellant judgment-debtor does not make a decree passed in the appeal in favour of that respondent void and incapable of execution. 37 A. 179=13 A.L.J. 179; 34 A. 321=9 A.L.J. 290. Defective appointment—Omission to consult minor's wishes is not a defect. 56 I.C. 313; 2 P. 273=4 Pat.L.T. 329. Defective appointment—*Ex parte* decree—Suit to set aside. 4 Pat.L.T. 147=2 P. 335. No person can be appointed guardian without his consent. Where Court has given sanction and approval for appearance of a person as guardian, the absence of formal order of appointment is not always fatal to the proceeding. 3 Pat.L.T. 451=66 I.C. 137. A mere irregularity in the appointment of guardian *ad litem* will not render the decree passed against minor null and void, unless it is proved that the minor's interest has suffered thereby. 66 I.C. 137. Where no notice or summons is served on the guardian of the minor, and no order was made appointing guardian and there was no appearance by the so-called guardian at any stage of the proceedings a decree passed against minor is not binding on him. 3 Pat.L.T. 451=66 I.C. 137.

See also 26 C.L.J. 258; 37 A. 179; 20 C.L.J. 469; 2 P. L. T. 617. For determining whether a minor was sufficiently represented in the execution proceeding, Courts can look at the substance of the transaction. 64 I.C. 25=35 C.L.J. 9=109 I.C. 521. An execution sale held of a minor's property without appointing a guardian *ad litem* is materially irregular and the guardian of the minor can set it aside. 29 I.C. 211. A duly appointed guardian for a suit is fully entitled to represent the minor in all proceedings which take place in execution of the decree. 48 I.C. 39; 41 C.W.N. 531=1937 C. 259. A decree against a minor without a guardian *ad litem* at the time is void, as also all further proceedings. Subsequent appointment of a guardian in execution proceedings will not validate the decree nor other proceedings in its execution. 35 I.C. 154=31 M.L.J. 39; 18 C.L.J. 18=17 C.W.N. 549. *See also* 1928 M.W.N. 275. Failure to appoint guardian for the minor does not vitiate execution proceedings since the provisions of O. 32 do not in terms apply to execution. 190 I.C. 513=1940 Lah. 241. Court has no jurisdiction to sell the minor's interests even though they were safeguarded by other defendants having a common defence. 35 I.C. 154=31 M.L.J. 39. If notice of appointment of guardian *ad litem* is not given to the minors concerned or their mother, they are not bound by the decree passed against the guardian *ad litem* who was a Court Nazir and who had no funds or instructions to defend the suit. 41 A. 235=17 A. L. J. 249.

DUTY OF COURT.—When defendant in a suit is a minor, it is the duty of Court not only to appoint a guardian *ad litem* for him, but also to satisfy itself that the proposed guardian is a fit and proper person to represent the minor in the suit; to put in a proper defence, and generally to act in the interests of the minor. 36 Bom.L.R. 844=1934 B. 396.

FIT PERSON—ADVERSE INTEREST.—The provisions of R. 3 are mandatory and leave no option to Court and they cannot be ignored or overlooked. In a suit against an adult member of a joint Hindu family and his minor nephew on a hundi executed by the former (and not by the minor's father), the uncle is not the proper person to be appointed as guardian of the minor inasmuch as his interests are necessarily *adverse to those* of the minor. The appointment of another guardian *ad litem* is therefore imperative in such a case. 151 I.C. 1066=11 O.W.N. 1236=1934 O. 47. As to adverse interest *see also* 1937 A.L.J. 340=1937 All. 374; 1937 A.L.J. 468=1937 All. 562; 1938 Pat. 437; 1938 Rang. 468. The fact that the guardian of the minor is his step-brother would not alone be sufficient justification for holding that he is intentionally harming the interests of the minor or that his interest is in any way adverse to that of the minor, especially where he himself is to be equally affected by the

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decree with the minor. 1935 L. 44. The fact that the person appointed as guardian *ad litem* of a minor defendant happens to be an executant of the deed on which the suit is brought is not invalid. It cannot be said that he is not a fit person to be appointed. 10 Luck. 293=1935 Oudh 183. Where a mortgage debt due to a Mahomedan was fraudulently assigned to the plaintiff by his widow without regard to the interests of her minor daughter who was also entitled to the debt, and the assignee sued to recover the mortgage debt making the mother and daughter parties thereto, *held*, that the mere fact the mother executed the assignment was not, as a matter of law, sufficient to hold that her interest was adverse to that of the minor or to invalidate the appointment of the mother as the guardian *ad litem* of the minor. 38 L.W. 539=1933 M. 806=65 M. L. J. 548. When a person has executed a document on behalf of a minor, and a suit is filed on that document against the minor, the question whether that person can be validly appointed guardian *ad litem* is not a pure question of law, but one of fact, and no hard and fast rule of law can be laid down. There is, however, nothing in the Code, or in the authorities laying down that such a person cannot be appointed guardian; under certain circumstances, he may be a proper person to act as a guardian. 36 Bom.L.R. 844=1934 B. 390; 52 M. 275=1925 M. 213=56 M.L.J. 175 (F.B.); 29 L.W. 393=1929 M. 393. There is nothing in the Code permitting the appointment of joint guardian *ad litem*. Where, in a suit on mortgage against two persons and their minor children, the Court, without issuing any notice to the minors or other persons who might be fitted to act as guardians of the minors and without taking any steps to comply with the provisions of Rr. 3 and 4, passes an *ex parte* order appointing the two persons as guardians *ad litem* jointly for the same minors and the interests of the guardians *ad litem* are adverse to those of the minors, the appointment of the guardians *ad litem* is defective. 163 I.C. 499=1936 R. 237.

PROCEDURE.—Defendant alleged to be minor—Issue to be framed and decided—Court's opinion about defendant's appearance is not sufficient. 96 I.C. 273=1926 P. 489. It is not necessary for appointment of a guardian under R. 3 (6) that the list of relatives mentioned in sub-R. (3) should be exhausted. 142 I.C. 629=1933 L. 337. Nor will the appointment be irregular merely because the wishes of the natural guardian were not considered by Court. 61 C. 227=1934 C. 474. In a suit brought by a next friend on behalf of a minor, the real question to be considered by Court is whether the suit is on its merits in the interests of the minor, and the Court is not justified in dismissing the suit on the ground that the suit was filed by the next friend for his own ends or that the next friend had an adverse interest. 1933

M.W.N. 839. When a certificated guardian of a minor is properly appointed as guardian *ad litem* of the minor in a suit he does not *ipso facto* cease to be guardian *ad litem*; merely because some other person has got himself appointed guardian of the person and property of the minor by some other Court. There is no inherent disqualification in all persons other than the certificated guardian to be a guardian *ad litem*. 61 C. 1023=39 C.W.N. 293=1935 C. 160; 58 M. 802=1935 M. 795=69 M.L.J. 177. *See also* 18 Pat. 593=1939 Pat. 601. Where a guardian *ad litem* is appointed for a minor defendant and a decree is passed in order that the decree may be set aside, it must be shown that actual prejudice was caused to the minor. Mere possibility of prejudice is not enough. 1934 L. 132. The order for the appointment of a guardian should be made before the minors are asked to file a written statement and not at a late stage of the case when it comes up for hearing of the evidence. The procedure is defective. But in such a case the decree will bind the minor unless it is shown that the defect of procedure has prejudiced him. 148 I.C. 456=11 O.W.N. 393=1934 O. 171.

PRACTICE IN CALCUTTA HIGH COURT.—According to the practice of the Calcutta High Court up to the year 1936, a guardian *ad litem* appointed in a suit ceased to be the guardian on the passing of the decree and the decree-holder was bound to have a new guardian *ad litem* appointed at the execution stage. 69 C.L.J. 288=43 C.W.N. 519=1939 Cal. 471.

NOTICE.—R. 3 (4) imperatively requires service of notice upon the minors. 43 I.C. 728. *See also* 15 P.L.T. 380=1934 Pat. 427; 14 P.L.T. 441=1933 P. 473. Failure to comply is only an irregularity and where the minor is not prejudiced the proceedings are not vitiated. 88 I.C. 294=1925 A. 548; 15 P.L.T. 380=1934 P. 427. *See also* 42 I. C. 421=6 L.W. 272. In absence of proof of fraud or collusion, the mere fact that notice of appointment of a guardian *ad litem* was not issued to the minor, does not entitle him to treat the proceedings as a nullity. (Case-law reviewed.) 75 I.C. 440=5 L. 38 1923 L. 575; 43 I.C. 728; 117 I.C. 475; 149 I.C. 1144=1934 P. 111=15 P.L.T. 160. *See also* 1937 Cal. 658. There is nothing in the Code requiring plaintiff to issue a fresh summons to a minor defendant after he attains majority. (*Ibid.*) When appointment of a guardian *ad litem* is proposed, notice must always be sent to the natural guardian of the minor or the person with whom he lives. 36 I.C. 795=4 L.W. 362. The appointment of a guardian *ad litem* for a minor defendant before the date fixed for the hearing of the notice issued to the minor under O. 32, R. 3 (4) and without the consent of the minor may under certain circumstances be regarded as defects or irregularities condonable under S. 99. 154 I.C. 961=1935 O.W.N. 333=1935 Oudh 287. But

(4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

¹[(5) A person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional Court and any proceedings in the execution of a decree.]

LOC. AMS.—[ALLAHABAD AND OUDH.] Add as a proviso to O. 32, r. 3 (4):—

"Provided that if the minor is under ten years of age no such notice shall be issued to him."

[BOMBAY.] The words "to the minor and" in line 2 of sub-r. (4) of r. 3 of O. 32 shall be deleted.

[LAHORE.] The following sub-rules were substituted for sub-rr. (3) and (4).

"(3) The plaintiff shall file, with his plaint a list of relatives of the minor and other persons with their addresses, who *prima facie* are most likely to be capable of acting as guardian for the suit for a minor defendant. The list shall constitute an application by the plaintiff under sub-r. (2) above.

(4) The Court may, at any time after institution of the suit, call upon the plaintiff to furnish such a list, and, in default of compliance, may reject the plaint.

(5) Any application for the appointment of a guardian for the suit and any list furnished under this rule shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor, and that each person proposed is a fit person to be so appointed.

(6) No order shall be made on any application under this rule, except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule:

Provided that the Court may, if it sees fit, issue notice to the minor also."

[MADRAS.] O. 32, rr. 3 and 4. Substitute r. 3 for old rr. 3 and 4:—

Qualifications to be a next friend or guardian. 3. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit:

Provided that the interest of that person is not adverse to that of the minor and that he is not in the case of a next friend a defendant, or in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than the guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed as the case may be.

(3) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for the minor.

(3a) A person appointed under sub-rule (3) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout

LEG. REF.

¹ Sub-rule added by Act XVI of 1937.

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when a Court sanctions a compromise entered into by such a guardian, which, on the face of it, is injurious to the interests of the minor, it acts illegally in that it fails to consider whether the minor's interests have been properly safeguarded by his would-be guardian. Such a compromise ought not to be sanctioned and will be set aside in revision by High Court. (*Ibid.*) A Court can appoint an officer of Court as guardian only when there is no other guardian available. (*Ibid.*) See also 1934 L. 132. When all the near relatives of the minors are parties to the suit and their interests are likely to clash with those

of the minors, no notice need be issued on such relations. 114 I.C. 101=1929 Sind 32. An order appointing a guardian *ad litem* of a minor defendant without notice to the minor is without jurisdiction. 2 P. L. T. 116=6 P. L. J. 82; 32 I.C. 380. It is quite open to the Court to make an order appointing the mother as guardian of her minor sons on the application from their father stating that he did not desire to be their guardian but he desired that his wife in whose charge the minors were to be their guardian. It is not necessary for the mother in whose care the minors are to notify to the Court her willingness to Act. 1940 All. 467. See also 16 Pat. 623=1938 Pat. 97=Pat. L. T. 259. In appointing a guardian *ad item* the wishes of the minor defen-

all proceedings arising out of the suit including proceedings in any appellate or revisional Court and any proceeding in execution of a decree.

(4) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff. The application, where it is by the plaintiff shall set forth, in the order of their suitability, a list of persons (with their full addresses for service of notice in Form No. 11-A set forth in Appendix H hereto who are competent and qualified to act as guardian for the suit for the minor defendant. The Court may, for reasons to be recorded, in any particular case, exempt the applicant from furnishing the list referred to above.

(5) The application referred to in the above sub-rule whether made by the plaintiff or on behalf of the minor defendants shall be supported by an affidavit verifying the fact that the proposed guardian has not or that no one of the proposed guardians has any interest in the matters in controversy in the suit adverse to that of the minor and that the proposed guardian or guardians are fit persons to be so appointed. The affidavit shall further state according to the circumstances of each case, (a) particulars of any existing guardian appointed or declared by competent authority; (b) the name and address of the person, if any, who is the *de facto* guardian of the minor; (c) the names and addresses of persons, if any, who in the event of either the natural or the *de facto* guardian or the guardian appointed or declared by competent authority, not being permitted to act, are by reason of relationship or interest or otherwise, suitable persons to act as guardians for the minor for the suit.

(6) An application for the appointment of a guardian for the suit of a minor shall not be combined with an application for bringing on record the legal representatives of a deceased plaintiff or defendant. The application shall be by separate petitions.

Application for appointment of guardian to be separate from application for bringing on record the legal representatives of a deceased party.

(7) No order shall be made on any application under sub-r. (4) above except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or where there is no guardian, upon notice to the father or other natural guardian of the minor, or where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule. The notice required by the sub rule shall be served six clear days before the day named in the notice for the hearing of the application and may be in Form. No. 11 set forth in Appendix H hereto.

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dant, should if possible, be considered. 2 P.L.T. 116=6 P.L.J. 82. The natural father of a minor is his proper guardian to assert his right as adopted heir against rival claimants. 43 M. 288; 22 L.W. 560=49 M. L.J. 549. A mother or in her absence a grand-mother may be appointed, and the fact that she is a *pardanashin* lady is not a disqualification. 2 P.L.T. 116=6 P.L.J. 82. Notice under R. 3 (4) for appointment of a guardian *ad litem* must be served upon the natural guardian. 45 I.C. 253=4 Pat.L.W. 373. See also I.L.R. (1937) 1 Cal. 586. If a guardian *ad litem* is guilty of negligence and makes no attempt to protect the minor's interests decree will not be binding on minor. (*Ibid.*) See also 1932 A.L.J. 1128=1933 A. 116. Where an officer of Court is appointed as guardian *ad litem*, due notice of such appointment should be given to that officer and the suit should not be dismissed on the mere ground that process fees are not paid for issue of summons to him. 35 P.R. 1912=11 I.C. 317.

NEGLIGENCE OF GUARDIAN—APPOINTMENT OF FRESH GUARDIAN.—Where *ex parte* decree against a minor was set aside by Court on the ground of negligence of minor's father who acted as guardian, and Court removed the father from guardianship and appointed

mother in his stead. *Held.* that the Court had jurisdiction to do so. 55 A. 136=1932 A.L.J. 1128=1933 A. 116.

OFFICER OF COURT AS GUARDIAN.—Omission to adduce evidence when amounts to negligence. 44 M.L.J. 299=1923 M. 465. In absence of proof that guardian *ad litem* could have adduced any useful evidence or was aware of such evidence in the prior suit, it did not constitute negligence or fraud. (*Ibid.*) See also 8 P. 558=1929 P. 360. Officer of Court, guardian—Guardian's address and whereabouts known—Procedure illegal—Decree—Setting aside—Inherent power of Court. 1922 M. 485. When suit is filed against a minor in respect of whom proper guardian has already been appointed but whose identity or appointment is not known to plaintiff Court is competent to appoint an officer of the Court as guardian *ad litem*. 33 I.C. 481. Guardian *ad litem*—Mother acting as such—Failure to defend suits—Right of minor to set aside decree. 29 I.C. 220=13 A.L.J. 437. Guardian *ad litem* does not continue in his office after decree. 84 I.C. 68=1925 C. 23. Procedure to appoint guardian for a lunatic. 62 I.C. 770. Where proposed guardian does not appear, Court must be moved to appoint one of the officers as guardian *ad litem*. Otherwise decree will be null and void. (15 C.L.J. 3 Foll.) 17 I.C. 263=16 C.L.J. 318. The object of Rr. 3

(8) Where the application is by the plaintiff, he shall, along with his application and affidavit referred to in sub-r. (4) and (5) above, produce the necessary forms in duplicate, filled in to the extent that is possible at that stage for the issue simultaneously of notices to two at least of the proposed guardians for the suit to be selected by the Court from the list referred to in sub-r. (4) above, together with a duly stamped voucher indicating that the fees prescribed for service have been paid.

If one or more of the proposed guardians signify his or their consent to act, the Court shall appoint one of them and intimate the fact of such appointment to the person appointed by registered post. If no one of the persons served signifies his consent to act, the Court shall proceed to serve simultaneously another selected two, if so many there be, of the persons named in the list referred to in sub-r. (4) above, but no fresh application under sub-r. (4) shall be deemed necessary. The applicant shall, within three days of intimation of unwillingness by the first set of proposed guardians pay the prescribed fee for service and produce the necessary forms duly filled in.

(9) No person shall, without his consent, be appointed guardian for the suit. Whenever an application is made proposing the name of a person as guardian for the suit, a notice in Form No. 11-A set forth in Appendix H hereto shall be served on the proposed guardian, unless the applicant himself be the proposed guardian or the proposed guardian consents.

(10) Where the Court finds no person fit and willing to act as guardian for the suit, the Court may appoint any of its officers or a pleader of the Court to be the guardian and may direct that the costs to be incurred by that officer in the performance of his duties as guardian shall be borne either by the parties or by any one or more of the parties to the suit or out of any fund in Court in which the minor is interested, and may give directions, for the repayment or allowance of the costs as justice and the circumstances of the case may require.

(11) When a guardian for the suit of a minor defendant is appointed and it is made to appear to the Court that the guardian is not in possession of any or sufficient funds for the conduct of the suit on behalf of the defendant and that the defendant will be prejudiced in his defence thereby, the Court may, from time to time, order the plaintiff to advance moneys to the guardian for purpose of his defence and all moneys so advanced shall form part of the costs of the plaintiff in the suit. The order shall direct that the guardian, as and when directed, shall file in Court an account of the moneys so received by him.

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and 14. is to provide that minor's interest should not suffer and that he should be properly represented in a suit filed against him. The object of giving notice to minor is that the person may not be a minor at all and the plaintiff may have by mistake sued him as a minor. Notice to guardian and other persons interested is given for the reason that a person who is guardian or who has the custody of the minor is the person best fitted to represent the minor. It is obligatory on the Court that no order should be made appointing a guardian *ad litem* unless and until the necessary notice is given under R. 3. 29 Bom.L.R. 1357=105 I.C. 537=1927 B. 613; 1934 L. 132. A person who is merely appointed to conduct a case on behalf of a minor is not a lawfully appointed guardian within the meaning of R. 3. 139 I.C. 113=1932 L. 521.

MISREPRESENTATION.—Major described as minor—Decree not binding. 49 I.C. 627. Suit by minor—*Bona fide* mistake—Amendment. 1924 L. 157. Appointment of guardian—Minor's name wrongly given—None misled in fact—Objection in execution not sustainable. 1940 A.W.R. (H.C.) 623=1940 All. 467. A compromise not expressly sanctioned by Court, though beneficial to the minors is not binding on them. 3 P.L.J. 255=46 I.C. 358 (F.B.). Reference to arbitra-

tion by next friend or guardian *ad litem* without leave of Court. 33 I.C. 941=9 Bur.L.T. 158. Period of limitation counts from date of the plaint, and not from appointment of the guardian. 4 A. 37. Where certain minors were sued as majors but they appeared in the suit through their mother as guardian and filed a written statement and Court accepted the guardian by permitting her to compromise, *held*, that the omission to formally amend the cause title of the suit as originally instituted was a mere irregularity. 13 P.L.T. 737=12 P. 117=1933 P. 104.

...O. 32, R. 3 (5).—Where a decree is passed by a competent Court against a defendant, who was a minor at the time of the institution of the suit and who attained majority during the pendency of the suit, but who was still shown in the records as a minor represented by a guardian, the decree is a perfectly good decree, and it cannot be said that such a decree is a nullity. 18 Pat. 539=A.I.R. 1939 Pat. 601. Where in an appeal to the High Court from a decree of a lower Court, it is found that a guardian *ad litem* had been appointed in the lower Court for certain minor respondents and that such guardian has been served with this notice of appeal, it is not proper for the Registrar of the High Court to appoint a fresh guardian for such minors until the existing guardian has been discharged. 191 I.C. 794. Powers and dura-

[NAGPUR.] For rr. 3 and 4 substitute the following :—

“ 3. Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit of such minor.”

[RANGOON.] The following shall be substituted for r. 3 :—

“ 3. (1) Where any of the defendants is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper guardian for the suit for such minor.

(2) For this purpose there shall be filed by the plaintiff with the plaint a list of all persons whom the plaintiff considers to be capable of acting as guardian of the minor for the suit. Such list shall be in the form of an application duly verified and requesting that one of such persons may be appointed guardian of the minor for the suit, and shall state for each of such persons whether he is a guardian appointed or declared by competent authority, or a natural guardian, or the custodian of the minor, or a stranger, and shall give the address of each of such persons.

(3) An order for the appointment of a guardian for the suit may also be obtained upon application in the name and on behalf of the minor.

(4) An application under sub-rule (2) or sub-rule (3), shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(5) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or where there is no such guardian, upon notice to the father or other natural guardian, of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

Who may act as next friend or be appointed guardian for the suit.

4. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit :

Provided that the interests of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

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tion of guardianship—Appeal filed by third person—Order of dismissal—Effect of. 1939 Rang. 144. Where a guardian appointed by Court for a minor is still due to function, not having been removed and being alive, an appeal filed by the minor under the guardianship of another person is illegal and of no effect. 1941 A.W.R. (Rev.) 927=1941 O.A. (Supp.) 801=1941 R.D. 788.

O. 32, R. 3: NAGPUR AMENDMENT.—See 1941 N.L.J. 115.

O. 32, Rr. 3, 5 and 7.—If a guardian *ad litem* has been appointed for a minor, then the karta of the family of the minor or the father of the minor cannot enter into a compromise on behalf of such minor so as to bind the minor unless the guardian *ad litem* is a party to it. It is clear from O. 32, Rr. 3 and 5, that the guardian *ad litem* alone can represent the minor. Where a compromise is entered into by the natural guardian of a minor defendant, but the guardian *ad litem* appointed for the suit is not a party to it, such compromise is not binding on the minor though the Court may have approved of it. 19 Pat. 343=1940 Pat. 663.

O. 32, Rr. 3 and 4: GUARDIAN—ABSENCE OF VALID APPOINTMENT—BINDING NATURE OF DECREE.—In cases where in fact a guardian was appointed and in fact the guardian had acted for the minor the appointment may not be capable of being called in question, on the ground of any irregularity. But where no one has appeared for the minor at all and there has been no valid appointment and the notices sent to the nominated guardian have been refused, any decree that may be

passed against the minor in such circumstances cannot be regarded as a mere irregularity. It is a wholly illegal procedure and no minor can be bound by such a decree. 1941 R.D. 658.

O. 32, R. 4: SCOPE AND APPLICATION.—R. 4 does not apply to a non-contentious proceeding in probate. 59 I.C. 435=24 C.W.N. 538. Irregularities in the appointment of guardian *ad litem* do not vitiate the proceedings in the suit. 93 I.C. 848=1926 L. 435. If personal interest of next friend conflicts with his duty towards minor, then unless there be *uberrima fides*, he cannot act as the minor's next friend. In such a case minor is not properly represented and decree in the suit would not bind him. (22 W.R. 290, Foll.) 56 I.C. 97. It cannot be stated as a universal proposition of law that in a suit on a mortgage executed by a Hindu father impleading his minor son as a defendant the father's interests are necessarily adverse to those of the minor and the father cannot properly represent the minor son in the mortgage suit. That is a question of fact; if the father-guardian fails to raise the defences open to the minor son, it follows that the minor is not properly represented and the decree made in the suit would not bind him. 17 Pat. 236=1938 Pat. 437. Under R. 4 it is necessary to see first that the father or any other person, the mother, with whom the minor is living, should be appointed as guardian. Where a father or mother is not appointed guardian of the minor nor are grounds shown for not appointing them but an uncle who has an interest adverse to the minor is appointed, there is no proper ap-

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

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pointment of the guardian of the minor. 149 I.C. 988=1934 A. 212. Where a mortgage is executed by a guardian on behalf of himself and minors in respect of property in which they were jointly interested and in a suit brought against them on the mortgage the guardian is appointed guardian *ad litem*, his interest is adverse to that of the minors as they are sued as joint-debtors, and every joint-debtor has an interest in seeing that his co-debtors do not escape from their joint liability. This being so, the decree obtained against minors is a nullity on the ground that they were not represented in the suit. 1938 Rang. 468. It is doubtful whether R. 4 can be applied to the case of a Hindu idol. 27 A.L.J. 1251=1929 A. 887.

O. 32, R. 4 (1), Allahabad Amendment.—The leave of the Court as contemplated by sub-S. (1) of R. 4 of O. 32, need not necessarily be in writing and an oral granting of leave may be inferred from the circumstances of particular cases. Where the existence of a certificated guardian for a minor is not brought to the notice of the Court in a suit by a next friend on behalf of such a minor, it cannot be held that such a next friend was acting as such with the leave of the Court as contemplated by O. 32, R. 4 (1). 1940 A.L.J. 85=1940 All. 202.

WHO CAN ACT AS NEXT FRIEND.—Next friend should be a person residing in British India. A guardian who cannot be served is useless, and where a guardian has left the country a fresh guardian should be appointed. 17 M.L.J. 179. The representation of a minor by a non-consenting guardian is no representation at all and all proceedings while the minor is under such guardianship are null and void against him. (1927 C. 488, Rel. on; 1922 P. 448 and 31 A. 572, Cons.) 161 I.C. 200=1936 Pesh. 40. The fact that the guardian of the minor is his step-brother would not alone be sufficient justification for holding that he is intentionally harming the interests of the minor or that his interest is in any way adverse to that of the minor especially where he himself is to be equally affected by the decree with the minor. 157 I.C. 801=1935 L. 44. A mother cannot act as next friend in a suit brought by minor sons against their father. 11 C. 733. Natural father of adopted son as guardian. See 49 M.L.J. 549=91 I.C. 742=1925 M. 1285. Mortgage by father before son's birth—Suit against father and minor son—Father's interest is not adverse to minor son. 97 I.C. 703=1926 M. 1146. Married woman under the old Act of 1882. See 29 A. 728; 6 C.L.J. 36. The rule of Mahomedan Law that an uncle cannot be guardian of the property of a minor does not prevent an uncle representing

his infant nephew as next friend in a suit. 6 C.L.R. 413. The interest of every litigant in a partition suit is mutually exclusive and comes into direct conflict with that of the other. In such suits, therefore, it cannot be presumed as a matter of course that a minor sister can safely and properly be represented by an adult brother, especially when he happens to be a step-brother. The interest of one is clearly adverse to that of the other and as such one is legally disqualified to act as the next friend of the other. 37 P.L.R. 112. A guardian may refuse to litigate on his ward's behalf a claim which he knows to be false and unfounded. 56 I.C. 97. Where it appears to appellate Court on an examination of the record that a minor has not been properly represented in the suit, the decree cannot be allowed to stand even though there has been no appeal by minor. 51 I.C. 583. A minor, who is represented by a guardian who is the nominee of a party whose interest is adverse to the minor's, is not properly represented in the suit. 45 C. 538=41 I.C. 503=21 C.W.N. 1043. A minor can sue to set aside a decree on the ground that he was not properly represented in the suit. 23 A. 459. Court guardian—Omission to record reasons for appointment of. 44 M.L.J. 515=1923 M. 553. No written permission need be given to the next friend to enable him to act as such. 12 C. 531. Defect in following the rule as to representation of minors is not necessarily fatal to the proceeding and does not render invalid a decree passed against the minors. 43 M. 842=39 M. L.J. 375.

SUB-RULE (2).—See 31 B. 413; 20 A. 162; 23 B. 403; 10 C. 627 (P.C.). Guardian *ad litem*—Failing to furnish security—Effect of. 54 I. C. 368. Mere omission to obtain the consent of the person whom it is proposed to appoint guardian of a minor is not fatal to the proceeding unless the minor was prejudiced thereby. 2 P.L.J. 390=40 I.C. 227; 15 C.L. J. 446=17 C.W.N. 219; 37 I.C. 389; 34 C. L.J. 293=26 C.W.N. 781; 43 A. 104=18 A. L.J. 956. See also 155 I.C. 365=1935 A. 649. When a certificated guardian of a minor is properly appointed as guardian *ad litem* of the minor in a suit, he does not *ipso facto* cease to be guardian *ad litem* merely because some other person has got himself appointed guardian of the person and property of the minor by some other Court. There is no inherent disqualification in all persons other than the certificated guardian to be a guardian *ad litem*. 61 C. 1023=39 C. W.N. 293=1935 C. 160. Where there is no appointment and appearance of a guardian *ad litem* for a minor, the decree passed is, as against the minor, a nullity and not binding on him. 2 P.L.T. 617=62 I.C. 494.

(3) No person shall without his consent be appointed guardian for the suit.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayments or allowance of such costs as justice and the circumstances of the case may require.

LOC. AMS.—[ALLAHABAD AND OUDH.] *Substitute* the following for R. 4 of O. 32 :—

4. (1) Where a minor has a guardian *appointed* or declared by competent authority, no person other than such guardian shall act as next friend, except by leave of the Court.

(2) Subject to the provisions of sub-rule (1) any person who is of sound mind and has attained majority may act as next friend of a minor, unless the interest of such person is adverse to that of the minor, or he is a defendant, or the Court for other reasons to be recorded considers him unfit to act.

(3) Every next friend shall, except as otherwise provided by clause ["in Oudh" read "sub-rule" for "clause" (5)] of this rule, be entitled to be reimbursed from the estate of the minor any expenses incurred by him while acting for the minor.

(4) The Court may, in its discretion, for reasons to be recorded, award costs of the suit or compensation under S. 35-A, or S. 95 against the next friend personally as if he were a plaintiff.

(5) Costs or compensation awarded under clause [in Oudh read "sub-rule"] (4) shall not be recoverable by the guardian from the estate of the minor, unless the decree expressly directs that they shall be so recoverable.

Add the following as R. 4-A of O. 32 :—

4-A. (1) Where a minor has a guardian appointed by competent authority, no person other than such guardian shall be appointed his guardian for the suit unless the Court considers for reasons to be recorded that it is for the minor's welfare that another person be appointed.

(2) Where there is no such guardian, or where the Court considers that such guardian should not be appointed, it shall appoint as guardian for the suit the natural guardian of the minor, if qualified, or where there is no such guardian the person in whose care the minor is, or any other suitable person who has notified the Court of his willingness to act, or failing any such person, an officer of the Court.

Explanation.—An officer of the Court shall for the purposes of this sub-rule include a legal practitioner on the roll of the Court.

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SUB-RULE (3).—The Court has no power to appoint, against his or her will, any person, to be a next friend or guardian. 5 B. 306. Guardian cannot be appointed without his consent. 34 C.L.J. 293=65 I.C. 18=26 C.W. N. 781; 13 I.C. 414=15 C.L.J. 3; 29 I.C. 579=18 M.L.T. 401. Consent need not be express, it may be implied. 4 O.W.N. 356=101 I.C. 632; 4 O.W.N. 791=104 I.C. 814. (47 M. 783; 43 A. 104; 2 P. 296; 101 I.C. 632, Rel. on). Effect of guardian *ad litem* not consenting to appointment. *See* 54 C. 450=31 C.W.N. 634=103 I.C. 124=1927 C. 488.

SCOPE OF.—R. 4 (3) is mandatory and a Court has no jurisdiction to appoint a guardian *ad litem* on behalf of minor without his consent. [16 C.L.J. 318=20 I.C. 578, Foll.; 30 C. 1021 (P.C.), Dist.] 40 I.C. 2; 2 P. 7=4 P.L.T. 575; 4 Pat.L.T. 127=2 P. 296; 37 C.L.J. 496; 20 C.L.J. 469=19 C.W. N. 537; 59 I.C. 664=24 C.W.N. 541. Consent—Need not be express. 43 A. 104=18 A.L.J. 956; 47 M. 783=47 M.L.J. 273; 83 I.C. 290=1923 P. 231; 129 I.C. 175=1931 O. 50. As to cases where consent is implied, *see* 43 I.C. 563; 4 Pat.L.T. 127=2 P. 296. There is nothing however in sub-cl. (3) which requires Court to obtain the express consent of the guardian; where the guardian so appointed is a certificated guardian whom

Court was bound to appoint, consent may be properly presumed when he makes no objection. 4 Pat.L.T. 127=2 P. 296; 1927 O. 560. But *see* 87 I.C. 238=1925 O. 633. Where interests of a minor have not been prejudiced, any defect in procedure for appointment of his guardian is not fatal. 2 P. 296=4 Pat.L.T. 127. Appointment of officer of Court—Absence of inquiry—Proceeding whether vitiated. 8 P. 558=1929 P. 360. Appointment of an officer of Court as guardian *ad litem* of minors in a suit without requiring the party at whose instance he is appointed to deposit necessary funds to enable the guardian to defend the case is a farce. 13 A.L.J. 179=37 A. 179. *See also* 110 I.C. 346. Where appeal is filed against a minor under the guardian *ad litem*, appellant must pay to the guardian such sum of money as would enable him to oppose the appeal. 28 I.C. 852. The wishes of minor should be considered and given due weight in appointment of a person as next friend. If pleader of the minor does not make the application, Court may appoint a proper person bearing in mind the wishes of the minor. 113 I.C. 901=1929 L. 257.

SUB-RULE (4).—A *vakil* is an officer of the Court for purposes of R. 4. 45 A. 395. When an officer of the Court is appointed as guardian, Court cannot pass a decree against him

(3) No person shall without his consent be appointed guardian for the suit; provided that in all cases the consent of such person shall be presumed, unless within fifteen days of receipt of notice from the Court he notifies to the Court his refusal to accept appointment as such guardian. Refusal to accept notice shall be presumed to be refusal to act.

(4) Where an officer of the Court is appointed guardian for the suit under sub-rule (2) the Court may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for re-payment or allowance of such costs as justice and the circumstances of the case may require.

[CALCUTTA.] Substitute the words "Except as otherwise provided in this Order" for the words "Where there is no other person fit and willing to act as guardian for the suit."

[LAHORE.] Sub-rule (2-A) was inserted:—

"(2-A) Where a minor defendant has no guardian appointed or declared by competent authority, the Court may, subject to the proviso to sub-rule (1), appoint as his guardian for the suit a relative of the minor.

If no proper person be available, who is a relative of the minor, the Court shall appoint one of the other defendants, if any, and failing such other defendant, shall ordinarily proceed under sub-rule (4) of this rule to appoint one of its officers."

The following words were added to sub-rule (3):—

"but the Court may presume such consent to have been given, unless it is expressly refused."

[MADRAS.] See Madras Amendment to Rule 3, *supra*.

[NAGPUR.] Substitute the following:—

Who may act as next friend
or guardian for the suit.

"4. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit:

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or as his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act in either capacity."

Add the following as R. 4-A:—

Procedure for appointment
of guardian for the suit.

"4-A. (1) No person except the guardian appointed or declared by competent authority, shall, without his consent, be appointed guardian for the suit.

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as guardian of the minor. 4 B. 638; 28 B. 626. In cases where a certificated guardian of a minor is appointed, the appointment of another guardian for suit is illegal and a decree obtained in such a suit is liable to be set aside. 43 M. 808=39 M.L.J. 239. Appointment of Court guardian when natural guardian is available. See 93 I.C. 84=1926 M.W.N. 8=1926 M. 950. Duty of Court to require party applying to make a deposit for the guardian for defending the cause. See 93 I.C. 84=1926 M.W.N. 8=1926 M. 950. Appointment of Court nazir as guardian—Practice condemned. 13 R.D. 834=6 O.W. N. 1060. Negligence in conduct of suits on behalf of minors resulting in prejudice to interest of minor—Minor can avoid the decree. 48 A. 44=1926 A. 36. Appointment of Court guardian—Decree passed—Proof of fraud necessary before a suit to set aside decree is allowed. 46 C.L.J. 287=105 I.C. 199=1927 C. 865. In suit for restitution of conjugal rights by husband against his wife where the wife is a minor, a person who is alleged to have been responsible in bringing about the marriage of the defendant with the plaintiff should not be appointed as guardian *ad litem* of defendant. 100 I.C. 468=9 Lah.L.J. 206=28 P.L.R. 627.

COSTS.—Court has power to order an unsuccessful infant plaintiff to pay defendant's costs or to direct it to be paid out of minor's estate and *vice versa*. Court can also order next friend or guardian *ad litem* to pay costs personally. 61 C. 227=59 C.L.J. 9=151 I.C. 399=1934 C. 474. Court may provide for costs incurred by guardian in order to obtain legal assistance, even when guardian is himself a pleader. But no guardian should make a profit out of his office. 146 I. C. 986=16 N.L.J. 206=1933 N. 329.

REVISION.—Appointment of a guardian *ad litem* is a matter of procedure, and an error therein is not revisable ordinarily. 46 I.C. 816=5 P.L.W. 92.

O. 32, R. 4-A (Allahabad Amendment): FUNDS FOR COURT GUARDIAN—PROCEDURE FOR OBTAINING.—Where an advocate appointed guardian of a minor and the matter comes up to the High Court in which the minor is a respondent it is the duty of the advocate to make a formal application to the High Court at the earliest stage for funds and not wait till the appeal comes on for hearing and then communicate orally to the Court through an advocate appearing for another respondent, his request for funds. The Court cannot take notice of it. 1941 A.L.J. 370.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Unless the Court is otherwise satisfied of the fact that the proposed guardian has no interest adverse to that of the minor in the matters in controversy in the suit and that he is a fit person to be so appointed, it shall require such application to be supported by an affidavit verifying the fact.

(4) No order shall be made on any application for the appointment as guardian for the suit of any person, other than a guardian of the minor appointed or declared by competent authority, except upon notice to the proposed guardian for the suit and to any guardian of the minor appointed or declared by competent authority, or where there is no such guardian, the person in whose care the minor is; and after hearing any objection that may be urged on a day to be specified in the notice. The Court may, in any case, if it thinks fit, issue notice to the minor also.

(5) Where, on or before the specified day, such proposed guardian fails to appear and express his consent to act as guardian for the suit, or where he is considered unfit, or disqualified under sub-rule (3) the Court may, in the absence of any other person, fit and willing to act, appoint any of its officers or a pleader to be guardian for the suit.

(6) In any case in which there is a minor defendant, the Court may direct that a sufficient sum shall be deposited in Court by the plaintiff from which sum the expenses of the minor defendant in the suit shall be paid. The matter shall be adjusted in accordance with the final order passed in the suit in respect of costs."

[PATNA.] In sub-rule (4) for the words "Where there is no other person fit and willing to act as guardian for the suit" in the first sentence of the sub-rule *substitute* the following :—

"Where the person whom the Court, after hearing objections, if any, under sub-rule (4) of R. 3, proposes to appoint as guardian for the suit, fails within the time fixed in a notice to him, to express his consent to be so appointed."

[RANGOON.] The following shall be *substituted* for r. 4 :—

4. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit; provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor, or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) In the event of there being no such guardian, the natural guardian of the minor, or, if there is no natural guardian, the person in whose care the minor is, should, subject to the proviso to sub-rule (1), ordinarily be appointed his guardian for the suit.

(4) No person shall without his consent be appointed guardian for the suit.

(5) Where none of the aforementioned persons, or of the persons mentioned by the plaintiff in the list filed by him under sub-rule (2) of r. 3, is fit and willing to act as guardian for the suit; and where no application is made on behalf of the minor under sub-rule (3) of r. 3, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for re-payment or allowance of such costs as justice and the circumstances of the case may require. An advocate or pleader of the Court shall be an officer of the Court for this purpose.

Representation of minor by next friend or guardian for the suit.

5. (1) Every application to the Court on behalf of a minor, other than an application under rule 10, sub-rule (2), shall be made by his next friend or by his guardian for the suit.

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O. 32, R. 5: ILLUSTRATIVE CASES.—When a guardian *ad litem* has been once appointed by Court for a minor defendant his appointment continues until revoked and an appeal against a decree passed against minor can only be preferred by him. (44 A. 35; 22 M. 187; 2 A.L.J. 482, Foll.) 44 A. 619=20 A.L.J. 599. See also 1939 Rang. 144; I.L.R. (1938) All. 829=1938 A.L.J. 919=1938 All. 601. Suit by authorised agent of guardian on behalf of minor is not a suit in which minor is effectively represented. Judgment in such a suit is not conclusive against minor. 128 I.C. 763=1930 A. 875. O. 32, R. 5 was made for the benefit and protection of a minor and not for his prejudice. 32 S.L.R. 215. *Quære*.—Whether R. 5 of O. 32 compels the Court in every case to discharge an order

made at the instance of a minor without a guardian or next friend even when such order is for the benefit of the minor? 32 S.L.R. 215. See also 1939 Sind 332. Where certain minors were sued as majors but they appeared in the suit through their mother as guardian and filed a written statement and Court accepted the guardian by permitting her to compromise, *held*, that the omission to formally amend the cause title of the suit as originally instituted was a mere irregularity. 13 Pat.L.T. 737. It is open to a minor against whom a decree has been passed on the basis of an award without the appointment of a guardian, to put in an application under O. 32, R. 5 to have the decree declared a nullity. 189 I.C. 254=1940 Lah. 164. Minor not represented, effect of—Ignorance of decree-holder,

(2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

Receipt by next friend or guardian for the suit of property under decree for minor.

6. (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other movable property on behalf of a minor either—

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27 I.C. 425. An order for execution passed against a minor without a guardian *ad litem* is invalid; and when it is brought to the notice of Court that such order has been passed, Court should immediately discharge the order. 9 M.L.J. 144. See also 13 B. 234. The words of the Code appear to give discretionary power to Court to discharge the application made by minors who appear without a next friend. 22 C. 270 (274). A next friend is not a party to the suit, and cannot appeal in his own name. 9 C. 629. Nor can he execute the decree after the death of the minor. 14 W.R. 162; 22 M. 187; 29 A. 675. As to compromise by guardian, see 18 Pat. 708. Court has no power to make minor's estate liable for costs. 13 B. 234. But see 11 C. 213. Where there has been gross negligence of guardian, and minor was not really represented in the suit, it is open to minor to avoid the order. 138 I.C. 465=1932 A.L.J. 437=1932 A. 293 (F.B.). Sale in execution of decree against minor—Guardian *ad litem* neglecting his duties—Person interested in minor must be allowed to set it aside (O. 21, R. 90). 1930 N. 185. See 1929 M. 275 (280) (This Order has no direct application to execution petitions if rights of the parties have merged in a valid decree).

O. 32, R. 5 (2).—Sub-R. (2) to R. 5 of O. 32 does not say that an order on any application made by a minor where no next friend or guardian is appointed 'shall' be discharged; it says 'may' be discharged. The sub-rule cannot be so construed as to deprive the Court of its discretion to allow proceedings, which are in the interests of the minor, to go on, or to permit them to be frustrated by mere accident or technicality. Hence, where a minor has made an application for execution of rent decrees and there is no guardian appointed, the Court may allow the receiver appointed in the proceedings to recover rent on behalf of minor. 1939 Sind 332.

O. 32, R. 6.—R. 6 prohibits next friend of a minor decree-holder from realising money due under a decree without leave of Court. 19 L.W. 686=1924 M. 279. Where a decree, even in the case of a compromise decree in favour of minors sanctioned by the Court as being beneficial to the minor parties, provides that a certain payment shall be made to the minor plaintiff's next friend, it must be understood as meaning that the payment shall be made under the provisions of the Civil Procedure Code, and that the next friend

must apply to the Court to receive the money, and, if not a statutory guardian, must furnish the requisite security. O. 32, R. 6 is imperative on this point. The next friend at the time of payment of the money need not be the same person who was the next friend when the compromise decree was sanctioned. It is necessary therefore that the Court sanctioning the receipt of money on behalf of the minor should apply its mind to circumstances as they exist at the time of the receipt and not as they existed at the time when the decree was passed. Where a compromise includes acts which are unlawful, *e.g.*, in respect of payments of money to a minor's next friend or guardian direct, out of Court, the promisor is entitled to ignore such part of the contract by way of analogy to S. 56, Contract Act, as being unlawful and therefore void. 50 L.W. 384=1939 Mad. 814=(1939) 2 M.L.J. 262. Next friend accepting money on behalf of minor from judgment-debtor without obtaining leave of Court—Certification cannot be made. 39 P.L.R. 714=1937 Lah. 387. On an application to enforce a security bond executed by certain sureties hypothecating immovable properties in respect of a certain amount drawn by next friend of the minor plaintiffs on their behalf, *held*, that (i) S. 145 was not applicable, as the sureties had not made themselves personally liable and the matter was not connected with the execution of a decree and was not a question between the parties to the suit; (ii) as it was not executed in favour of any named person, it could not be assigned by Court and the only mode of enforcing it was by Court making an order in the suit upon an application to which the sureties are parties and by directing sale of the properties for the realisation of the amount due; (iii) no such direction could however be made till the extent of the liability of next friend was determined in a separate suit. [46 I. A. 228=38 M.L.J. 302 (P.C.), Appl.] 57 M. 803=1934 M. 262=66 M.L.J. 540. A bond executed by a surety for a guardian under R. 6 to the Judge of the Court described by his title, *e.g.*, to the District Munsif, being one to a judicial person can be assigned by the District Munsif. The fact that his full name is not given makes no difference, he being a *persona designata* described by his title of District Munsif. The assignment by the Judge is valid and enables the assignee to maintain a suit on the bond to enforce it against the surety. 44 L.W. 621=1936 M. 953.

- (a) by way of compromise before decree or order, or
 (b) under a decree or order in favour of the minor.

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=71 M.L.J. 675. Even though the terms of O. 32 do not apply to execution proceedings, the procedure laid down in that order and the principle which underlies the provisions contained in that order must be taken to apply not only to suits but to execution proceedings as well. Accordingly a guardian *ad litem* who represents a minor in a mortgage suit and obtains a final decree for sale, is not in a position to give a legal and valid discharge of the decree without the leave of the Court obtained under O. 32, R. 6. 65 C.L.J. 381=1937 Cal. 649. Where next friend of a minor decree-holder was merely ordered to be allowed to draw money paid into Court by judgment-debtor in satisfaction of decree, and to purchase Government Promissory Notes for the balance and deposit the same into Court but there was no order by the Court granting leave to the next friend to receive any property on behalf of the minor, R. 6 does not apply. [41 M. 40, Dist.] 56 M. 687=1933 M. 678=65 M.L.J. 142 (F.B.). In interpreting O. 32, R. 6 (1), the widest meaning of which the words are capable must be attributed to it. The word "receive" occurring there should be taken as "receive either directly or indirectly". The protection given to the minor would be reduced to a farce if the guardians, while restrained from receiving any money directly from the judgment-debtor, were free to assign the decree to a third party and receive money from the assignee, who would then recover it from the judgment-debtor. To permit any such assignment without leave of the Court would be to defeat the plain purpose of the rule. It is open to the judgment-debtor to attack the assignment on the ground that it falls within O. 32, R. 6 (1) (b), and to contend that the assignee has no right to apply for execution or to substitute himself in pending execution. 43 C.W.N. 962=70 C.L.J. 115=1939 Cal. 588. Payment to manager of joint Hindu family towards a decree in favour of manager and minor coparcener cannot be recognized unless sanctioned by Court. 1925 M. 230 (2)=47 M.L.J. 498. See however, 1927 P. 329 (payment to Karta, valid discharge). Whatever the case as regards a compromise without the leave of the Court under R. 7, as regards a valid discharge the question must be one of construction of the decree in each case as to whether the manager has or has not power to receive payment. 31 Bom.L.R. 963=1929 B. 382. Manager of a joint Hindu family acting as next friend, if should furnish security. 103 I.C. 460. When he is not acting as next friend, 43 L.W. 390=1936 M. 434=70 M.L.J. 700. In a suit for partition by two brothers, one of whom was a minor, there was an award made by arbitrators which was made a

decree of Court. The major plaintiff settled the claim under the decree with the defendants who applied to have satisfaction of the decree recorded in terms of the settlement. Court entered satisfaction as prayed for with the full knowledge of the fact that the plaintiff had received from the defendants moneys in full satisfaction of the claim under the decree. The major plaintiff did not, however, obtain sanction of Court for receiving money outside Court on behalf of his minor brother. The minor plaintiff after becoming a major, applied to execute the decree. *Held*, he could not do so, and that the Court having made an order recording satisfaction knowing full well that the money had been received without its previous sanction, must be taken to have approved of the receipt by the major plaintiff of the money on behalf of the minor brother; the defendants were therefore entitled to the full benefit of that order and to claim full discharge by reason of the same. 44 L.W. 486=1936 M. 861=71 M.L.J. 388. Order for attachment of surety's property under R. 6 cannot fall within the words "such directions as will, etc." 41 M. 40=39 I.C. 928. Court cannot order payment of money to a person not appointed guardian by any competent authority without demanding security from him. 29 I.C. 475. The guardian *ad litem* of the minor is a trustee and must act strictly in the interests of the minor. If minor is injured by reason of guardian not carrying out his duties efficiently, minor can sue for redress and claim that so far as equity demands, the decree should be set aside or modified. (35 P.R. 1898, Foll.; 2 P. R. 1912, Ref.) 14 I.C. 150. Creditor—Minor plaintiff—Right of debtor to demand security. 64 I. C. 385. As regards the procedure to be followed, see 17 A. 531; 21 M. 309. See also 43 C.W.N. 962=1939 Cal. 588. An award can only be enforced as if it were a decree, and when enforced, all the provisions relating to enforcement of a decree apply. Where therefore an award is made in favour of a certain person on behalf of himself and as representing his minor brothers, the award is one made in favour of all such persons, and when out of the amount payable to such person under such award, some amount is deposited in Court for payment to him, and when such person applies for withdrawal of the said amount from Court, the security which he can be called upon to furnish under O. 32, R. 6, is in respect of the amount payable to the minors according to their shares in the amount so deposited. 169 I. C. 943=1937 Sind 173. Next friend receiving payment from judgment-debtor without leave of Court—Objection to certification newly raised in second appeal is maintainable. 39 P.L.R. 714=1937 Lah. 387.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other movable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

LOC. AM.—[MADRAS.] O. 32, r. 6.—*Add* proviso to sub-rule (2):—

"Provided that the Court may, in its discretion, dispense with such security in cases where the next friend or guardian for the suit is the manager of a joint Hindu family or the karnavan of a Malabar tarwad and the decree is passed in favour of the joint family or the tarwad."

7. (1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

Agreement or compromise by next friend or guardian for the suit.

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O. 32, R. 6 (2).—When a Hindu father or manager of a joint Hindu family is himself a next friend or guardian of the minor, his powers are controlled by the provisions of the Code relating to next friends and guardians *ad litem* and he cannot do any act in his capacity as father or managing member which he is debarred from doing as next friend or guardian without the leave of Court. 1930 M.W.N. 1240. [36 M. 295 (P.C.), Foll.; 29 I.C. 475 and 47 M. 920, Ref.]. See also 43 C.W.N. 962=70 C.L.J. 115=1939 Cal. 588. Payment to such guardian without leave of Court is invalid. (*Ibid.*) The advisability of amending R. 6 so as to exempt managers or *karthas* of joint families or *karnavans* of Malabar *Tarwad* from the provisions of the rule pointed out. 1930 M.W.N. 1240. Stamp on security bond. See 53 C. 101=1925 C. 906.

O. 32, R. 7: SCOPE AND APPLICATION.—It is the duty of the Court to see that the interests of minors are adequately protected, and when a compromise is effected to which a minor is a party, it is of considerable importance that the conscience of the Court should be satisfied that the compromise is really in the interests of the minor. In ordinary circumstances, when the Court records an order to the effect that a compromise has been allowed, it may be assumed, unless there are clear indications to the contrary, that the Court has exercised its judicial discretion in dealing with the matter. In cases, however, in which the circumstances are peculiar or suspicious, it is clear that a heavy duty lies upon the Court to scrutinise with care the terms of the proposed compromise and the circumstances connected therewith. In the latter case, a mere order permitting the compromise is not sufficient to show that the Court applied its mind judicially to the question as to whether or not the compromise was really for the benefit of the minor. 1937 Cal. 658=I.L.R. (1937) 1 Cal. 586; 1941 A. 431=1941 A. L. J. 605. There is a heavy duty cast upon the counsel appearing for a minor to satisfy himself

that the compromise is for the benefit of the minor, and a similar duty is cast upon the Court to scrutinize the compromise and satisfy itself before sanctioning it. 156 I. C. 153=1935 S. 95. A compromise of suit made on behalf of a minor without strict compliance with the provisions of R. 7 is not enforceable against minor. 125 I.C. 587. See also 14 L.R. 513 (Rev.)=16 R.D. 660; 18 Pat. 708=1940 P. 59. The directions in R. 7 are not intended to be merely formal and it is incumbent on the Court to protect the interests of a minor and of a person of unsound mind and to apply its mind to any compromise which is offered on their behalf in order to ascertain as far as possible that the compromise is really for the benefit of the minor. 1933 A. 149. See also 136 I. C. 350=35 L.W. 171=1932 M. 303; 33 Bom.L.R. 1033=134 I.C. 1221=1931 B. 500. The provisions of R. 7 are imperative. 33 Bom.L.R. 1033=1931 B. 500. But see 136 I.C. 254=7 Luck. 493=1932 O. 44.

Contra.—Under O. 32, R. 7 (2), a decree based on an agreement or compromise entered into by a guardian of a minor without the leave of the Court is not void, but only voidable at the instance of the minor concerned. 18 Pat. 708=1940 Pat. 59. It is enough if the attention of the Court is directed specifically to the fact that there is a minor involved in the suit and the compromise entered by the guardian *ad litem* on behalf of the minor is brought to its notice; if thereafter a decree is ordered to be passed in terms of the compromise it must be assumed that the Court has complied with the requirements of the law. 175 I. C. 75=1938 Pat. 202. 'With reference to the suit'—Meaning of. See 1937 P. 232=1937 P.W. N. 51. A matter which is not strictly the subject-matter of a suit may relate to or have "reference to the suit" if it forms part of the consideration. 1937 P. 232. Where a petition for leave is filed under R. 7 Court should consider whether the compromise is or is not in the interests of the minors. If it is satisfied that the petition of compromise is for the benefit of the minors then it should grant leave. If it is not so satisfied it should

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refuse leave. If leave is granted Court has no option, but to record the compromise and to pass a decree in accordance therewith. In so deciding whether the petition of compromise is for the benefit of the minors, it will be open to Court to make such alterations in the terms of the compromise, agreed to by the parties, as it deems expedient. (17 A. 531, 28 A. 585, 47 I.A. 88 and 1929 B. 350, Ref.) 1934 R. 168. See also 142 I.C. 751=34 P.L.R. 409=1933 L. 468; 152 I.C. 715=36 Bom.L. R. 738. The provisions of this rule are not applied *en bloc* to proceedings under Land Revenue Act. But the adult parties who are co-obligees with the minor are not on that account exonerated from liability. 7 Luck. 493=136 I.C. 254=1932 O. 44; 39 M. 409=43 I.A. 99=31 M.L.J. 18=34 I.C. 213 (P.C.). As the provisions of O. 32 have been extended to all proceedings under the Land Revenue Act with a few minor exceptions, a compromise arrived at the partition proceedings on behalf of a minor is invalid if the provisions of R. 7 have not been complied with. 14 L.R. 464 (Rev.)=17 R.D. 625. See also 1937 A.L.J. 1284=1938 All. 74; 42 C.W.N. 154; 1940 A.M.L.J. 25; 1940 A.W.R. (B.R.) 96; 1941 R.D. 196; 1939 A.L.J. 624=1939 All. 607. The rule applies to an agreement to refer a suit to arbitration, and to an agreement to be bound by an oath. 27 C. 229; 24 M. 326; 12 M. 483; 27 P.L.R. 729=96 I.C. 748=1926 L. 665; 40 P.L.R. 498=1938 Lah. 582; 1941 A.L.J. 596; 1941 N.L.J. 601; 1938 Lah. 582=40 P.L.R. 498. But see 38 P.L.R. 629=162 I.C. 921=1936 L. 235, where it was held that agreement by next friend to relinquish claim of the minor should the opposite party take a certain oath, was only a special method of proof and not a compromise, and that as the interest of the minor was identical with that of the next friend, sanction under this rule was not necessary. In the case of a reference to arbitration by a guardian without leave of Court and a decree passed on the basis of an award thereon, the only person who can repudiate guardian's act is the minor and he should on attaining majority do so by an application for review or by a separate suit and not by way of appeal. 58 C. 628=130 I.C. 209=35 C.W.N. 238=1931 C. 211; 38 L.W. 927=1933 M. 862=65 M.L.J. 755. But see 28 A. 35. The provisions of O. 32, R. 7 are by virtue of S. 141 applicable to miscellaneous proceedings. Hence where a decree is adjusted before execution by means of a compromise and one of the parties to the litigation happens to be a minor, the consent of the Court is necessary, if the minor is to be bound thereby. 1940 All. 16=1939 A.L.J. 1019. Agreement or compromise must be lawful. (See O. 32, R. 3.) Abandonment of an issue does not amount to a compromise. 22 M. 538; 22 M. 378; 27 C. 229; 24 M. 326; 12 M. 483. But see 28 A. 35. No sanction

is necessary for agreement by guardian to be bound by statement of certain witnesses. 49 A. 842=25 A.L.J. 729=1927 A. 584; 34 C.W.N. 310. Effect of want of sanction—Compromise without leave—Invalid, though supportable on other grounds. 39 M. 115=29 M.L.J. 856=20 C.W.N. 201=32 I.C. 258 (P.C.); 47 A. 782=23 A.L.J. 523. See also 1939 P.W.N. 631; 1938 Lah. 709. The provision of law making it necessary to obtain leave of Court is of great importance to protect the interests of minors and in absence of such leave, a compromise cannot be supported. 39 M. 115=29 M.L.J. 856 (P.C.). See also 40 P.L.R. 403=1938 Lah. 709. Where no application for sanction to enter into a compromise was filed by the guardian *ad litem* of a minor defendant and there was no order expressly recorded by the Court granting such sanction and there is nothing to indicate that when the terms of the compromise were placed before the Court and accepted by it, it applied its mind to the question that the compromise was for the benefit of the minor, the provisions of R. 7 are not complied with and the compromise and the decree passed thereon are not binding on the minor. The fact that the minor himself has signed the statement embodying the terms of the compromise is of no avail. 40 P.L.R. 403=1938 Lah. 709. In absence of an order granting permission the presumption is that no permission was granted. 50 I.C. 752=17 A.L.J. 789. Where Judge wholly failed to consider whether the terms of a compromise were for benefit or prejudice of the minor, *held*, the compromise decree was not binding on minor. See 139 I.C. 113=1932 L. 521; 1933 A. 149. Where minor comes forward to set aside the compromise, Court has no power to uphold it on the ground that it was for the benefit of the minor. 35 B. 322=13 Bom.L.R. 280; 44 B. 202=56 I.C. 399; 50 I.C. 752=17 A.L.J. 789. When suit is compromised by Court of Wards on behalf of a minor ward, the compromise does not require the leave of Court in order that it may be binding. 37 I.C. 971=44 C. 829. Court should be very jealous of the interest of minors and should not allow a suit or part of a suit to be withdrawn without being satisfied that it is for their benefit. (27 M. 377; 29 C. 735, Rel. on.) 47 I.C. 508=59 P.R. 1919. A suit lies at the instance of a minor to set aside such a compromise effected by his guardian *ad litem*. (2 P.R. 1912, Ref.) 47 I.C. 508=59 P.R. 1919. In a suit by the plaintiff on attaining majority for a declaration that a compromise decree passed against him is not binding on him on the ground that the provisions of O. 32, R. 7 had not been complied with, the granting of a declaration *simpliciter* is incomplete. It should further be ordered that the proceedings in the original suit be revived from the stage at which they were when the irregularity above mentioned was committed. 40 P.L.R. 403=1938

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor.

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Lah. 709. Compromise decree—Setting aside—Fraud, proof of—Facts alleged in prior litigation whether can be re-opened. 116 I.C. 116=1929 M. 96. The next friend of a minor cannot transfer to a third party the decree in favour of the minor without leave of Court. 41 M.L.J. 75=63 I.C. 285. Compromise by guardian sanctioned by Court—Interest of guardian adverse to that of minor—Validity. 10 L. 86=49 C.L.J. 38=1928 P.C. 294=55 M.L.J. 746 (P.C.). As to what is claiming an interest adverse to minor, see 136 I.C. 562=1932 A. 130. Compromise decree—Enforcement as against minor—Sanction of Court—Subsequent events if material—Concealment of material facts—Proof. 51 C.L.J. 364=1930 C. 539. An assignment of a decree passed in favour of a minor to a third person by the guardian *ad litem* of the minor without the leave of the Court, though not covered by O. 32, R. 7 (1), falls within O. 32, R. 6 (1) (b), and is, therefore, invalid. The word 'agreement' in O. 32, R. 7 (1) means an agreement with a party to the suit and must be in reference to the proceedings in the suit. An agreement with a third party, as also an agreement outside the scope of the suit, does not come within the scope of the said rule. 43 C.W.N. 962=70 C. L.J. 115=1939 Cal. 588.

SCOPE OF SUB-RULE (2).—41 C.L.J. 213=29 C.W.N. 597. Under R. 7, Cl. (2) an agreement or compromise entered into by the guardian of a minor without the sanction of the Court is voidable. 47 I.C. 508=59 P.R. 1919; 2 P.R. 1912=11 I.C. 523; 1940 A.W.R. (B.R.) 96; 1940 A.M.L.J. 25; 41 M.L.J. 75=63 I.C. 285; 12 I.C. 499=34 M. 314; 58 I.C. 178; 44 I.C. 164; 61 I.C. 118=14 S.L.R. 245; 60 C.L.J. 173. The provisions of O. 32, R. 7 are mandatory and if a compromise is entered into on behalf of a minor without leave of the Court, it is null and void so far as the minor is concerned. 1940 R.D. 497=1940 A.W.R. (B.R.) 197. A guardian *ad litem* of a minor defendant cannot enter into a compromise without the leave of the Court, and such leave must be expressly recorded by the Court. The terms of O. 32, R. 7 are not complied with by merely asking the Court to approve of a compromise which has been actually entered into under that rule, the Court must consider the proposed terms before they are agreed to by the parties and must grant leave to the guardian *ad litem* to enter into the compromise. Approving the terms of a compromise after it has been entered into is not sufficient compliance with O. 32, R. 7. 19 Pat. 343=1940 Pat. 663. The real meaning of R. 7 of O. 32 is that the express leave of the Court must be obtained before the compromise entered into becomes a valid one for future eventualities. The result of this is that

subsequent express leave of the Court granted will validate a compromise entered into on behalf of a minor. 1940 A.M.L.J. 25. Where a minor is represented in mutation proceedings by his elder brother who *bona fide* enters into a compromise with the other party without the leave of the Court as required by R. 7, the compromise is not bad for want of such leave. 7 Luck. 493=136 I.C. 254=1932 O. 44. Where a compromise petition is presented by a respondent on his own behalf and on behalf of two minor respondents and the compromise is an indivisible one so far as all the three respondents are concerned, if the compromise is held to be bad for the minors it must be held to be bad so far as the other respondent also, as it would be useless to pass a decree on the compromise petition against him only. 1934 R. 168.

EXECUTION PROCEEDINGS.—The rule applies to a compromise of execution proceedings. 26 B. 109. See also 64 M.L.J. 437 (F.B.); [29 M. 309; 26 B. 109; 31 M.L.J. 207, Rel. on; 55 M. 17 (F.B.), Dist.]; 17 Pat.L. T. 743=1936 P. 506. And contemplates the existence of a guardian and a pending litigation. 26 B. 298. See also 27 B. at 291; 29 M. 309. Proceedings in execution are proceedings in suits and R. 7 applies to execution proceedings as well. [29 M. 309; 26 B. 109; 31 M.L.J. 207, Rel. on; 55 M. 17 (F.B.), Dist.] 56 M. 430=1933 M. 456=64 M.L.J. 437 (F.B.); 1940 Rang.L.R. 772. An agreement varying terms of a decree between parties some of whom are minors is not enforceable unless sanctioned by Court. 40 I.C. 820=1917 M.W.N. 327. A compromise effected after the passing of a decree is governed by R. 7. Sanction of the Court is necessary where the minor is a party to the adjustment. 35 I.C. 70=31 M.L.J. 207. A managing member of a joint Hindu family cannot without leave of the Court, do any act which he is debarred from doing as guardian *ad litem*. Where a manager and a minor for whom he was a next friend are joint decree-holders and an application is made by the manager for entering up satisfaction of the decree, O. 21, R. 2 does not empower a Collector executing the decree to certify payment as satisfying the decree as far as the minor was concerned, unless leave of the Court had been obtained according to O. 32, R. 7 and such leave cannot be implied but must be expressly recorded. 1938 N.L.J. 363.

SHALL BE VOIDABLE.—A compromise not properly sanctioned can be annulled before a minor attains majority. 26 B. 109. See 23 B. 62 and 13 B. 137. See also 60 C.L.J. 173; 30 C. 613. There is no justification for extending the provisions of O. 32, R. 7 by analogy or on considerations of policy. 45 L.W. 722=1937 Mad. 446=(1937) 1 M.L.J. 384. Where judgment-debtor applied to have the sale adjourned and on

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condition of the same being granted waived his right to a fresh proclamation and such waiver was effected both on behalf of himself and his minor sons, *held*, that the waiver did not require leave of Court. 150 I.C. 1134=1934 M. 260=66 M.L.J. 464. If guardian has wrongly settled the suit out of Court, that may be a ground for further steps being taken, but that must be at instance of the minor after attaining majority or a next friend or a guardian during minority. The attorneys who received their instructions from guardian cannot go behind those instructions and continue to represent the minor. 34 Bom.L.R. 614=1932 B. 401 (1). Compromise sanctioned by Court, when can be set aside. 28 Bom. L.R. 1225=50 B. 716=1927 B. 11; 104 I.C. 222=1927 L. 685. [36 M. 295 (P.C.), Foll.] 46 C.L.J. 441=103 I.C. 522=1927 C. 796; 28 Bom.L.R. 1507=99 I.C. 814=1927 B. 87. Compromise arrived at by guardian *ad litem* without leave of Court—Decree passed thereon. In a suit to enforce the terms of the compromise, it is open to the minor to plead in defence the invalidity of the compromise. There is nothing in law to prevent him from taking such a plea in defence. 1936 A.L.J. 1366=1936 A. 811.

POWERS OF NATURAL GUARDIAN.—After appointment of a guardian *ad litem* the powers of a natural guardian to deal with minor's interest so far as they are involved in suit are suspended. 22 Bom.L.R. 725=57 I.C. 417=44 B. 574. Even if a natural or a certificated guardian appointed by the District Judge, is appointed guardian *ad litem*, he is bound by the provisions of O. 32, R. 7. It is not all the rules of O. 32 that have been made applicable to proceedings under the Land Revenue Act and as such a compromise of mutation proceedings on behalf of a minor without the sanction or permission of the Court is not fatal to the validity of the compromise. 1939 A. L.J. 624=1939 All. 607. See also 7 Luck. 493=1932 Oudh 44. A compromise even by a father and managing member as guardian *ad litem* requires leave of Court. 36 M. 295=40 I.A. 132=25 M.L.J. 150 (P.C.). But not so when he is not the guardian *ad litem*. (1937) 1 M.L.J. 384. The natural guardian can on behalf of a minor enter into an arbitration so as to be binding on the minor if it is proper, reasonable and for the benefit of minor. 44 B. 202=22 Bom.L.R. 266.

PROOF OF SANCTION.—There ought to be evidence that the attention of Court was directly called to the fact that the minor was a party to the compromise, and it ought to be shown, by an order on petition (or in some way not open to doubt) that leave of Court was obtained. 35 A. 487=40 I.A. 182=25 M.L.J. 492=21 I.C. 288 (P.C.); 56 I.C. 97; 16 I.C. 397; 2 P. 538=4 Pat. L.T. 311. See also 39 I.C. 53=36 P.R. 1917; 55 I.C. 218. Compromise on behalf of minor—Proof of benefit to minor—

Affidavit by guardian or statement by counsel necessary. 31 Bom.L.R. 621=119 I.C. 663=1929 B. 350. See also 51 C.L.J. 364. The fact that the Court, when sanctioning a compromise entered into by the next friend of a minor, omitted to use the words that it was for the benefit of the minor, is not a sufficient ground to invalidate the compromise, when there is good reason for thinking that it applied its mind to the question. 1937 O.W.N. 1012=1937 O. 521. Sanction can be inferred from circumstances. 1926 S. 128=20 S.L.R. 116. Presumption as to minor's interest having been considered in giving sanction. See 102 I.C. 358=1927 L. 330. (94 I.C. 104; 36 P.R. 1917; 8 C.L.J. 33, Ref.) 1929 L. 250=122 I.C. 103. Matters to be considered in granting sanction—Court's duty to consider benefit of the minor. See 46 C. L.J. 441=103 I.C. 522=1927 C. 796. See also 39 M. 115=29 M.L.J. 856 (P.C.); 29 M. 104; 28 Bom.L.R. 362=94 I.C. 104=1926 B. 291. As to who can apply for sanction in partition suit by minor, see 91 I.C. 521. A decree passed under a misapprehension of a material fact as to the true position of the minor is not binding on minor. 1 L. 314=56 I.C. 878; 1929 L. 279. An omission to record the sanction does render the compromise *ultra vires* especially in the absence of prejudice to the minors, who could only apply for review. 5 Pat.L.J. 379=1 Pat.L.T. 663. See also 111 I.C. 156=1928 A. 534. R. 7 does not compel Judge to reduce this matter to writing, though it is exceedingly desirable he should do so. (29 M. 104; 17 A. 531; 8 C.L.J. 31, Ref.) 39 I.C. 53=36 P.R. 1917. Mere recording a compromise and passing a decree according to it is no sanction by Court and therefore not binding on the minor. 39 M. 853=30 M.L.J. 465. See also 21 M. at 93; 17 A. at 532; 28 A. 585 (P.C.). It is not necessary that the sanction of Court, if otherwise proved, must be in express terms. 14 I.C. 6. See also 1935 S. 235 (noted *infra*). The attention of Court must be expressly drawn to the fact and its approval obtained. 6 Pat.L.J. 199=60 I.C. 980. Leave of the Court must be expressly recorded. 35 I.C. 675=1917 P. 77; 2 Pat.L.T. 325=60 I.C. 980. Even if leave of Court is not expressly recorded that would not make the decree a nullity. It would only make the decree voidable at option of the minor. 2 P. 538=4 Pat.L.T. 311. No particular formula is necessary to be used by the Court in order to grant leave. 2 P. 538. See also 1939 Pat. 387; 1941 N.L.J. 601. It is a salutary rule that the Judge must on the face of his order show that he has considered the question of the minor's benefit and give reasons for his thinking that it is. But the omission to record reasons will not make the order a nullity. R. 7 does not give the minor an unqualified right to have the matter avoided but vests the Court with the discretion to avoid or not to avoid it. An agreement

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which offends R. 7 in that the Court had not given reasons for its granting leave, cannot be avoided by a separate suit in the absence of fraud upon the Court, for there is only an irregularity and not an illegality. 1941 N.L.J. 601. Compromise—Sanction of Court—Some terms, not embodied in decree—Sale in pursuance of compromise—Sale by father and guardian *ad litem*—Effect. 53 I.C. 354=1919 M.W.N. 356. Court is not obliged to pass a formal decree in the exact form which the parties propose. It may make such alterations as may be necessary. Very often it is convenient to set out in a schedule the precise compromise the parties have agreed to and then in the order itself merely to state what the parties actually want as an operative order, *e.g.*, for payment of money. 31 Bom.L.R. 621=119 I.C. 663=1929 B. 350. Sanction of compromise—Permission of Court under S. 29, Guardian and Wards Act, 1890, not necessary. 122 I.C. 103=1930 L. 250.

TRANSFER OF DECREE.—Decree is property and hence the guardian can transfer a decree in favour of the minor without the sanction of Court. 40 M.L.J. 124=62 I.C. 255; 56 I.C. 313. But see 1938 N.L.J. 363.

REFERENCE TO ARBITRATION.—Where a reference, in which property of minor is involved, is under the Arbitration Act and not with reference to a pending suit, no leave of the Court is necessary. R. 7 contemplates agreement or compromise with reference to a pending suit. (26 B. 298 and 1918 B. 123, Rel. on; 1921 S. 61, Dist.) 1935 S. 235. The leave of the Court under O. 32, R. 7 is necessary if an agreement is to be entered into or a compromise is to be effected on behalf of a minor in a pending suit or proceeding. A reference to arbitration out of Court at a time no suit or proceeding is pending in Court, does not require the sanction of any Court. Where the guardian of a minor and a creditor of the estate refer their dispute regarding the debt to arbitration, and, the arbitrator having given his award, the creditor presents the award in Court and applied to have it filed, if the minor's guardian voluntarily appears in Court and consents to the award being filed, the decree made by the Court in terms of the award cannot afterwards be challenged as not binding on the minor on the ground that no leave of the Court was obtained in the case under O. 32, R. 7. It does not follow that the consent of the guardian to the filing of the award is given as a result of any agreement entered into by the guardian with the creditor after the latter files his application in Court for filing the award. It is only when an agreement is entered after the award is presented in Court that there would be a Court to sanction or not to sanction it. Till then there would be no Court whose sanction can be sought. 1940 Bom. 33=41 Bom.L.R. 1208. If a guardian *ad litem* of a minor defendant enters into an agreement of reference to

arbitration on behalf of the minor without obtaining the leave of the Court as required by O. 32, R. 7 the proceedings and the award resulting therefrom would be voidable against all the parties at the option of the minor defendant. This option is not intended to be given to the very persons who may enter into an agreement in contravention of R. 7 with a next friend or guardian *ad litem* of a minor party. It is only the minor who alone is entitled to resile from the agreement, if he may choose to do so, either on attaining majority or even before that through a next friend or guardian. *Obiter*.—The question of the legality of the reference and of the award can be raised on behalf of the minor by the same guardian or next friend who agreed to the reference resulting in the award. 1940 M.W.N. 191=1940 Mad. 650. See also 187 I.C. 860=1940 Pesh. 12; 41 Bom.L.R. 485=1939 Bom. 296. It is the minor alone who can challenge the award and the decree based thereon and the other parties to the reference cannot. If the decree based thereon is subsequently set aside at the instance of the minor, the effect would be to re-open the whole suit in respect of all the parties from the point at which the matter was referred to arbitration. 18 Pat. 271=1939 P. 278. See also 1939 Pat. 387; 40 P.L.R. 498=1938 Lah. 582. Where a dispute to which minors are parties is referred to arbitration and a party makes an application for an order directing the arbitrators to file the award and for a decree in accordance therewith and the guardian *ad litem* of the minors makes a petition that they have no objection to the decree the provisions of R. 7 are not attracted and the Court is under no necessity to sanction anything as a condition precedent to filing the award and passing a decree upon it. (22 Mad. 538, Rel. on.) 1939 Cal. 500. Neither S. 141 nor O. 32, R. 7 applies to a reference to an arbitration when the subject-matter of the proceedings in Court cannot possibly be said to be the same as covered by the reference to arbitration, and the award is not, therefore, invalid for want of leave of the Court for the reference. 41 P.L.R. 201=1939 Lah. 308. Where an application requesting that the Court should decide the case after local inspection and local inquiry as an arbitrator is signed by the pleaders duly authorised to compromise make a reference to arbitration and so forth and the fact that some of the defendants are minors and the application is for their benefit is clearly stated, the Court's sanction is presumed from the acceptance of the application. 15 L. 726=1934 L. 176. See also 59 C.L.J. 521=1934 C. 845. Where one of the parties to an arbitration is a minor, no particular form of sanction that the suit is for the benefit of the minor is required under R. 7. Where the Court appoints a guardian of the minor when it accepts an award it shows that

LOC. AM.—[MADRAS.] Add the following in O. 32, r. 7 as sub-rule (1-A) :—

"(1-A) Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall file in Court with the application a certificate to the effect that the agreement or compromise or action proposed is, in his opinion, for the benefit of the minor or other person under disability. A decree or order for the compromise of a suit, appeal or matter, to which a minor or other person under disability is a party, shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in Form No. 24¹ in Appendix D to this Schedule.

LEG. REF.

¹Note.—*This rule and Form No. 24 supersede r. 119 and Form No. 35 of the Civil Rules of Practice, 1905 and r. 33-A of the Rules of the High Court, Madras Appellate Side.

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interests of the minor are in its mind. (1926 S. 128, Rel. on.) 1935 S. 235. In the case of a minor party leave of Court need not be obtained before making an application to refer a dispute to arbitration. (28 A. 25, Foll.) 36 A. 69=12 A.L.J. 57; 43 B. 258=20 Bom.L.R. 970. See also 59 C.L.J. 521=1934 C. 845; 15 L. 726=1934 L. 176; 44 B. 202=22 Bom.L.R. 266. Where after suit on behalf of a minor was referred to arbitration, and a compromise was then entered into by parties and the same was accepted by the arbitrators who passed an award in its terms, the minor is not entitled to have the decree on the award set aside on that ground, especially when there is nothing to show that his guardian was negligent or that the compromise was not advantageous or beneficial to him. 42 L.W. 612=1935 M. 1068=69 M.L.J. 523. But see 1935 S. 235. Where under similar circumstances it was held voidable at the option of the minor on attaining majority. See also 19 I.C. 424=15 Bom.L.R. 223. Such an order of reference and the award can be assailed by the minor either in the suit itself or by a separate suit. 1936 A.L.J. 1333=167 I.C. 99=1937 A. 65 (F.B.). Agreement by pleaders of both sides to abide by decision of Munsif after inspection—Reference or compromise. A joint application signed by the pleaders for both the parties by which they agreed to abide by the decision of the Munsif after personal inspection of the locality is not a reference to arbitration but amounts to a compromise between the parties. 125 I.C. 587. Though one member of firm is minor, sanction of Court is not necessary to refer a suit against that firm to arbitration. 1923 L. 103. Where guardian of a minor party to a suit wishes to refer the matter to arbitration, Court ought to fully apply its mind to the matter and consider if the reference would be for minor's benefit. 59 I.C. 31=5 P.W.R. 1921; 52 I.C. 327=145 P.R. 1919; 17 I.C. 388=125 P.R. 1912; 15 S.L.R. 165=1922 S. 1; 39 M. 853=30 M.L.J. 465; 1929 L. 257. An application of next friend of a minor under Sch. II, para. 1, C. P. Code, comes within R. 7. 52 I.C. 327=145 P.R.

1919; 15 I.C. 161=95 P.R. 1912; 30 M.L.J. 465. Application to refer a question to arbitration is an agreement within the meaning of R. 7 because the rule has reference to the suit. 95 P.R. 1912=15 I.C. 161 (F.B.); 39 M. 853=30 M.L.J. 465. Where a decree is given on award, there is neither an appeal nor a revision. 15 S.L.R. 165=1922 S. 1. An agreement to refer to arbitration in a case where a minor or lunatic is concerned is an 'agreement' within the meaning of R. 7, and hence before the matter could be referred to arbitration, the leave of the Court must be expressly got recorded in the proceedings. Before granting the leave, the Court should exercise a judicial discretion as to propriety of the reference to arbitration in the interests of the minor or lunatic. All available materials should be placed before the Court and the materials must satisfy the mind of the Court that the action proposed is for the benefit of the minor or lunatic. Though it is not possible to lay down any hard and fast rule as to what should be done in such matters, this much can be said, that all facts necessary for the exercise of a judicial discretion by the Court should be placed before it and nothing should be concealed, for where the matter is being referred to arbitration and one of the parties is a lunatic, there should be abundant good faith. 1941 A.L.J. 596.

WITHDRAWAL OF SUIT.—The withdrawal of a suit by a next friend in pursuance of an agreement or compromise entered into with the defendant without leave of Court is voidable at instance of the minor. 27 M. 377; 14 M.L.J. 442; 3 C.L.J. 119; 1 A.L.J. 130. It is necessary that leave should be given after the Court's attention is directly called to the fact that a minor is a party to it, and the Court should apply its mind and ascertain whether the compromise is for the minor's benefit and then has to exercise its discretion; it is to be seen in each particular case from the application and the order thereon as to whether the Court intended to grant such leave. If no such leave is given the compromise or withdrawal is voidable at the instance of the minor by a suit to avoid it, and the minor, on the decree being set aside, will be restored to his original position in the suit. 152 I.C. 715=36 Bom. L. R. 738. When a next friend of a minor plaintiff withdraws from the suit, it is open to the minor through another next friend to have the suit reopened or reviewed. 29 C.

8. (1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

Retirement of next friend.

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor.

9. (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him,

Removal of next friend.

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735. See also 20 A. 98; 27 M. 377; 17 M. L.J. 179; 12 B. 553. A suit was filed by a person on his own behalf and on behalf of his minor brother to set aside an alienation by their father, the major brother withdrew from the suit as far as he was concerned, whereupon Court appointed another person who had been impleaded as third plaintiff as next friend of minor. Held, that neither O. 32, R. 7 nor O. 23, R. 1 (2) applied to the case, that the institution of the suit for the benefit of the minor made him a ward of the Court, that the withdrawal of the suit on his behalf was not in his interest and that the order appointing third plaintiff as next friend was proper. 148 I.C. 1171=1934 O. 257.

WITHDRAWAL OF APPLICATION.—Guardian can withdraw his petition to enter into a compromise at any time before the leave is granted. 35 I.C. 675=1917 P. 77. See also 7 L.R. 162 (Rev.). But see 107 I.C. 477=1928 C. 247.

APPEAL.—If the parties come to an agreement to settle an appeal on certain terms which puts an end to it, such a settlement, if it affects the interests of a minor, must under R. 7 be subject to the leave of the Court. 161 I.C. 751=43 L.W. 601=1936 M. 494.

SECURITY.—A next friend of a minor even if he is the managing member is not entitled to draw money from Court on behalf of the minor without furnishing the security. [36 M. 295 (P.C.), Foll.] 29 I.C. 475.

COSTS.—Where a next friend has acted *bona fide* he is entitled to his costs out of the infant's estate. 11 C. 213; 10 C. 248. But see 13 B. 234. As to whether a minor is liable for the costs of an attorney retained by the next friend, see 7 C. 140.

O. 32, R. 7: MADRAS AMENDMENT, R. 7 (1-A).—Leave of the Court is not necessary under R. 7 of O. 32, before a decree passed in favour of a Hindu minor plaintiff can be assigned or transferred by his guardian. R. 7 does not affect the rights of a natural guardian or a legal guardian who also happens to be the next friend in the matter of dealing with a decree as part of the property belonging to the minor. The scope of R. 7 has not been extended by R. 7 (1-A) added by the Madras High Court. Though the minor may challenge the validity of the transfer made by the guardian, that cannot make the judgment-debtor who

has paid to the assignee-decree-holder liable to pay the amount again. Payment made in accordance with the Court's order would protect him. I.L.R. (1938) Mad. 819=1938 Mad. 539=(1938) 1 M.L.J. 775 (F.B.).

O. 32, R. 8: SCOPE OF RULE.—See 1931 A. 656. Where a guardian *ad litem* to a minor defendant has once been appointed such appointment continues for the whole of the *lis* or until it is revoked by Court and the guardian so appointed is the only person who can file an appeal on behalf of the minor. 41 A. 619; 45 A. 623=21 A.L.J. 691. But see also 16 R.D. 553 (Irregularity in superseding one guardian and appointing another is curable and cannot be interfered with in second appeal. 16 R.D. 553). Absence of an affidavit is not sufficient to render the proceeding illegal and void as against the minor on the ground that he was not properly represented. 55 I.C. 833=1 L. 27. Where the next friend of a minor sues *in forma pauperis* Court can order next friend to pay the costs of defendant. 1923 N. 43. An application on behalf of a minor, made by a guardian *ad litem* discharged long before the date of application, should not be entertained. 6 Pat. L.J. 171=62 I.C. 235.

O. 32, Rr. 9 and 10.—Partition suit—Compromise—Father as next friend—Father's interest is not adverse to minors. 87 I.C. 42=1925 M. 734=48 M.L.J. 417. Court should remove a next friend under R. 9 if it thinks his interest is adverse to that of the minor and should stay proceedings under R. 10 until the appointment of another next friend. 63 I.C. 736=6 Pat.L.J. 317. A suit does not abate by the next friend's death and Court should either appoint a new next friend or keep suit pending till minor attains majority. 27 M.L.J. 405=25 I. C. 597. Appeal heard after death of guardian of minor defendant but without a fresh guardian on record—Appeal does not abate—But the appellate decree is invalid. 1928 P. 168=106 I.C. 540=9 P.L.T. 547.

MINOR NOT PROPERLY REPRESENTED—REMEDIES OPEN TO.—When a minor is made a defendant, it is the minor who is a party and not his guardian *ad litem*. It is not correct to say that the minor is not a party and cannot be allowed to be heard in the suit itself and if he is not properly represented his remedy is only to bring a separate suit. On the other hand, a minor, if not represented

or where he does not do his duty, or, during the pendency of the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit.

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.

10. (1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

Stay of proceedings on removal, etc., of next friend.

(2) Where the pleader of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.

11. (1) Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit.

Retirement, removal or death of guardian for the suit.

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or if not properly represented, has several remedies open to him. He may appeal, apply under O. 9, R. 13, apply for review, apply under O. 32, R. 5 (2) or bring a separate suit. The summary remedy in the suit itself is the least expensive and always open to the minor. 1932 A.L.J. 1128=1933 A. 116=55 A. 136.

O. 32, R. 10.—Death of next friend—Suit, whether abates—Duty of Court to appoint another next friend. 37 C.W.N. 184=1933 C. 508. Appeal—Death of appellant—Substitution of widow and minor son—Death of widow—Absence of application to appoint new next friend—Procedure—Right of respondents to apply. 17 Pat. L.T. 86.

O. 32, R. 11.—Guardians are not bound to contest all claims whether well or ill-founded. The test is whether the inaction of the guardian amounted to neglect of duty or was in the best interests of the infant. 6 C.L.J. 448. Mere fact that guardian did not enter appearance and take steps in connection with the appeal does not of itself show that he was either unable or unwilling to act or that he was guilty of neglect towards the minor. 59 C. 1108=1932 C. 888. Guardian cannot retire without Court's permission. 94 I.C. 340=1926 A. 437. (1922 A. 416, Dist.) Guardian *ad litem*—Permission to retire—Court can refuse. 1928 M. 980=113 I.C. 238 (2). Considerations for Court in giving permission to the guardian to retire or removing him. See 1931 A.L.J. 1102=1932 A. 130. "Claiming an interest adverse to the minor's"

only means that the interest of the minor cannot be safe in the hands of the guardian. 1932 A. 130. Dismissal of appeal for default of appearance by guardian of minor—Application for removal of guardian and restoration of appeal—Duty of Court. 21 L.W. 325=1925 M. 774. When a plaintiff fails or refuses to place an officer of Court appointed as guardian in possession of funds, Court can remove the officer appointed under this rule. 12 B. 553. The power of the Court under R. 11 to remove the guardian for the suit of a minor defendant and appoint a new guardian instead may be exercised at any time during pendency of the suit and same is not taken away by the fact that an order to try the suit *ex parte* has previously been passed. 1920 M.W.N. 241=55 I.C. 945. Inability on the part of the guardian *ad litem* to provide funds is sufficient cause. 9 I.C. 435=9 M.L.T. 333. The mere fact that the guardian *ad litem* did not appeal at the hearing of the suit and prosecute the defence would not necessarily go to show that the guardian was grossly negligent. A guardian *ad litem* is not bound to defend a suit if there is no valid defence to take. 14 Pat. L. T. 441=1933 P. 473. When a guardian appointed in the Court below fails to appear before High Court, the Court may, in order to safeguard the interests of the minor, appoint another person as guardian and such an appointment will operate as removal of the other guardian who has not appeared. 37 C. W. N. 921=1933 C. 794. Where a Court removes a guardian *ad litem*, the party concerned should be given an opportunity to suggest

(2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place.

Course to be followed by minor plaintiff or applicant on attaining majority.

12. (1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read henceforth thus :—

“A. B., late a minor, by C. D., his next friend, but now having attained majority.”

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

(5) Any application under this rule may be made *ex parte*; but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.

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another person. The Nazir should only be appointed as a last resort. 1939 A.M.L.J. 31. Appeal—Misconduct of guardian *ad litem*—Removal—Jurisdiction of trial Court—Procedure to be adopted—Application for removal made to appellate Court long after appeal was filed—Grounds for removal not set out—Application liable to be dismissed. 1930 A. 456. After a suit is decided the Court is *functus officio* and cannot pass any orders for removal of any guardian *ad litem* of the minor. If any person desires to file an appeal against the decision, he must apply to the appellate Court to remove the original guardian and appoint him in his place so as to enable him to appeal. 122 I.C. 445=1930 N. 177. Removal—Admission of claim by guardian *ad litem* who had been removed—Whether admissible as against subsequently appointed guardian. 6 O.W. N. 1060=1930 O. 110=5 Luck. 453. Where during the pendency of the appeal, the guardian for the minor respondents dies and no effort is made by the Court, under R. 11 to appoint a guardian *ad litem* for them, and a decree is passed, that must be set aside as made during the absence of a guardian *ad litem* and the suit must be remanded to the same lower appellate Court. 1936 P. 570=165 I.C. 581 (1). Defendant of unsound mind represented by his brother defendant as guardian *ad litem*—Suit dismissed—Appeal—Both defendants impleaded as respondents but omission to describe one of them as guardian *ad litem*—Death of guardian *ad litem* pending appeal—No fresh guardian appointed—Held, that there was only a misdescription in the heading of the appeal and that the defendant was represented by the guardian *ad litem* but as the appeal had proceeded in the absence of a guardian

ad litem after his death, the defendant was not represented and the decree passed in the appeal was a nullity and not binding on him. (38 P.L.R. 320=161 I.C. 987, Reversed.) 1936 L. 861.

COSTS.—Costs cannot be decreed against the guardian of a defendant except in the case referred to in this rule. 3 M. 263; 1929 A. 18. Costs cannot be decreed against a guardian who has not been appointed with his previous consent. 5 B. 306. Guardian *ad litem* who is also a party on record can be made to pay costs—O. 32, R. 11 does not control S. 35, C. P. Code. 1928 M. W.N. 318=110 I.C. 310=1928 M. 590. The appellants in the lower appellate Court who are respondents in the second appeal, not being under a duty to appoint guardian *ad litem* for the minor respondents in the lower Court, should not be made responsible for costs of the appellants in second appeal. 165 I.C. 581 (1)=1936 P. 570.

O. 32, R. 12.—The title of the suit or application should only be corrected when the suit or application is pending. No correction need be made after final decree, and when it only remains to proceed in execution. 22 C. 274. R. 12 does not contemplate the giving of an opportunity to a person who is not on record to continue the suit. The rules apply to cases where a suit has been filed by a minor who becomes a major during the course of the trial. A suit was filed by an uncle in the name of his nephew for the purpose of making it appear that the nephew was a minor on the date of a decree of a Panchayat Court against the nephew which was sought to be set aside in the suit. It was found that the plaintiff's nephew was a major on the date of the decree as well as of the suit. Held, that the plaintiff being a major at the time

13. (1) Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

Where minor co-plaintiff attaining majority desires to repudiate suit.

(2) Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant.

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs.

(4) Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant.

14. (1) A minor on attaining majority may, if a sole plaintiff, apply that a Unreasonable or improper suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper.

(2) Notice of the application shall be served on all the parties concerned; and the Court upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit.

LOC. AM.—[MADRAS.] In O. 32, after r. 14 add the following as r. 14-A:—

“14-A. The appointment or discharge of a next friend or guardian for the suit of a minor in a matter pending before the High Courts in its appellate jurisdiction, except in cases under appeal

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of the filing of the suit, no other person had a right to file the suit on his behalf, and the suit had therefore to be dismissed. 51 L. W. 267=1940 Mad. 522=(1940) 1 M. L. J. 337. Suit by next friend—Election to continue—Effect of. 88 I.C. 116=1925 S. 330. When the minor, on attaining majority, elects to abandon the suit, he must pay costs of next friend, unless under R. 14, he can show that the suit was unreasonably or improperly instituted. [(1910) 2 Ch. 393, Foll.] 38 L.W. 985=65 M.L.J. 841. When next friend is dead no application for his discharge could be made. 22 C. 274. The case of a defendant attaining majority during pendency of suit is not provided for—Notice of the case need not be given to him—Decree passed by Court in his absence not a nullity. 110 I.C. 725=1928 L. 71. Minor defendant attaining majority during pendency of suit but not electing to come on record and conduct defence himself—Decree in suit passed on foot of his being a minor—Validity against him—Decree after contest—Decree based on compromise—Distinction—Leave of Court under O. 32, R. 7—Effect. 1928 M. 294=51 M. 763=29 L.W. 455.

O. 32, Rr. 12-14: SCOPE—NEXT FRIEND AND GUARDIAN AD LITEM—DIFFERENCE.—Under O. 32, Rr. 12-14, C. P. Code, a plaintiff or applicant, on attaining majority, is given by the Statute an option to abandon the suit or to proceed with it, and there is no anomaly if some similar liberty to ratify or to repudiate the act of guardian on his behalf is not given to a minor defendant. The reason is that the plaintiff suing through a next friend is put in a different position from a defendant against whom a suit is brought through a guardian *ad litem*. The next friend of a minor plaintiff, unless he

happens to be a certificated guardian under the Guardians and Wards Act or the Court of Wards Act, takes upon himself the responsibility of instituting a suit in the name and for the benefit of the minor. But a guardian *ad litem* for a minor defendant is a person appointed to act as such by the Court. 1937 P.W.N. 720=1937 Pat. 625.

O. 32, R. 13.—Minor attaining majority during pendency of appeal—Counsel engaged by next friend not appearing on date of hearing—Fresh engagement not given to counsel by *quondam* minor—Dismissal of appeal for want of prosecution—Legality—Proper procedure. 1929 L. 555 (2)=30 P.L.R. 273.

O. 32, Rr. 13 and 14.—If a minor plaintiff, on whose behalf a suit has been filed by his next friend, elects, on attaining majority, not to proceed with the suit, he can only do so on submitting to an order to pay the costs of the defendant and also the costs of the next friend. The defendant is placed in exactly the same position as he would be in if the plaintiff had never been a minor. It is only in a case of misconduct by the next friend, which falls within R. 14 of O. 32, that any order for payment of costs can be made against the next friend after the minor has attained majority. I.L. R. (1940) Bom. 135=41 Bom.L.R. 1296=1940 Bom. 58.

O. 32, R. 14.—Next friend of a minor plaintiff died during the pendency of the suit. Suit was subsequently dismissed owing to the indifference of the plaintiff's relations and costs were ordered to be paid out of the estate of the deceased next friend. *Held*, that the order as to costs was made without jurisdiction. 20 O.C. 300=43 I. C. 257=5 O.L.J. 106.

to the King in Council, shall be deemed to be a *quasi-judicial* act within the meaning of S. 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications represented out of time shall be posted before a Judge for disposal."

15. The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

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O. 32, R. 15: SCOPE AND APPLICATION.—Court must be satisfied of the title of next friend to intervene and it ought to be satisfied that the person is of unsound mind and that he stands in need of protection. 23 B. 658. See also 1941 A.L.J. 596. The fact that there is some evidence in the shape of statements found on the record indicating that a person is of unsound mind is not enough to enable a suit to be maintained on his behalf by a next friend. R. 15 requires that it should be found on enquiry that by reason of unsoundness of mind or mental infirmity that person is incapable of protecting his rights as plaintiff or a defendant as the case may be. Such a finding will have to be arrived at, and it must be arrived at upon an enquiry properly held. 38 C.W.N. 1081. In cases coming under R. 15, it is desirable that the Court should, before admitting the plaint, insist upon an independent application and an affidavit disclosing the facts relating to the unsoundness of mind of the person on whose behalf the plaint is presented; it is also open to the Court to direct the next friend to produce witnesses before it in order that it may satisfy itself as to the mental capacity of the person on whose behalf the plaint is presented. All that is needed that there should be some *prima facie* proof to satisfy the Court that the person was, by reason of unsoundness of mind or mental infirmity, incapable of protecting his interests, because an order permitting the next friend to represent such a person is not final. It is always open to the defendant to take out an independent application to have the said order revoked, when the Court can go fully into the matter. But when once the Court permits the next friend to sue on behalf of such person, it is not open to the Court to raise an independent issue in the trial as to the competency of the next friend to represent the plaintiff in the suit. 53 L.W. 258=(1941) 1 M. L.J. 354. Where an application is made to a Court after the final decree in a suit has been passed by the mother of the judgment-debtor for appointing a guardian *ad litem* for the judgment-debtor who is alleged to be mentally infirm and unable to manage his affairs for the purpose of enabling the guardian to ask the Court to apply the provisions of Madras Act IV of 1938 to the decree passed in the Court, the Court should hold a judicial inquiry as contemplated by R. 15.

C. C. M.—153

It is not proper for the Court to dismiss the application by merely relying on the previous history of the litigation and on its opinion after looking at the judgment-debtor and questioning him. When the applicant is desirous of adducing evidence such as a doctor's certificate, an opportunity must be given to adduce such evidence. Since the consequence of the dismissal of the application would be to prevent the applications of the provisions of the Madras Act IV of 1938, to a case to which they may apply it is incumbent on the Court to hold a regular inquiry and to invite the parties to proper evidence even if the parties are somewhat indifferent, as otherwise justice could not be done. 53 L.W. 193=(1941) 1 M.L.J. 234. Where the respondent to an appeal dies during its pendency, but no enquiry is made, as no information is given to the Court which would lead to an enquiry, the provisions of the rule are not directly contravened by the omission to appoint a guardian *ad litem*. 1936 O. 67=11 Luck. 486. It is not to be assumed as a matter of course that if a plaintiff alleges that a defendant is of unsound mind the Court must immediately accept it and appoint a guardian *ad litem* under R. 15. Court has to appoint a guardian *ad litem* only when a defendant has been adjudged a lunatic in an inquisition under the Lunacy Act or when the Court itself on inquiry has found that the defendant is of unsound mind. 38 C.W.N. 900=1934 C. 833. Where there was no adjudication that a person was of unsound mind, nor was there any enquiry resulting in the finding of the Courts that he was by reason of unsoundness of mind or mental infirmity incapable of protecting his interest in the suit, a suit by a person posing himself as the next friend of the lunatic and on his behalf is not competent. 161 I.C. 665=1936 R. 121. See also 1937 M.W.N. 398. Inquiry under R. 15—Scope of—Act IV of 1912—Lunacy proceedings under—Scope of—Distinction—Finding in latter—Not conclusive in former. 50 A. 335=25 A.L.J. 1082=1928 A. 108. The rule applies to execution proceedings. 19 M. 219 (226). The provisions of R. 15 do not apply in terms to the proceedings before Privy Council, though their Lordships would ordinarily require an insane person to be adequately represented before them so that his interests might be protected. 158 I.C. 338=1935 O. W.N. 1071. Where one of the parties to

16. Nothing in this order shall apply to a Sovereign Prince or Ruling Chief suing or being sued in the name of his state, or being Saving for Princes and Chiefs. sued by direction of ¹[the Central Government, or the Crown Representative, or a Provincial Government] in the name of an agent or in any other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind.

LEG. REF.

¹ Substituted for "the Governor-General in Council or a Local Government" by A.O., 1937.

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the suit is a person of unsound mind, but a major, the Judge should in the first place ascertain whether he is a person of unsound mind, and whether he is to be represented by a guardian or not, and should then proceed with the hearing of the suit. 1933 A. 149. The fact that a person of high position had renounced the world and become a sanyasi, devoting himself wholly to spiritual things and entirely neglecting his worldly affairs, would not of itself, however unusual such conduct might be in a man of high position of a zamindar possessing considerable landed property, justify the Court in holding that by reason of unsoundness of mind or mental infirmity he was incapable of protecting his interests, when suing or being sued within R. 15. But a persistent delusion of being haunted by demons, of persecution by imaginary voices attributed to gases issuing from various parts of his body and the religious megalomania which led him to regard himself as destined to be in some sort of a saviour of the world are symptoms which would justify the conclusion that the person is suffering from systematic delusional insanity and incapable of managing his own affairs. 31 C.W.N. 1087=101 I.C. 363 (2)=1927 P.C. 123 (P.C.). Applicability—Deaf and dumb persons. 1930 L. 425=126 I.C. 579.

THE POSITION OF LUNATIC AND MINOR IS THE SAME.—A sale of a lunatic's property in execution of a decree against him in a suit in which he was not represented by a guardian *ad litem* is a nullity and the lunatic can resist an action for possession without setting aside the sale. [32 C. 296=32 I.A. 23 (P.C.); 38 M. 1076, Dist.]; 34 I.C. 551=4 L.W. 228; 33 C. 1094; 18 C.W.N. 1329=20 C.L.J. 291. Where guardian of respondent died before appeal was argued and appeal was subsequently decided, held that it was not valid and binding. 1936 L. 861 (Reversing 38 P.L.R. 320=161 I.C. 987). But see 1936 A.L.J. 964=1936 A. 806. (Where it was held that it was only an irregularity and that if there was no prejudice to any party the decision cannot be set aside; and that in any event the appeal could be revived and proceeded with with proper guardian or next friend appointed). Where a decree is obtained against a lunatic

on the refusal of Court to appoint a guardian *ad litem* for him, the representatives of the lunatic cannot after his death raise an objection in execution that the decree was null and void. 45 I.C. 219. The provisions of this rule are not exhaustive and lunatic can sue through his next friend though not adjudged a lunatic under any law. 33 C. 1094; 24 M. 504; 23 B. 658. See also 13 B. 656. Omission to appoint a guardian *ad litem* for a man of unsound mind does not render the whole suit invalid *ab initio*. 22 I.C. 673. Rule applies whether the lunatic is adjudged or not. 3 L.W. 301=34 I.C. 428; 16 I.C. 885; 29 I.C. 595=13 A.L.J. 562; 34 I.C. 551=4 L.W. 228 (7 C. 242; 13 B. 656; 24 M. 504, Foll.) Defendant alleged to be of unsound mind by one party denied by the opposite party—Judicial inquiry is necessary. 1922 C. 86. There is no established rule of practice requiring that suits relating to a lunatic's property should be brought by the lunatic manager and not by himself. On the contrary the code contemplates suits by persons of unsound mind whether so adjudged or not. Though it is true that a person so incapacitated has to sue by a next friend, yet next friend is not a party and the absence of a next friend is immaterial. 27 I.C. 459=19 C.W.N. 45. Person of weak mind can sue through a next friend. 83 I.C. 253=1925 N. 245. See also 48 L.W. 610=(1938) 2 M.L.J. 810. Power-of-attorney granted by plaintiff—Plaintiff incapable of protecting his interests—Suit by next friend for revocation is maintainable. 48 L.W. 610=(1938) 2 M.L.J. 810. Notice of unsoundness—Duty to appoint guardian—Decree. 50 I.C. 109=17 A.L.J. 257. Lunatics are under the peculiar protection of the Court and from the mere fact that by reason of the ignorance of the Court no enquiry was made, the decree passed against a lunatic without the appointment of a guardian cannot be said to be binding upon him. Such a decree is a nullity. The lunatic so aggrieved is not confined to the solitary remedy by way of review only; he can through his next friend institute a suit for a declaration that the decree is not binding on him. 1937 A.L.J. 17=1937 A. 29.

ABSENCE OF ENQUIRY INTO UNSOUNDNESS OF MIND—EFFECT ON PROCEEDINGS.—The inquiry contemplated by R. 15, should precede the filing of the plaint. 1937 M.W. N. 398. Non-compliance with R. 15—Effect—Defendant alleged to be of unsound mind

LOC. AM.—[MADRAS.] Add as r. 17 of O. 32 :—

"17. In suits relating to the person or property of a minor or other person under the superintendence of the Court of Wards, the Courts in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance."

ORDER XXXIII.¹

Suits by Paupers.

Suits may be instituted in
forma pauperis.

1. Subject to the following provisions, any suit may be instituted by a pauper.

LEG. REF.

¹ Amendments for Rangoon, see p. 1237.

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in midst of hearing of suit—Issue as to unsoundness of mind not raised and tried—Finding on written statement subsequently filed and without taking evidence is not binding—Decree is liable to be set aside. 1938 P.W.N. 705=1939 P. 25. Where a suit on behalf of a person of unsound mind has been tried out, without any inquiry into or finding as to the plaintiff's unsound mind, the appellate Court which finds out the defect must itself hold the enquiry, and not direct the trial Court to hold it; and if as a result of the enquiry the appellate Court finds that unsoundness of mind as required by R. 15 is made out, it must hold the trial to be in order and must dispose of the appeal on the merits; but if on the other hand the unsoundness of mind is not made out, the suit must be held to be not in order, and the proceedings being illegal the decree must be held to be a nullity. 38 C.W.N. 1081=1935 C. 224. See also 1937 M.W.N. 398.

REVISION.—Application for enquiry under R. 15—Wrongful dismissal—High Court can set aside by virtue of inherent powers. 23 A.L.J. 1082=50 A. 335=1928 A. 108.

O. 33.—This order applies to pauper suits; and O. 44 applies to pauper appeals. As to applicability of this order to pauper appeals, see 1936 Pesh. 69=161 I.C. 954. There is no machinery in O. 33 by which Court is enabled to allow plaintiff to continue as a pauper a suit instituted in the ordinary way. 1932 C. 655=36 C.W.N. 567. But see 36 C.W.N. 1035=56 C.L.J. 148=60 C. 827; 64 M.L.J. 728; 161 I.C. 359=43 L.W. 380=1936 M. 158 (Partition suit); 40 C.W.N. 747=162 I.C. 689=1936 C. 221 (*contra*). See also 57 M.L.J. 677. An application for the grant of probate or letters of administration, which is clearly a proceeding in a Court of civil jurisdiction, is subject to the provisions of O. 33, C.P. Code, and the rules of that order are therefore applicable to such an application. The mandatory language of S. 19-I of the Court-Fees Act is subject to the provisions of O. 33. The Court has power to order letters of administration or probate to issue *in forma pauperis* making the fees payable to Government under S. 19-I, Court-Fees Act and any other Court-fees payable as a first charge upon the subject-matter of the grant pursuant to O. 33, R. 10. 47 L.W. 731=1938 Mad. 486.

VAKALATNAMA.—When an application for leave to sue as a pauper is granted, a vakalat filed by a pleader in the application must be considered to have become a vakalat given for the suit as well, unless it is distinctly limited and confined to the pauper petition alone. No fresh vakalat is necessary to conduct the suit. 1934 M. 690=67 M.L.J. 594.

O. 33, R. 1.—Person entitled to property—If a pauper. 119 I.C. 697=1929 N. 319.

SCOPE OF RULE.—An applicant to be disqualified to sue as pauper must be possessed of means sufficient to pay Court-fees, and not merely entitled to property. 105 I.C. 30. Whether a suit instituted in the ordinary way may be continued as a pauper suit. See notes under O. 33, *supra*. Whether S. 141 makes the general provisions of the Code applicable to proceedings for the grant of succession certificate under the Succession Act of 1925. 155 I.C. 1118=1935 A. 735. In 5 C. 819 it was held that Court had power to allow a defendant to defend *in forma pauperis*. English law is different from Indian law. 2 P. 879=4 Pat.L.T. 538. No Court-fee is payable upon a bill or plaint in England and only the costs of conducting the litigation such as payment of fees to lawyers, etc., has to be incurred. 2 P. 879.

WHO CAN SUE AS A PAUPER.—A person who has obtained leave to sue under S. 18 of the Religious Endowments Act can be permitted to sue *in forma pauperis*. 24 M. 419. Where a suit is filed on behalf of an estate and the estate is not a pauper, the trustee representing such estate may claim to be allowed to file a suit *in forma pauperis*. (7 M. 390, Foll.) 1933 M. 883=65 M.L.J. 781. A minor can sue as a pauper although his next friend has substantial means. 3 M. at 4; 1929 L. 746 (2); 37 C.L.J. 394=1923 C. 656. A next friend who is a pauper can sue *in forma pauperis*. 11 B. L.R. 373. Leave to sue *in forma pauperis*—No assets as executor—Grant of leave. 1930 L. 735 (2)=125 I.C. 611. An executor may be allowed to petition for, and, if entitled thereto, obtain probate *in forma pauperis*. 18 B. 237. An administrator of an estate can also sue as a pauper. 7 M. 390. An Official Receiver in whom the estate of an insolvent has vested under S. 28 (2) of the Provincial Insolvency Act by virtue of an order of adjudication made by the Court, can institute a suit as a pauper for recovery of the said estate, provided he fulfils the conditions laid down in the

Explanation.—A person is a “pauper” when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing-apparel and the subject-matter of the suit.

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explanation to O. 33, R. 1. The word “person” in the rule would include both natural and legal persons and would not exclude the Official Receiver. The test is not whether he is the legal owner, but whether as legal owner, as distinct from his personal capacity, he is a pauper or not. The fact that he is not a pauper in his individual capacity is immaterial. 1 L. R. (1937) Mad. 784=1937 Mad. 549=(1937) 1 M. L. J. 727 (F. B.). Order 33 applies to suits by companies. The term ‘persons’ in the order includes companies also. 41 M. 624=34 M.L.J. 421. Firm can be considered to be ‘person’ under R. 1. Where a firm brings a suit for recovery of certain amount by way of damages for certain wrongful acts but afterwards becomes insolvent and the suit is dismissed as Official Assignee refused to prosecute it the firm can be granted leave to appeal as a pauper even though there is possibility that some of the assets will come back to the firm later. 1930 R. 272. A shebait suing his co-shebait and an alienee for recovery of endowed property may be allowed to sue *in forma pauperis*; the fact that his co-shebait is possessed of means is perfectly immaterial. 11 I.C. 892. An idol is a “person” who comes within the meaning of R. 1. 31 N. L.R. 413=1935 N. 209. Where the *shebait is suing for recovery of possession* of debutter properties with an application for permission to bring the suit as a pauper the question that requires consideration is whether the trust property vesting in the idol is sufficient to pay Court-fees or not. 152 I.C. 241 (1)=1934 P. 531. The question whether the *shebait* has funds of his own is irrelevant. 31 N.L.R. 413 (noted *supra*). (1927 C. 309, Foll.).

EXPLANATION.—See 30 B. 593; 10 B. 207; 10 A. 467; 1936 O.W.N. 237=1937 O. 431. It cannot be laid down that the subject-matter in dispute in the suit can in no circumstances be taken into account in considering whether the plaintiff is possessed of sufficient means to enable him to pay the Court-fee or not. The Explanation to R. 1 consists of two distinct parts, and while under the second part the legislature has advisedly excluded the subject-matter of the suit, it has obviously refrained from excluding it in the first part. In cases coming under the first part, it is not possible to hold that the subject-matter of the suit must always and of a necessity be excluded from consideration. Whether or it should or should not be excluded is a matter for the consideration of the Court. The words “possessed of sufficient means to enable him to pay the fee” are not equivalent to “possessed of sufficient

property to enable him to pay the fee.” 1937 A. L. J. 1171=1937 All. 740. The two clauses in explanation to R. 1 are disjunctive. Hence where there is a fee prescribed in the plaint, possession of a part of the subject-matter can be considered and the words “subject-matter of the suit” in Cl. (2) cannot be imported into Cl. (1). 149 I.C. 1004=1934 A. 323. See also 1933 P. 203; 67 M.L.J. 581. The comma after the word “suit” in the explanation to O. 33, R. 1, separates the first part of the explanation from the second part; it would therefore follow that the words “other than his necessary wearing apparel and the subject-matter of the suit,” qualify only the second part of the explanation and not the first. Where it is found or agreed that the plaintiff has a saleable interest in certain items of the property in suit it would be contrary to the spirit of O. 33, if the plaintiff could ignore that property on which money could be raised. 51 L. W. 633=1940 Mad. 754=(1940) 1 M.L.J. 813. Where an applicant for leave to appeal as a pauper is in possession of the subject-matter of the suit, the Court should take into consideration its value in determining whether or not he should be allowed to appeal as a pauper. 42 P. L. R. 266=1940 Lah. 310. In deciding whether an applicant for permission to sue *in forma pauperis* is possessed of sufficient means to enable him to pay the Court-fee prescribed by law, the possession by the applicant of an occupancy holding must be taken into consideration. The Court will have to consider whether the applicant can convert the occupancy holding into cash so as to enable him to pay the Court-fee. 1 L. R. (1938) Nag. 171=1938 Nag. 176. The word “persons” in O. 33 has reference to all those who have a right to institute a suit under the Code. O. 33 applies to all prospective plaintiffs or persons in whom any right to relief exists within the meaning of O. 1, R. 1 of the Code. (1930 R. 272 and 1918 M. 362, Foll.; 1930 R. 259, not Foll.) 31 N.L.R. 413=1935 N. 209. A person who applies for leave to sue as a pauper is not bound to try and raise funds by mortgaging his claim. 3 M. 249. Where an applicant for permission to sue as pauper is shown to own considerable properties, but all of them are heavily mortgaged, some being with possession and some being the subject of suits, evidence has to be taken to enable the Court to judge whether any money can be raised on the properties. If it cannot be reasonably held that the applicant can raise the amount necessary for the suit, he will be allowed to sue as a pauper. 152 I.C. 260=40 L.W. 273=1934 M. 562 (1). See also 7 Cut.L.T. 28. It

LOC. AMS.—[BOMBAY.] The following sentence shall be added to the Explanation to r. 1 of O. 33, namely:—

“In determining whether he is possessed of sufficient means the subject-matter of the suit shall be excluded.”

[MADRAS.]

Explanation (i).—A person is a pauper—

(a) when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or

(b) where no fee is prescribed when he is not entitled to property worth one hundred rupees other than his wearing apparel and the subject-matter of the suit.

Explanation (ii).—Any part of the subject-matter of the suits which the opposite party relinquishes and places at the immediate disposal of the plaintiff shall be taken into account in considering the question of the possession of sufficient means by the plaintiff.

Explanation (iii).—Where the plaintiff sues in a representative capacity the question of pauperism shall be determined with reference to the means possessed by him in such capacity.

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cannot be laid down as an abstract proposition that in every case where plaintiff has got a *mortgage or similar claim*, he cannot be regarded as a pauper. It all depends on circumstances of each case, but until it is shown that plaintiff can raise money, he is a pauper and entitled to permission to sue as such. 152 I.C. 938=40 L.W. 370=1934 M. 561. See also 1929 L. 821. *Suit to redeem*—Equity of redemption—Should be excluded in calculating means. 19 N.L.R. 165=1924 N. 44. See also 45 C.W.N. 426; 1933 M. 679=65 M.L.J. 277. Occupancy tenancy is not property. 90 I.C. 949=1925 N. 438. *Suit in forma pauperis*—Admission of part of the claim by defendant cannot dispauper plaintiff. 47 B. 523=25 Bom.L.R. 199. Meaning of the words “other than his necessary wearing apparel and subject-matter of suit”. See 1926 N. 273; 1928 N. 24; 1928 L. 271; 1929 N. 319. “Is not possessed of sufficient means” in the explanation. See 100 I.C. 264=1927 C. 309. Mortgage in petitioner’s favour is ‘means’. 1929 L. 821. See also 1934 M. 561. Ordinary ornaments of women are wearing apparel and ought to be excluded. (*Ibid.*) So also dower debt not reduced to possession. (*Ibid.*) Ornaments worn by a woman on her person cannot be classed as necessary wearing apparel, when she is applying for leave to sue as a pauper. 1938 P.W.N. 804=19 Pat.L.T. 844. Explanation—Sufficient means—Property involved in suit whether can be taken into account—Effect of word ‘possession’—Injunction restraining parties from dealing with suit amount after termination of suit pending decision as to Court-fee—Propriety. 34 C. W. N. 188=1930 C. 147. The existence of joint family property of a joint family of which the applicants suing as paupers are members, may amount to ‘means’ within the meaning of R. 1. 1934 A.L.J. 247=1934 A. 396. In considering whether a person is a pauper the subject-matter of the suit should be excluded. A decree obtained by a pauper plaintiff for partition and separate possession of properties subject to his liability to pay debts against which he seeks to appeal in *forma pauperis* in respect of his liability for the debts should be excluded in

considering whether he is entitled to leave to appeal as pauper. 1934 M. 653 (1)=67 M.L.J. 581. For determination of the question whether a person is of sufficient means to enable him to pay Court-fee on the plaint any property of which he may be in possession will not be excluded from consideration, even though it may form part of the subject-matter of his suit. The subject-matter of the suit has to be excluded from the consideration only at the time when Court comes to consider under the second part of the explanation to what property he may be entitled. 144 I.C. 230=1933 P. 203. See also 1930 C. 147; 67 M.L.J. 581. Where plaintiff claims to be owner of the property in dispute but the property is in possession of defendant who sets up *adverse title*. Held, that it was entirely different from a case where plaintiff in a mortgage suit has the equity of redemption which may be treated as his “asset”; here the plaintiff could not raise a penny on such property which could not, therefore, be treated as his “asset”. (1928 L. 271, Dist.) 1933 L. 528. The mere fact that the applicant’s husband has property is not sufficient reason for disallowing her application to sue in *forma pauperis*. 44 I.C. 723=3 Pat.L.J. 178. Nor can the earnings of a brother in service be regarded as property belonging to plaintiff. 158 I.C. 369 (1)=1935 L. 965. A person may have rich relations, and yet he or she herself may not be in a position to pay Court-fee. If he is not possessed of any means, the question whether or not the alleged rich relations of the applicant were in a position to pay Court-fee which the applicant would have to pay should not be gone into, and he should be allowed to sue as a pauper. 146 I.C. 473=1933 A. 556. An applicant for a succession certificate can be considered to be a “pauper” only if he is not possessed of sufficient means to enable him to pay the Court-fee on the application for succession certificate. 155 I.C. 1118=1935 A. 735. The deposit required under S. 379, Succession Act, cannot be considered to be the “Court-fee payable on the plaint”, or in the case of the application for certificate, on such application, for the purpose of determining whether the applicant is a “pauper”. (*Ibid.*) A woman who has been permitted to sue as

2. Every application for permission to sue as a pauper shall contain the particulars required in regard to complaints in suits; a schedule of any movable or immovable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings.

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pauper cannot be asked to furnish security for costs under O. 25, R. 1. 36 I.C. 320=10 Bur.L.T. 105; 1928 L. 960. An order for security for costs passed in an ordinary suit ceases to operate as regards the antecedent costs if leave is given to continue the suit as a pauper before the period for furnishing the security has expired. 13 Bom.L.R. 955=36 B. 415.

APPEAL.—Where money deposited into Court under decree of lower Court and drawn by plaintiff appellant was sufficient for payment of Court-fee on appeal, she cannot be allowed to institute the appeal *in forma pauperis*. 94 I.C. 337=1926 M. 567=50 M.L.J. 114.

REVISION.—Order, either rejecting or granting an application for leave to sue *in forma pauperis*, amounts to case decided and if the order falls within the purview of Cls. (a), (b) or (c) revision is competent. 1931 R. 318. See also 1938 O.W.N. 561=1938 Oudh 146; 1941 O.A. 427; (1941) 2 M.L.J. 505; 7 Cut. L. T. 28. From an order allowing a pauper application defendant can have no possible grievance, assuming the order was wrong. The only person really affected is the Crown High Court can interfere in a proper case, but it would be slow to move at the instance of the opposite party. 151 I.C. 316=1934 L. 295. See also 1930 A.L.J. 901=1930 A. 708=52 A. 927; 1940 O.W.N. 259; 1940 O.W.N. 626.

PRACTICE AND PROCEDURE.—Court should not allow plaintiff to sue *in forma pauperis* without affording defendant an opportunity to prove that plaintiff is not a pauper. (10 B. 207; 30 B. 593, Rel. on.) 23 I.C. 974. Order as to pauperism or otherwise ought not to be made on mere conjecture. 1931 R. 318 [referring to 5 R. 296 (F.B.) and 7 R. 339]. Application to sue *in forma pauperis*—Dismissal without deciding fact of pauperism—Legality—Interference in revision. 1930 A.L.J. 901=52 A. 927. Report of *Tahsildar* as to possession of means, when good or otherwise. 28 I.C. 87=39 P.L.R. 1915. Where pauper application is dismissed, Court can extend time for payment of Court-fee. 18 L.W. 451=46 M.L.J. 254. See also 66 C.L.J. 78. Where subsequent to application to sue as a pauper, the applicant receives a sum of money sufficient to defray the suit expenses Court has no jurisdiction to grant leave to sue as a pauper. 61 I.C. 958=13 L.W. 76. A suit instituted in the ordinary way may be allowed to be continued *in forma pauperis*. 60 C. 827=57 C.L.J. 441. See also 37 L.W. 725=1933 M. 498=64 M.L.J. 728; 57 M.L.J. 677; but see 36 C.W.N. 567=1932 C. 655=

139 I.C. 520. Once application to sue as a pauper is admitted, plaintiff can only be dispaupered under O. 33, R. 9 on the grounds mentioned therein. If during the trial of the suit, it appears to Court that plaintiff has got no cause of action, the plaintiff's suit will be dismissed and he will not be merely dispaupered. 157 I.C. 520=1935 Pat. 449.

BURDEN OF PROOF.—As to pauperism is on the applicant himself, see 1926 N. 273.

LIMITATION.—An application for leave to sue as a pauper presented five years after attaining majority is barred, and cannot be allowed. 26 I.C. 90=1 L.W. 668.

LEGAL REPRESENTATIVE of pauper plaintiff cannot continue suit after plaintiff's death unless such legal representative is also a pauper. 104 I.C. 347=1927 L. 665; 24 L.W. 550=1925 M. 819; 1928 M. 66; 36 B. 279=11 I.C. 724=13 Bom.L.R. 577; 25 A. 137; 33 C. 1163; 26 I.C. 714; 64 I.C. 63. Where one of the applicants to sue as pauper dies during pendency of the application, his legal representative is entitled to be brought on record in his place, and to continue the proceedings as a suit by substitution on payment of Court-fees, or else by filing a fresh application for leave to sue as pauper. Court, not allowing the applicants time for substituting the heirs of deceased applicant, acts with material irregularity. 15 Pat. 738=1936 Pat. 591.

O. 33, R. 2.—A petition to sue *in forma pauperis* which fails to comply with the provisions of R. 2 ought to be rejected. 6 Bur.L.T. 141=20 I.C. 640. The Court has power to allow a plaintiff to continue *in forma pauperis* a suit which has been instituted in the ordinary way, but before he can do so, there must be an application for permission which must comply with O. 33, R. 2. 196 I.C. 40. R. 2 is mandatory. An applicant who is a member of a joint family must enter all the joint family properties in a schedule under R. 2 for information of all Courts inasmuch as he is entitled to a share of that property on partition. The same proposition holds good in respect of a minor member of a joint family. 1934 A.L.J. 247=1934 A. 396. The property which is the subject-matter of the suit is not exempted from the operation of R. 2. 177 I.C. 311=1938 Pesh. 50. Mortgage decree—Mortgagor applying for leave to appeal *in forma pauperis*—Duty to state in affidavit valuation of equity of redemption. 45 C.W.N. 426. As to necessity for verification of schedule to application, see 138 I.C. 652=1932 L. 548. Whether verification is required in the case of pauper appeals.

3. Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can

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1937 Nag. 108. When allegations in plaint show *prima facie* cause of action the application to sue as a pauper should not be dismissed except on merits. 30 I.C. 689. Substantial compliance with the provisions of the rule will be sufficient. 138 I.C. 335=1932 L. 328. Code is not designed as a trap which a litigant must try to avoid by all means in his power but is designed to enable Court to ascertain the real points in issue between the parties and come to a speedy and clear determination of those points. 1932 L. 328 (1929 R. 128, Ref.); 140 I.C. 74. See also 1939 Rang. 351; 171 I.C. 412. Where a pauper application omits to mention applicant's immovable property and also fails to submit a list of such property when required, the application is not in proper form. 1923 O. 118; 1930 P. 368. But see also 8 Pat.L.T. 794=104 I.C. 364. Application to sue as pauper omitting to mention a few articles of trifling value which would not affect the decision of Court as to pauperism would not be ground for disallowing the application. 140 I.C. 74=1932 P. 308. See also 151 I.C. 635=38 C.W.N. 548=1934 C. 640; 39 P. L.R. 665. In an application for leave to sue as a pauper in respect of a claim under the Fatal Accidents Act, failure to give particulars of all the beneficiaries is a defect in form but where the plaint includes a claim for loss of petitioner's personal effects as well and Court-fee on that portion of the claim alone exceeds the value of the petitioner's belongings, plaint cannot be rejected and the whole claim should be considered on its merits. 59 C.L.J. 391=38 C.W.N. 551=1934 C. 632. Where prior to the rejection of an application for leave to sue as a pauper, the applicant is granted on his request time for payment of Court-fee and the Court-fee is paid within that time, the plaint is treated as having been filed on the date when the application for leave to sue *in forma pauperis* was filed and not on the date when the Court-fee was actually paid. 1940 O. 59=1939 O.W.N. 920. See also I.L.R. (1939) 2 Cal. 68=1939 Cal. 394; 1939 Rang.L.R. 629. Plaint filed with stamp duty—Filing of written statement raising an objection as to valuation of suit and payment of Court-fee—Framing of issues one of which related to the valuation of suit and Court-fee payable—Trial of this issue as a preliminary issue—Decision by Court that additional Court-fee was payable—Application by plaintiff to continue suit *in forma pauperis* on the ground of inability to pay the additional Court-fee demanded is maintainable—Proper procedure to be followed by Court. 30 L.W. 637=1929 M. 828=57 M.L.J. 677; 60 C. 827; 64 M.L.J. 728.

See also 35 C.W.N. 1035=56 C.L.J. 148; 35 C.W.N. 567=1932 C. 655=139 I.C. 520; 6 Cut.L.T. 39=1940 Pat. 667.

O. 33, Rr. 2 and 5.—Omission to include one solitary item of property in schedule of properties attached to an application for leave to sue as a pauper is not such a defect in the form or frame of the application as to call for rejection under R. 5 (a), where the application is otherwise regular. 151 I.C. 635=38 C.W.N. 548=1934 C. 640. See also 140 I.C. 74=1932 P. 308. As to power of Court to reject application under R. 5, and to reject it under O. 7, see 156 I.C. 402=1935 Pat. 193 *Per Division Bench*.—Where a plaintiff sues in a representative capacity, as manager or *sarburakar* of an institution, unless it is shown that he is in possession of property belonging to the institution sufficient to enable him to pay the Court-fee prescribed by law for the suit, he may be allowed to sue *in forma pauperis*, even if it is shown that he has sufficient personal property of his own. His personal and representative capacities must be kept distinct. 1940 O.W.N. 259=15 Luck. 365=1940 Oudh 148 (F.B.).

O. 33, R. 2 and S. 149: PAUPER PETITION—SUBSEQUENT APPLICATION TO PAY COURT-FEES—EFFECT OF—DISCRETION OF COURT.—Under O. 33, C. P. Code, as amended by the Rangoon High Court, a pauper applicant is required to present a plaint together with his application to sue as a pauper. He may at any time apply to the Court under S. 149, C. P. Code, for leave to pay the Court-fee payable on the plaint. By making such application his prior application to sue as a pauper must be taken to be abandoned and will accordingly stand rejected. It is then incumbent upon the Court to deal with the application under S. 149. The Court must exercise its discretion judicially and must consider all the circumstances of the case, including, of course, the fact that, if the application is granted, the plaintiff may, by presenting and subsequently abandoning a petition for leave to sue as a pauper, have obtained a valuable extension of time, and that the Court, by exercising its discretion in the plaintiff's favour, may in effect be extending the limitation of time imposed by statute. 1938 Rang.L.R. 629. See also 15 Luck. 68=1940 Oudh 59; 1939 Cal. 394.

O. 33, R. 3.—Form of petition—Separate affidavit instead of verification is sufficient. 1923 L. 684. An authorized agent in R. 3 does not include a recognized agent or a pleader as such. 80 P.L.R. 1915=28 I.C. 448. See also 7 P. 825. Leave to sue *in forma pauperis* ought not to be refused on insufficient ground. If Court does so, High Court will interfere in revision. 26 M. M.L.J. 343=23 I.C. 82. Presentation through

answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

LOC. AMS.—[ALLAHABAD.] In O. 33, r. 3, *after* the words "unless he is exempted from appearing in Court" *add* the words "or detained in prison."

[MADRAS.] *Add* the following at the end of r. 3 :—

"The High Court may by general or special order exempt any person or class of persons from the obligation to present in person an application for permission to sue as a pauper."

4. (1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant, or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

If presented by agent, Court may order applicant to be examined by commission.

(2) Where the application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.

Rejection of application.

5. The Court shall reject an application for permission to sue as a pauper—

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the Nazir is sufficient and proper. 58 I.C. 961=17 N.L.R. 22. *See also* 47 M.L.J. 522. It is the ordinary *practice for revenue Courts* to accept the natural guardian of a child as the guardian for purposes of petty litigation and not, except in important cases, take action as mentioned in O. 33, R. 3 (4). But where a landlord brought a suit for ejectment of minor tenant from what he claimed to be his 'sir' land, an agreement by which the mother of the minor gave up her defence that the minor was a perpetual lessee and gave up possession is one which requires sanction of Court for its validity. 14 L.R. 69 (Rev.)=17 R.D. 64.

O. 33, R. 3 (Rangoon).—Where a petition for leave to sue *in forma pauperis*, although otherwise in proper form does not state the date on which the verification was signed, Court has jurisdiction under R. 3, as amended by the Rangoon High Court in 1935, to allow an amendment of the petition to enable plaintiff to put in the date upon which the petition was verified. 14 R. 311=63 I.C. 842=1936 R. 279.

O. 33, Rr. 3 and 4.—Court inquiring into pauperism after notice has jurisdiction to consider if plaint discloses cause of action or suit barred. 1939 Rang.L.R. 263=1939 Rang. 351.

O. 33, R. 4.—Where the applicant who seeks for permission to sue as pauper, is examined under R. 4, the opposite party has right to cross-examine. 60 I.C. 738. Court can enter into merits of a case under R. 4 and for that purpose Judge can examine plaintiff who applies for permission to sue as a pauper. 3 P. 275=1925 P. 30. For that purpose Court may avail itself of such help he may render. The opponent has no right to examine applicant on merits of the claim. 108 I.C. 657=1928 S. 118. In an inquiry under O. 33 Court cannot take evidence except that of the applicant himself on

merits of the claim. 46 C. 651=52 I.C. 610. But Court cannot examine witness for deciding the question of limitation or any other question than the pauperism of the applicant. 52 I.C. 610=46 C. 651. But *see* 50 I.C. 676, *contra*.

O. 33, R. 4 (as amended by Rangoon High Court, 1935).—R. 4 of the new rules under O. 33, C.P. Code, as amended by Rangoon High Court in 1935, does not give any express authority to the Court to reject a plaint on the ground that it does not show a cause of action after enquiry held under the rule; but when on the face of the plaint itself it does not show a valid cause of action, it does not stand to reason that the Court cannot act upon that finding at any stage of the proceedings provided it has not infringed the rule that it should not adduce matters extraneous to the plaint in determining whether it shows a valid cause of action or not. Since the reference to certain proceedings in the High Court cannot be deemed to be tantamount to adducing of matters extraneous to the plaint where those proceedings are themselves mentioned in the plaint and the applicant himself asks that those proceedings be read as part of the plaint, there is nothing which renders the order dismissing the application illegal. 1937 Rang. 365.

O. 33, R. 5.—R. 5 of O. 33 is by no means exhaustive; it merely states a series of circumstances any of which if proved compels the Court to reject the application. 20 Pat.L.T. 720=1939 Pat. 385. An *ex parte* order of rejection passed under this rule is not governed by R. 15. 31 N. L.R. 386=157 I.C. 294=1935 N. 168. Application for leave to sue *in forma pauperis*—Elements to be considered by Court—Plaintiff's allegations to disclose cause of action. 11 I.C. 55=13 C.L.J. 593; 15 I.C. 184=16 C.W.N. 466 (P.C.). *See also* 1929 R. 209 (1); 142 I.C. 379=

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1933 S. 82. For purpose of R. 4, Court should not embark upon doubtful questions of fact and law in order to see whether the allegations show cause of action. And the same applies to the question of local jurisdiction. (1932 R. 107, Foll.) 141 I.C. 570=34 P.L.R. 557. In a proceeding under O. 33 it is open to Court to consider not only statements made in plaint but also statements made in his examination by the applicant before determining whether her allegations disclose a cause of action as laid down in R. 5 (d), but Court cannot examine other witnesses for deciding questions other than the pauperism of the applicant. 7 R. 361=1929 R. 273. See also 27 A.L.J. 1059=118 I.C. 669 (1). Where it is apparent on the face of the application to sue *in forma pauperis* that the applicant is possessed of immovable property which he has not included in a schedule and on which he has placed no value, the application must be dismissed. 177 I.C. 311=1938 Pesh. 50. See also 7 Cut.L.T. 28. All matters mentioned in R. 5 need not be gone into unless raised. 96 I.C. 830=1926 L. 642. Elaborate enquiry as to merits not to be made. 97 I.C. 349=1926 M. 1160; 10 R. 357=139 I.C. 265=1932 R. 107 (F.B.); 141 I.C. 570; 160 I.C. 351=1936 P. 2; 41 M. 620=45 I.C. 95=34 M.L.J. 399. See also notes under R. 6; nor complicated questions of limitation. 23 L.W. 406=92 I.C. 415=1926 M. 135. "Agreement" and "proposed suit" in Cl. (e) explained. 37 I.C. 172. Cause of action means every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of Court. 164 I.C. 556=1936 R. 388. "A right to sue in R. 15 is the same thing as a cause of action" in R. 5. 57 I.C. 9=31 C.L.J. 351. "Cause of action" means a subsisting cause of action which can be enforced. 42 I.C. 519=33 M.L.J. 577; 41 M. 620=34 M.L.J. 399; 38 I.C. 566; 37 I.C. 172; 13 M.L.J. 292; 54 I.C. 462=10 L.W. 589; 18 L.W. 53=1923 M.W.N. 412=1924 M. 80. But see also 29 P.W.R. 1913. R. 5 (d) applies only to a case where allegations in the petition do not disclose a cause of action. 41 M. 620=34 M.L.J. 399. Where allegations in plaint show a cause of action an application to sue *in forma pauperis* should not be rejected *in limine*, even though it may be that on merits, plaintiff has no claim. That is a matter for investigation by Court at the trial. 1935 L. 124. Government pleader has a right to cross-examine witnesses of the applicant and can also produce evidence to oppose the application. 12 I.C. 741=8 A.L.J. 1148. Next friend suing on behalf of a minor need not be a pauper. 58 I.C. 446=23 C.W.N. 955. Omissions of some items of property from the schedule of property submitted by a pauper applicant are not fatal unless they are *mala fide*. 7 Cut.L.T. 28. Application for leave to sue *in forma*

C.C.M.—154

pauperis—Dismissal of—Application for withdrawal of pauper application to sue *in forma pauperis* bars subsequent pauper suit, not regular suit on payment of fees. 52 I.C. 562. There is no distinction between an order of rejection under R. 5 and an order of refusal under R. 7. Both have the same effect. 33 I.C. 812=20 C.W.N. 669. See also 1937 Oudh 452. But see next case. Rules for rejecting a plaint differ from those for rejecting an application to sue as a pauper. 5 Bur.L.T. 123=16 I.C. 83. See also 156 I.C. 402=1935 P. 193; 1937 Oudh 452. The fact that claim for some of the properties is not sustainable will not justify Court in declining to grant leave to sue as pauper. 16 I.C. 612=1912 M.W.N. 38; 26 I.C. 90=1 L.W. 668. Question of valuation—Court cannot go into pauper petition. 61 I.C. 891. Benamidar cannot be allowed to sue as pauper to give a non-pauper the right to evade the fiscal law by setting up a pauper nominee. 50 I.C. 520=1919 P.H.C.C. 232. Where application is made by a Hindu widow to allow her to file a suit *in forma pauperis*, if she is in possession of sufficiently valuable estate left by her husband her application should be rejected. But before doing so Court should take into consideration that her possession is only that of a person with a life interest on which it is almost impossible to borrow any money. The argument that to save the estate necessary expenses may be incurred even by selling part of the property is of no avail, for there is always the difficulty of finding a purchaser who will be willing to buy the property under a title of this sort which the reversioners would be sure to attack. 1933 M. 883=65 M.L.J. 781. Insolvency is not one of the grounds mentioned in R. 5 on which such an application can be rejected. 1925 M. 791=48 M.L.J. 491. Application for leave to sue as a pauper—Verification defective. 5 Bur.L.T. 123=16 I.C. 83. In an application to sue *in forma pauperis* evidence should be confined entirely to the question of applicant's pauperism. 54 I.C. 462=10 L.W. 589. But see also 29 P.W.R. 1913. In order to bar an application under R. 5 (e), the agreement must be with reference to the subject-matter of the proposed suit. 37 I.C. 172. Where an application for permission to sue as a pauper is rejected under R. 5, the Court, while rejecting the application can under S. 149, allow the applicant to pay the requisite Court-fee and treat the application as a plaint. If however the Court has refused to allow the applicant to sue as a pauper under R. 7 (3), then the Court while rejecting the application for permission to sue as pauper, cannot under S. 149 allow the applicant to pay the requisite Court-fee and treat the application as a plaint. Where the Court rejects an application for permission to sue as a pauper, it cannot, after rejecting the application, by a separate and subsequent order allow the applicant to pay the requi-

- (a) where it is not framed and presented in the manner prescribed by rules 2 and 3, or
- (b) where the applicant is not a pauper, or
- (c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or
- (d) where his allegations do not show a cause of action, or

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site Court-fee under S. 149 and treat the application as a plaint. Per *Allsop, J.*—The Court, having once passed an order refusing to allow an applicant to sue as a pauper, may after the proceedings have been reopened, exercise jurisdiction under S. 149. 164 I.C. 305=1936 A.L.J. 760=1936 A. 584 (F.B.). See also 38 P.L.R. 79.

ADMINISTRATION SUIT.—That the applicant under O. 33 was unable to name all the persons in possession of the property left by the deceased in an administration suit is no ground for dismissing the application to conduct the administration suit as a pauper. 138 I.C. 335=1932 L. 328.

SUIT UNDER FATAL ACCIDENTS ACT.—S. 3 of the Fatal Accidents Act requires that full particulars of all the beneficiaries must be given in a plaint in a suit for damages under that Act. Therefore an application for leave to file a suit, as a pauper, for damages in respect of a fatal accident, which does not contain such particulars, is liable to be rejected. 59 C.L.J. 394=1934 C. 712.

JOINT APPLICATION.—The fact that a joint pauper application by two persons to conduct a certain suit was dismissed is no ground for dismissing a subsequent pauper application by one of them. 138 I.C. 335=1932 L. 328.

AMENDMENT OF APPLICATION.—Provisions of O. 6 as to amendment of pleadings apply to applications under O. 33. 138 I.C. 652=1932 L. 548. Where a pauper application is in right form Court may at a subsequent stage allow plaint to be amended as to substance at the instance of the applicant's pleader. 11 R. 414=1933 R. 410 (2). It is doubtful whether the provisions of R. 5 were intended to take away the general power of allowing amendment, conferred on Courts by O. 6, R. 17. (138 I.C. 652, Ref.) 141 I.C. 570=34 P.L.R. 557. Under R. 5 the Court can reject an application if defective and if the defect could not be amended, but not without affording an opportunity to the applicant to correct the defect. Court has got ample powers under Ss. 99, 152 and 153 to afford opportunity to rectify defect in pleadings and under S. 153 is bound to do so. 55 A. 216=1933 A.L.J. 110=1933 A. 295.

O. 33, R. 5, cl. (a).—See 26 L.W. 546; 51 M.L.J. 79=50 M. 63. Value for Court-fee wrongly calculated—Application must be dismissed—Right of fresh application may subsist. 7 R. 359=118 I.C. 415 (2)=1929 R. 128 (2). Only such defects

of form as unfavourably reflect on the merits of the application must be regarded as justifying an order refusing to allow the applicant to sue as a pauper. 31 N.L.R. 386=157 I.C. 294=1935 N. 168. Where an application is defective in form by the list of property not being duly verified, the lack of verification might be due to the carelessness or ignorance, or might be deliberate. Whether the formal defect was unintentional or designed could be detected only by giving the applicant an opportunity to regularise the list of property by appending the required verification. If he made the amendment, the formal defect would have been cured, but if he fails to amend, his failure could be considered as cogent evidence of his having withheld information regarding his resources. This circumstance is such as can be reasonably considered as justifying an order of refusal under sub-R. (3), R. 7. 1935 N. 168. It is only when the Court is in a position to find that an opportunity to rectify the error of form was not availed of by the applicant that it would be reasonable to apply the bar of *res judicata* provided in R. 15. 1935 N. 168. Where opposite party opposes the application on any of the grounds under O. 33, R. 5 (b) or (c), the primary burden of proof is on the opposite party (defendant). 1938 Nag. 210=I.L.R. (1940) Nag. 463.

O. 33, R. 5, cl. (c): MEANS—ASSETS FULLY SPENT PRIOR TO LITIGATION.—The petitioner sold his house for Rs. 10,000, on 6th July, 1931. From that date up to 22nd August, 1931, he disbursed the amount to his creditors though they were not pressing him. On 23rd August, 1931, he applied for permission to sue as pauper. Held, that the petition should be dismissed as R. 5 (c) second part covered the case. 148 I.C. 527=1934 L. 681.

O. 33, R. 5, cl. (d).—If the allegations of the applicant *prima facie* disclose a cause of action Court ought not to embark upon the consideration of a complicated or doubtful question of law or fact that may arise upon the allegations for the purpose of determining whether they show a cause of action. 10 R. 357=139 I.C. 265=1932 R. 107 (F.B.). Per *Full Bench*.—To permit Court when considering whether the case falls within R. 5 (d) to take into account other matters of which it has received notice *aliunde* would be to travel outside the scope of O. 33 and in effect to allow it to try the suit on the merits of an application. 10 R. 357. See also 1935 M.W.N. 1270=69 M. L.J. 816. The words "cause of action"

(e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

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imply a good and subsisting cause of action and if at the time of the enquiry into the pauperism, Court finds that apart from merits, the suit is on the face of it hopelessly barred by limitation, application must be dismissed. [10 R. 357, Foll.; 54 A. 525, Diss.] 12 R. 124=151 I.C. 826=1934 R. 111; 1941 N.L.J. 473; 1937 Oudh 481; 1937 Cal. 516. So also if it is found to be barred by *res judicata*. 161 I.C. 47=1936 Pesh. 39 (19 M. 197, Foll.) The cause of action may be defined as the bundle of facts which would enable plaintiff to succeed in his suit. Where therefore a plaint sets out that succession to a particular *math* is regulated by custom of nomination followed by election but bases the cause of action on nomination merely, no cause of action is disclosed. Judge should in such a case confine himself to the case of plaintiff as set out in plaint. 14 Pat. L. T. 338=1933 P. 284; 1937 C. 516. Where an application for leave to sue *in forma pauperis*, itself does not disclose any want of cause of action, the Court should grant leave to the applicant, if other conditions are satisfied. The Court is not entitled to look into other evidence, such as documents, at that stage and to dismiss the application under O. 33, R. 5 (d), C. P. Code, on the ground that the suit would be barred by *res judicata*. The dismissal of the application being on a ground not contained in O. 33, R. 5, C. P. Code, the Court acts without jurisdiction and the order is therefore liable to be set aside by the High Court in revision. (1941) 1 M.L.J. 31. As to data and method of ascertaining existence of cause of action, see 101 I.C. 18=1927 M. 441=52 M.L.J. 330. For purpose of deciding whether the allegations of the applicant show a cause of action, under R. 5 (d), Court must take into consideration the averments in the application and any statements by the applicant regarding the merits of the claim made in the course of the examination by the Court under R. (4), but Court is not entitled to take into account any other evidence, oral or documentary, in considering whether the allegations disclose a cause of action. [10 R. 357 (F.B.), Rel. on.] 151 I.C. 429=1934 R. 214. See also 41 C.W.N. 1087=1937 Cal. 516. Where an application is made for leave to sue as a pauper, Court has no jurisdiction to go into the merits of the cause of action. 131 I.C. 64=1931 R. 79; 10 R. 357=139 I.C. 265=1932 R. 107 (F.B.); 1935 L. 961. It should not be rejected *in limine*, even though it may be that on the merits, the plaintiff has no claim. That is a matter for investigation by Court at the trial. 157 I.C. 753 (2)=1935 L. 124 (1). But where on the face of it the

plaint shows no cause of action petition should be rejected. 138 I.C. 269=1932 A. L. J. 303=1932 A. 487; 30 S. L. R. 314=164 I.C. 571=1936 S. 130. In an application to sue *in forma pauperis* the Court is entitled to see whether the petitioner has any cause of action and if it is found that the petitioner is in fact acting for somebody else the Court is perfectly justified in holding that his application is barred by O. 33, R. 5, Cl. (d). If this were not the law, and such persons were allowed to proceed with their suits *in forma pauperis*, every one who can afford to pay the Court-fee, would put up some pauper to sue as his transferee and avoid paying duty. (1919 Pat. 58, Foll.) 188 I.C. 31=1940 Pesh. 13.

O. 33, R. 5, cl. (e) is designed in aid of *bona fide* litigants only, and it must be strictly confined to such litigants. 8 P.L. T. 810=103 I.C. 448=1927 P. 352. See also 1932 R. 68; 37 I.C. 172. The agreement referred to in Cl. (e) of R. 5 of O. 33, C. P. Code, must not only be an agreement with reference to the subject-matter of the litigation, but it must also be an agreement under which any other person "has obtained" an interest in such subject-matter. In other words, the interest acquired must be subsisting and the agreement operative and not rescinded and the claim thereunder not renounced. If an applicant for leave to appeal *in forma pauperis* has by agreement assigned his interest or part thereof in the entire assets (the subject-matter of the litigation) to a third party to finance the litigation at any stage of the proceedings or even before the suit, his act comes within the ambit of O. 33, R. 5 (e), and he cannot claim exemption on the ground that he has reduced his claim to the unassigned share in the property. He cannot therefore be allowed to file the appeal *in forma pauperis*. 41 Bom. L. R. 1305=1940 Bom. 49. O. 33, R. 5 (e) contemplates an agreement entered into after the cause of action for the suit has arisen and enforceable at the time when the application for leave to sue *in forma pauperis* is filed. 44 C.W.N. 470. The provisions of C. P. Code which provide the machinery of leave to sue or to appeal *in forma pauperis* are not intended for the purpose of promoting the interest of champertors or for the benefit of such persons as are really working behind the applicant, but only for the purpose of protecting and giving assistance to people who are genuinely paupers and have no one to help them out of their difficulties. A chela of a deceased mahant in a math may be a pauper and may have no property, but if a suit by him claiming the right of mahantship of the math is really promoted by others who merely use him as a tool—it being also

LOC. AMS.—[ALLAHABAD.] O. 33, r. 5.—Add the following explanation to r. 5 at the end :—

“Explanation.—An application shall not be rejected under cl. (d) merely on the ground that the proposed suit appears to be barred by any law.”

[ALLAHABAD AND OUDH.] O. 33, r. 5 (a).—Add the words “and the applicant, on being required by the Court to make any amendment within a time to be fixed by the Court, fails to do so” between the figure “3” and the word “or”.

[MADRAS.] (d-1) where the suit appears to be barred by any law.

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found that the plaintiff is only a nominal plaintiff, and that the backers with whom he has entered into an arrangement are to derive substantial advantages—he cannot be permitted to sue or appeal *in forma pauperis*. 20 Pat.L.T. 720=1939 P.W.N. 261=1939 Pat. 385. See also (1937) 2 M.L.J. 789. The agreement contemplated by sub-cl. (e) of R. 5 of O. 33, is an agreement which is subsisting and effective on the date of the application for leave to sue as pauper. But when the agreement pleaded is no longer subsisting or effective at the time the application is made, it cannot be a bar to the applicant being allowed to sue as a pauper. 152 I.C. 417=11 O.W.N. 1356. The word “interest” in O. 33, R. 5 (e), is used in its ordinary and general sense, and not in the technical sense of an interest of a transferee or mortgagee, co-owner or charge holder under the combined operation of the T. P. Act and Registration Act. The “interest” need not be a vested and completed interest. The provisions of O. 33 are intended to aid a pauper suing for his own benefit, but not to enable an ostensible pauper to figure as plaintiff, when in the fruits of the litigation a third party has been given an interest. 47 L. W. 405=1938 Mad. 491=(1938) 2 M. L. J. 137. The appellant transferred the whole of his interest in the subject-matter of the litigation to a third party when the suit was pending. After the decree he sought to appeal against it *in forma pauperis* and applied for leave. Held, the case fell precisely within the words of R. 5 (e), because though there was no appeal in contemplation at the time of the agreement transferring his interest, an appeal was now “proposed” and the would-be appellant had entered into an agreement under which another person had obtained an interest in the subject-matter of appeal. 162 I.C. 840=43 L.W. 717=1936 M. 665. The agreement referred to in R. 5 (e), which authorises a Court to reject an application for permission to sue as a pauper is one which is champertous. A mortgage bond executed by a lady applicant after the presentation of the application for leave to sue *in forma pauperis*, not for money paid to her in cash, but under pressure for previous loans of her husband does not come under the clause in question, so as to justify Court in rejecting the application. 152 I.C. 514=38 C.W.N. 1069=1934 C. 740. But see 44 L.W. 856=1937 M. 161=(1937) 1 M.L.J. 147, where it was held that the agreement need not be of a champertous character, and that it mattered little with what purpose the agreement has been entered into. A man may advance

money to another out of sympathy and because he considers that such other has been unfairly dealt with, and that if he can bring his case before a Court of law, he will have justice done to him. This he can very well do without entering into an agreement with such other which will give him an interest in the subject-matter of the proposed suit. He may expect such other to repay to him, if he is successful, the money which he has advanced, but unless the re-payment can be shown to be secured on the subject-matter of the suit, there is nothing illegal in such an understanding, and such an understanding would not come within the definition of R. 5 (e). (9 B. 371, Dist.) 151 I.C. 429=1934 R. 214. Where applicant in his examination makes the following statement: “I have not yet paid any fees to him (his pleader) but I have undertaken to pay him his fees when I obtain a decree for my share,” the statement does not amount to giving any definite interest in the subject-matter to the pleader within the meaning of R. 5 (e) and does not justify dismissal of the application. 138 I.C. 831=1932 R. 68.

LIMITATION.—Though pauper application be dismissed, the plaint remains still pending until it is actually dismissed and if Court-fees are paid, limitation will count from date of the presentation of the petition which will be regarded as the date of plaint. 146 I.C. 566=1933 M. 883=65 M.L.J. 781. See also 1933 N. 237; 1939 O.W.N. 920; I.L.R. (1939) 2 Cal. 68=1939 Cal. 394. A Court is competent to reject an application to sue *in forma pauperis* under R. 5 (d) on the ground that the claim is barred by limitation. 11 I.C. 857=4 Bur.L.T. 1919; 57 I.C. 9=31 C.L.J. 351; 53 I.C. 441 (1)=134 P.R. 1919; 18 I.C. 491=58 P.L.R. 1913. See also 1925 M.W.N. 779. But see 54 A. 525=1932 A.L.J. 489=1932 A. 543, *contra*. An application to sue *in forma pauperis* cannot be allowed where cause of action is time-barred. 42 I.C. 519. But see 54 A. 525, *contra*.

TIME FOR PAYMENT OF COURT-FEES.—On a pauper application being dismissed, the person so applying cannot claim that time must be granted for giving necessary Court-fees. But it is customary to allow some time to pay Court-fees when a pauper application is dismissed. 1933 M. 883=65 M.L.J. 781. See also 1933 N. 237.

APPEAL.—No appeal lies from an order rejecting an application for leave to sue *in forma pauperis* but the applicant can bring a suit in the ordinary way. 39 I.C. 942. An order passed by a single Judge of the High Court sitting in Chambers rejecting an application for leave to sue *in forma pauperis* is appealable under the Letters Patent. 130

6. Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which notice of day for receiving evidence of applicant's pauperisms. at least ten days' clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

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I.C. 24=32 Bom.L.R. 1647=1931 B. 166. After grant of leave to sue as pauper, it was found during trial that the suit had been under-valued and the Munsif returned the plaint for presentation to proper Court. When it was presented in sub-Court, it was rejected on the ground that as an application for leave to sue *in forma pauperis*, it should be presented in person. Held, that the order of the sub-Court was appealable but that as the plaint was not presented in person, the sub-Court was justified in rejecting it. 1933 M.W.N. 197.

PAUPER APPEALS.—Rules 5 and 7 of O. 33 do not directly apply to pauper appeals. Appellate Court cannot address itself to the question whether the plaint shows a cause of action. 55 M. 982=1932 M. 523=63 M.L.J. 28.

REVISION.—Order rejecting application for leave to sue *in forma pauperis*, if open to revision. 20 A.L.J. 55=44 A. 248. But see 10 A. 467; 11 O.W.N. 1356; 21 A. 133; 2 C.W.N. 474; 8 C.W.N. 70; 101 I.C. 18=1927 M. 441=52 M.L.J. 330; 1938 O.W.N. 561; 1938 Rang. 453; 1941 N.L.J. 473; (1941) 1 M.L.J. 31; 45 C.W.N. 551. But see *contra* 9 R. 86=132 I.C. 705=1931 R. 79; 140 I.C. 381=34 Bom.L.R. 1273=1932 B. 584; 1933 S. 82=142 I.C. 379. See also cases under O. 33, R. 15. The mere fact that the schedule omits one item of property is not sufficient ground for dismissal and High Court can interfere in revision. 27 I.C. 891=1 L.W. 1068. See also 9 R. 86=1931 R. 129. Court has jurisdiction to consider the merits of the case on an application to sue *in forma pauperis*; the fact that Court placed reliance on evidence which might not be relevant to a pauper application is not an irregularity affecting its jurisdiction and no revision lies. (40 M. 793, Appl., 17 S.L.R. 133, Foll.) 142 I.C. 379=26 S.L.R. 491=1933 S. 82.

REVIEW.—Judge refusing an application to sue *in forma pauperis* is competent to entertain a petition of review of his own order. 33 I.C. 812=20 C.W.N. 669.

SECOND APPLICATION.—Rule 15 does not bar a second application to sue as pauper. 57 I.C. 9=31 C.L.J. 351. See also 96 I.C. 962=1926 M. 875=51 M.L.J. 79. But see 10 R. 475=140 I.C. 162=1932 R. 195. The rejection of an application under R. 5 is no bar to a subsequent application under R. 15. 10 O.W.N. 1145=1933 O. 534.

O. 33, Rr. 5, 6 and 7.—Where notices have been issued under R. 6, the opposite party has a right to adduce evidence and to be heard in connexion with any matter specified in R. 5; and the High Court will inter-

fere in revision under S. 115 (c) if the opposite party is prevented from defending himself on any of those grounds. I.L.R. (1940) Nag. 463=1938 Nag. 210. Court declining to reject application under R. 5 (a)—Notice under R. 6—Evidence and argument—Subsequent objection under R. 5 (a) based on admissions of applicant after notice—Maintainability. See 19 Pat.L.T. 101=1938 Pat. 209.

O. 33, Rr. 5, 7 and 15.—The rejection of an application under O. 33, R. 5, on the ground that the application was not framed and presented in the manner prescribed by Rr. 2 and 3 does not bar a subsequent application. The refusal contemplated by R. 15, which would have the effect of debarring a subsequent application, is the one that is provided for in R. 7. I.L.R. (1940) All. 253=1940 A.L.J. 118=1940 A. 251. A Court has, undoubtedly, power to permit during its pendency, an application for leave to sue *in forma pauperis* to be converted into a plaint by payment of the necessary Court-fees. This power can also be exercised at the time of rejecting the application, if in one single order the Court declines leave to sue as a pauper and also gives time for payment of Court-fee. This will be within the discretion allowed by S. 149, C. P. Code. But when once an order finally disposing of the application for leave to sue as a pauper has been passed, it is no longer open to that Court to give any further time so as to revive the proceedings already completely disposed of and to permit them to be resumed. 17 Pat. 281=19 Pat. L. T. 8=1938 Pat. 120. See also I.L.R. (1939) 2 Cal. 68=43 C.W.N. 686=1939 Cal. 394.

O. 33, R. 6.—Evidence as to plaintiff's title cannot be gone into. 45 A. 548=21 A.L.J. 441. Enquiry is to be confined to question of pauperism. 5 Bur.L.J. 174=99 I.C. 760=1927 R. 72. Evidence on merits not to be let into. (*Ibid.*) It is fully competent to a Court to take evidence under Rr. 6 and 7 on any matters specified in R. 5 and to decide on those matters to the best of its ability. 50 I.C. 520=1919 Pat. H.C.C. 232.

O. 33, Rr. 6 and 7.—An order to furnish security for Court-fee as a condition of being permitted to sue as a pauper would stultify the granting of such permission and is not proper. 1933 A.L.J. 757=1933 A. 779. See also 1940 All. 251=1940 A.L.J. 118. Court disposing of pauper application without notice to opposite pleader or Government Vakil acts without jurisdiction and revision lies. 100 I.C. 726=1926 C. 464. Court should pass order only after hearing the evidence. 1928 M.W.N. 235. The evidence to be taken under R. 7 read with

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6. *Notices of day for enquiring into the applicant's right to sue as a pauper.*—Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall “nevertheless” fix a day (of which at least ten days' clear notice shall be given to the opposite party and to the Government Pleader) for receiving such evidence as the applicant may adduce to prove that the application is not subject to any of the prohibitions in rule 5 and for hearing any evidence which may be adduced to the contrary.

7. (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

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R. 6 is confined to the question of pauperism. 56 B. 585=34 Bom.L.R. 1273=1932 B. 584. (45 A. 548; 46 C. 651; 3 P. 275; 7 R. 361, Foll.) It is not proper that a Court in deciding as to whether the plaintiff is entitled to sue as a pauper or not, should take into consideration the weakness of the merits of the plaintiff's case; the strength or weakness of the case on the merits must necessarily be left for decision on the merits when the application for pauperism is admitted. I. L. R. (1940) Nag. 549=1940 Nag. 258. A report of a Tahsildar to the effect that an applicant for permission to sue *in forma pauperis* is a pauper merely forwarded by the Collector of the district who has been appointed to perform the functions of the Government Pleader under O. 33, R. 6 is not in itself evidence in the case. It is for the Government Pleader who appears in the case for the defendant Secretary of State to decide whether to accept that report or to oppose the application. If he chooses the latter course, the Court has jurisdiction to enter upon a further enquiry in the matter and come to the conclusion that the applicant is not a pauper. 187 I.C. 134.

O. 33, R. 7.—The materials for forming an opinion whether applicant is or is not subject to any of the prohibitions specified in R. 5 are (1) the application and (2) the evidence of the applicant under R. 4 or R. 7, which is, however, confined to the question of pauperism. Then Court has to hear arguments, if any, offered on the face of (a) the application and (b) the evidence (if any) taken. There is no provision in O. 33 for allowing opponent to put in a written statement or to give evidence. If Court went into merits of the case and actually relied upon the evidence of two witnesses and that of the opponent himself and came to the conclusion that there was no subsisting cause of action, the procedure is unwarranted and illegal and the order should be set aside. 140 I.C. 381=34 Bom.L.R. 1273=1932 B. 584. Court has under O. 33, R. 7 power to dismiss the application either because on the evidence produced it is not satisfied that the petitioner is a pauper or because the petition falls within some of the prohibitions specified in R. 5. Hence there is no objection to the Court in dealing with the technical objections mentioned in R. 5 before hearing the evidence as to whether the petitioner is actually a pauper or not.

177 I. C. 311=1938 Pesh. 50. An order granting leave to sue as pauper on payment of costs to the other side when the applicant could afford it is an extraordinary order. I.L.R. (1940) All. 253=1940 A. L. J. 118=1940 All. 251. See also 1933 All. 779. The power to allow a case to be continued as a pauper suit is included in the power given to Court to allow a suit *in forma pauperis* to be instituted. A suit for partition was filed with a Court-fee of Rs. 10. Plaintiff, who was out of possession, was directed to pay *ad valorem* Court-fee and time granted for that purpose. On the last day fixed for payment, plaintiff applied to be allowed to proceed with the suit as a pauper. Held, that Court had jurisdiction to allow the application. 36 C.W.N. 1035=56 C.L.J. 148. See also 60 C. 827; 64 M.L.J. 728. But see 139 I.C. 520=36 C.W.N. 567=1932 C. 655. See also 1929 M. 828=57 M.L.J. 677. Suit *in forma pauperis*—Subsequent payment of Court-fee—Institution deemed to have been made on the date of the original presentation. 18 N.L.R. 44=1922 N. 600; 37 I.C. 921=3 O.L.J. 647; 1937 Rang. 185. If an application for leave to sue *in forma pauperis* is disallowed under R. 7 (3) as not being in conformity with R. 5 (a), the order dismissing the application operates as a bar to fresh application in that behalf by virtue of R. 15. 10 R. 475=140 I.C. 162=1932 R. 195. It is essential for granting of permission to pay Court-fees that there should be a pending proceeding before Court. Where therefore an application for leave to sue *in forma pauperis* is rejected under R. 7, there is no proceeding before the Court and the plaint cannot be said to remain, and an order granting plaintiffs permission to pay Court-fees cannot be deemed to be one under S. 149 and the suit must be held to have been instituted on the day on which Court-fee is paid. (1922 N. 160 and 1924 M. 118, Rel. on; 1929 P. 637, Diss. from.) 147 I.C. 732=1933 N. 237. See also 65 M.L.J. 781=1933 M. 883; 62 C. 711; 17 L. 831=1937 L. 151. Although a *bona fide* applicant to sue *in forma pauperis*, whose application has not been already refused, may be allowed to convert his application into a plaint which, after it has been so converted, should be deemed to have been filed on the date on which the original application was presented to the Court, the position would be different if the pauper application had been refused under O. 33, R. 7 or if the applicant had

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5.

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper.

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(4) Where the application is for leave to sue in a representative capacity under Explanation (iii) to rule 1, or under sections 91, 92 or under Order I, rule 8, the Court may, if it thinks fit, for reasons to be recorded in writing, direct that the plaintiff shall give security for the payment of Court-fee.

8. Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any Court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

9. The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

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presented his application *mala fide* or with intent to defraud the revenue. Where an application for leave to sue *in forma pauperis* is rejected under O. 33, R. 7, there is no proceeding before the Court and the plaint filed along with the original application cannot be said to remain. In such a case an order granting the applicant permission to pay Court-fees cannot be deemed to be one under S. 149 and the suit must be held to have been instituted on the day on which the Court-fee is paid. (62 C. 711, Dis. from.) I.L.R. (1939) 2 Cal. 68=43 C.W.N. 686=1939 Cal. 394. See also 1938 Pat. 120. If facts come into existence since the date of the application for leave to sue as a pauper, on which the plaintiff can be dispaupered under O. 33, R. 9, there is no reason why the Court cannot make such an order in anticipation by straight away refusing the leave asked for. But if the Court allows the plaintiff to sue as a pauper refusing to take into account those facts, it cannot be said to act so clearly without jurisdiction that the High Court should be bound to interfere in revision. 45 C.W.N. 551.

O. 33, R. 8.—Application for leave to sue as a pauper is not a plaint till leave is granted and till then it cannot be returned under O. 7, R. 10. If so returned, High Court will interfere in revision. 52 I.C. 688. Court has no jurisdiction to attach before judgment defendant's property before granting plaintiff's application to sue as pauper. 25 C.L.J. 159=21 C.W.N. 870. S. 3 of Limitation Act should be read along with R. 8. 22 L.W. 732=49 M.L.J. 538. Act—Leave granted after amended Act Pauper application under the old Court-Fees

came into force—Suit decreed with costs—Basis of calculation of Court-fees. See 1926 M. 159. When application has been granted, pauper plaintiff (and therefore the pauper appellant), is not liable to pay Court-fees. Payment of the Court-fee as such is not merely suspended, it has not to be paid at all. 8 R. 294. Application for leave to sue as pauper—Court-fees subsequently paid—Deduction of time when pauper application pending—If allowed. 12 I.C. 875. Where plaintiff applied to the Munsif and got leave to sue as pauper but subsequently during the course of trial it was found that the suit was under-valued and plaintiff was directed to re-present the plaint to proper Court, held, that the proceedings before the Munsif, being without jurisdiction, were mere nullities and that the leave granted by the Munsif was of no avail to plaintiff and that he should once more apply to sub-Court for leave to sue *in forma pauperis*. 56 M. 689=64 M.L.J. 493=1933 M. 417. A Court under O. 33, R. 7, ought not to go into complicated questions of fact or law such as questions of *res judicata*; but if the Court does embark upon such an inquiry as that the Court cannot be said to be acting beyond its jurisdiction so as to justify interference in revision under S. 115, C. P. Code. 1937 M.W.N. 415. An application for review of judgment passed in a suit or appeal *in forma pauperis* must, under the law, be considered to be one in continuation of the suit or appeal, as the case may be, which was *in forma pauperis*. Such an application must be held to be maintainable without payment of any Court-fee. 40 C.W.N. 1407=1936 C. 752.

O. 33, R. 9.—There is nothing in O. 33, which contemplates a fresh inquiry into

- (a) if he is guilty of vexatious or improper conduct in the course of the suit ;
 (b) if it appears that his means are such that he ought not to continue to sue as a pauper ; or
 (c) if he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter.

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pauperism merely from the fact that other defendants are subsequently added to the suit. Although an added defendant can apply under R. 9 for dispaupering the plaintiffs for one of the reasons given in R. 9 yet, in absence of such application, Court has no jurisdiction to pass an order requiring evidence of pauperism to be produced again. 161 I.C. 51=1936 Pesh. 51. Concealment of property—Asset of doubtful value—Insurance policy—Conduct which, by itself, may entitle Court to dispauper a plaintiff. See 46 B. 1017=1922 B. 215. If pauper purposely delays in bringing the legal representatives of the deceased opponent on the record within a reasonable time it is within the discretion of Court to punish him by rejecting his application either under the provisions of R. 9 (a) read with S. 141 treating his failure to bring the legal representatives on the record within the time allowed by the Court as vexatious or improper conduct on his part in the course of the proceedings or under the provisions of S. 151 as an abuse of the process of the Court. 116 I.C. 111 (2)=1929 S. 136. Dispaupering, grounds for. 2 P. 879=4 Pat.L.T. 538. The mere fact that the issue will be decided again in the suit is no reason why it should not be decided in the proceeding for dispaupering. 149 I. C. 1004=1934 A. 323. The provisions of O. 33 are designed in aid of *bona fide* litigants and must be strictly confined to them. Where a pauper plaintiff enters into an agreement with a stranger under which the latter advances a sum of money to the plaintiff towards the expenses already incurred by him in conducting the suit till then, and also agrees to advance another like sum "for taking steps and for the expense that may be necessary hereafter till the disposal of the suit," and the plaintiff in consideration of the advances so made and promised to be made, agrees to repay the amounts with interest within three months, and in default, to sell one-fourth of the properties to which he might be held entitled, the agreement falls within the language of O. 33, R. 9 (c), and affords a ground for dispaupering the plaintiff. O. 33, R. 9 (c) is wide enough to cover such an interest as is created by the plaintiff under the agreement in favour of the stranger. 46 L.W. 649=1938 M. 153=1937) 2 M.L.J. 789. See also 1939 Pat. 385=1939 P.W. N. 261=20 Pat.L.T. 720. Pauper plaintiff agreeing to pay his pleader a large sum of money if he wins his case would be a good ground for dispaupering him. 104 I.C. 316=1927 R. 283. But see 96 I.C. 830=1926 L. 642. (9 B. 371, Dist.) A pauper plaintiff died

pendente lite and his heir who was added as his legal representative was found to be possessed of sufficient means to pay Court-fee, *held*, that as the heir sought to continue the suit in his own capacity and not in any representative capacity, he could be dispaupered under R. 9. See 131 I.C. 828=1931 M. 324. Where plaintiff in a suit (*in forma pauperis*) dies, his executor is not liable to be dispaupered. 87 I.C. 372=1925 M. 768=48 M.L.J. 390. The word "means" in Cl. (b) is to be interpreted with the help of the definition of pauper referred to above. 2 P. 879=4 Pat.L.T. 538. The word "plaintiff" in O. 33, R. 5 (c) means, in both places in which it occurs, "the plaintiff or his representative." The application of the clause is not confined to the party who has entered into the agreement. A legal representative of the original plaintiff or appellant can be dispaupered for an agreement of the nature mentioned in the clause entered into by his predecessor-in-interest. 47 L.W. 405=1938 Mad. 491=(1938) 2 M.L.J. 137. R. 9 is intended to prevent the pauper continuing his suit when a third party has obtained an interest in the property and hence able to pay Court-fees. 21 I.C. 536=7 S.L.R. 52. R. 9 (c) must be construed as meaning that a person cannot sue as a pauper if at the time of the petition some other person has under an agreement an interest in the subject-matter of the suit. It must be a subsisting interest at the time of the suit. Where therefore a pauper plaintiff, after he has been given leave to sue as pauper, executes a mortgage over the properties affected by the suit, that is a good ground for dispaupering the plaintiff. 59 M. 901=1936 M. 662=71 M.L.J. 355. R. 9 (c) contemplates an agreement in and by which an interest is transferred or created in the subject-matter of the suit in favour of a person who is not entitled to it, and does not cover a case where by virtue of a family settlement between the parties there is a recognition of an antecedent title in one of the parties to the suit. Where a suit is filed *in forma pauperis* by C on a mortgage executed in favour of A and B claiming that the same was executed in their favour benami for the plaintiff's father and that plaintiff was therefore entitled to the full amount, impleading as parties to the suit, among others, the mortgagors and B's son who pleads that it is not benami, and pending the suit the plaintiff and B's son file a joint memorandum in Court by which the plaintiff agrees that the son of B is entitled to half the amount of the mortgage, such a case is not affected by R. 9 (c) and affords no ground for dispaupering the

10. Where the plaintiff succeeds in the suit, the Court shall calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue a pauper; such amount shall be recoverable by the ¹[Provincial Government] from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit.

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¹ Substituted for "Government" by A.O., 1937.

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plaintiff. 1937 M. 576=(1937) 1 M.L.J. 616. The practice of disposing of an application to dispauper a pauper plaintiff along with the judgment itself and after delivery of judgment in the suit is one that ought to be condemned. An application of that sort ought to be dealt with and decided finally before further proceedings in the suit are taken. 1940 M.W.N. 404=51 L.W. 666.

ORDER UNDER—FINALITY.—When a plaintiff has been declared a pauper, *res judicata* does not prevent the question from being re-opened. The question can be re-opened on any one of three grounds mentioned in R. 9. 149 I.C. 1004=1934 A. 323.

O. 33, R. 10.—Order 33, R. 10 creates two distinct and separate rights in the Crown, one right *in rem* against the property and the other right *in personam* against the pauper. 50 I.C. 315=4 P.L.J. 166. Where an appeal *in forma pauperis* is partially accepted, the Government is entitled under R. 10 to the full amount of Court-fee which was payable on the memorandum of appeal if appellant had not been allowed to appeal *in forma pauperis*. Court-fee leviable on the amount of the subject-matter of the appeal and not on the amount awarded to appellant would therefore be recoverable by Government. 36 P.L.R. 22 (1). See also 1937 A.L.J. 804. Crown can recover Court-fee without a separate suit. (*Ibid.*) Crown debts—Priority of. 34 A. 223=39 I.A. 62=22 M.L.J. 457 (P.C.). Pauper suit—Portion of Court-fee ordered to be paid by defendants—Sale of latter's property in execution of another decree—Right of Government to recover Court-fee out of sale proceeds—Priority over decree-holder. 59 M. 872=1936 M. 602=70 M.L.J. 601. This rule does not have the effect of restricting the right of Government to the subject-matter of the pauper suit. (*Ibid.*) A pauper succeeding partly in his case should be given the costs proportionate to his success. Pauper plaintiff should not be allowed to penalize defendant by exaggerating his claim. 14 A.L.J. 657=38 A. 469; 54 M.L.J. 530=1928 M. 216. Where pauper plaintiff applies for amendment of the plaint, it is not competent to Court to direct plaintiff to pay cost of the amendment. 47 B. 104=1922 B. 385. Amendment of plaint—Payment of costs of adjustment made a condition for granting—Legality. 6 R. 561=114 I.C. 677 (1)=1928 R. 366. Where a woman obtains a decree for maintenance C.C.M.—155

on a suit filed *in forma pauperis* and future maintenance is made a charge on certain property, the proceeds on sale of such property on execution are not attachable by Government for Court-fees. To permit such an attachment would be tantamount to permitting attachment of the right to future maintenance which under S. 60, C.P. Code, is not liable to attachment. 154 I.C. 580=1935 S. 21. See also 57 B. 507=146 I.C. 340=35 Bom.L.R. 615=1933 B. 350. The proper method of recovering Court-fee payable to Government in case the property out of which it is to be recovered is a right to future maintenance, is by Court appointing a Receiver to collect the same and pay to Government, in instalments, if necessary, in order that the maintenance holder may have something to live upon. 49 M. 567=1926 M. 565=50 M.L.J. 279. As to order for payment of Court-fees in suits for maintenance, see 105 I.C. 725=32 C.W.N. 48 (38 A. 469, Doubtful; 14 M. 163, Ref.); 94 I.C. 391=1926 C. 859. Suit *in forma pauperis*—Costs decreed to defendant exceeding claim decreed to plaintiff—Government, if can claim charge. 14 L.W. 529=42 M.L.J. 19. Suit *in forma pauperis*—Decree—Court-fee payable to the Secretary of State—Right of decree-holder to execute. 118 I.C. 191=1929 A. 905 (2). Where an application to sue *in forma pauperis* is granted, the suit is deemed to have been instituted on the date when the application was made and where the plaintiff succeeds in the suit, the Court-fee leviable from him is that payable under the law in force on the date when the application for leave to sue as a pauper was made and not the law in force on the date of the decree. (91 I.C. 302, Rel.) 27 S.L.R. 240=1933 S. 354. A suit *in forma pauperis* was compromised and the Court passed a decree in terms of the compromise which made the plaintiff liable to pay the Court-fee due to Government and also made it a first charge on the subject-matter of the compromise. The amount under the decree was paid to the plaintiff by the defendant out of Court before the decree was drawn up and satisfaction was duly recorded. Two years after the decree Government applied for execution against the defendant for the amount of the Court-fee due to them. Held, that the defendant could not be called upon to pay the Court-fee, there being nothing left due from him, and that the application in execution against the defendant was misconceived. 39 C.W.N. 1274.

PAUPER DECREE-HOLDER—PURCHASE FROM—LIABILITY FOR COURT-FEES.—The charge under R. 10 is created by law and a pur-

Procedure where pauper fails. **11.** Where the plaintiff fails in the suit or is dispaupered, or where the suit is withdrawn or dismissed—

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) chargeable for such service, or

(b) because the plaintiff does not appear when the suit is called on for hearing,

the court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.

LOC. AM.—[MADRAS.]

11. *Procedure where pauper fails.*—Where the plaintiff fails in the suit or is dispaupered or where the suit is withdrawn or where part of the claim is abandoned or where the suit is dismissed—

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) for such service, or

(b) because the plaintiff does not appear when the suit is called on for hearing,

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chaser of a decree obtained by a pauper takes it subject to the charge. The charge however is only for the Court-fees and not for the fees of the Government pleader also. 147 I.C. 751=1934 A. 438. The Court-fee payable in a case is the Court-fee leviable upon the plaint. Where the plaintiff in a suit filed as a pauper succeeds only in part, there is nothing improper in the trial Court ordering the defendant to pay the whole Court-fee, if the Court thought that it was a proper order. If the defendant thought that order unjust, he could appeal against that portion of the order. 1941 Oudh 66=1940 O.W.N. 1010.

APPEAL.—The orders passed under Rr. 10, 11 and 12 are appealable. 1939 A.L.J. 125=1939 All. 327.

O. 33, Rr. 10-13.—Decree passed in pauper suit—Basis of calculation of Court-fees—Amended Court-fees Act coming into force, effect of. See 96 I.C. 112=1926 M. 474=50 M.L.J. 280. See also 1926 M. 159=49 M.L.J. 538; 1937 A.L.J. 804.

O. 33, Rr. 10, 11, 12 and 14: SCOPE OF—REMEDY OF PROVINCIAL GOVERNMENT AGGRIEVED BY ORDER AS TO PAYMENT OF COURT-FEE.—The provisions of Rr. 10, 11 and 14 of O. 33 are mandatory. Though orders under Rr. 10 and 11 usually must be passed *suo motu*, R. 12 gives the Provincial Government a right to apply, as a precautionary measure for an order as to payment of Court-fee under Rr. 10 and 11. 1939 A.L.J. 125=1939 All. 327. The effect of the concluding portion of O. 33, R. 10, C.P. Code, is that it not merely declares the right of the Government to recover the Court-fees but also authorises the Court to make an order as to the party or parties from whom the Court-fees are to be recovered. It follows, therefore, that after the suit is disposed of, the Court is at liberty, whether the Government is represented or not before it at the time, to make an order in favour of Government for payment of Court-fees; and in making such an order, the Court will no doubt be

entitled in the exercise of its discretion to direct which of the parties shall be liable for the payment of such Court-fees. If no such order is incorporated in the decree of the Court, Government can seek to obtain such an order by an application made under R. 12. 43 C.W.N. 164=1938 C. 776. Court-fee ought to be calculated on the basis of the valuation at the date of the filing of the suit which is the valuation upon which the plaintiff would have had to pay 'if he had not been permitted to sue as pauper.' Hence where a pauper plaintiff gets his valuation amended to a figure less than that given originally in his plaint, and the suit is compromised subsequently, the Court-fee payable to the Government is to be calculated not on the amended valuation but on the original valuation given by the pauper plaintiff. 1941 A.L.J. 253..

O. 33, R. 11.—An order dispaupering the plaintiff operates retrospectively in respect of payment of Court-fees. 149 I.C. 1004=1934 A. 323. Pauper suit—Dismissal—Order directing defendant to pay Court-fee due to Government—Justifiability—Suit involving difficult construction of settlement deed. 70 M.L.J. 128.

O. 33, Rr. 11 and 12.—Pauper suit—Compromise—Court-fee. 35 B. 448=12 I.C. 29; 1930 P. 353 (2)=11 Pat.L.T. 267. Whenever a suit is dismissed, whether at the request of parties or not, plaintiff is the party defeated and must pay Court-fees to Government. (*Ibid.*) Court may, in disposing of a pauper suit, direct next friend of a minor pauper plaintiff to pay the costs of the suit; but such an order cannot have the effect of depriving Government of the right expressly given to Government by Rr. 11 and 12 to have an order that plaintiff shall pay Court-fee payable on plaint to Government. Government may, therefore, apply for such an order in spite of the order of Court directing next friend to pay the costs of suit. 45 L.W. 234=1937 M. 145=(1937) 1 M.L.J. 151.

the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court-fee and in the case of abandonment of part of the claim the proportionate court-fee, which would have been payable by the plaintiff if he had not been permitted to sue as a pauper.

In cases where the plaintiff is dispaupered the Court may, instead of proceeding under the previous paragraph, order the plaintiff to pay the requisite court-fee within a time to be fixed by it and in default dismiss the suit and make an order for the payment of court-fee as in the previous paragraph.

Where the Court finds that the suit has been instituted unreasonably or improperly by a next friend on behalf of a minor plaintiff on a cause of action which accrued during the minority of such plaintiff, the Court may order the next friend to personally pay the Court-fee.

12. The ¹[Provincial Government] shall have the right at any time to apply to the Court to make an order for the payment of court-fees under rule 10 or rule 11.

Provincial Government may apply for payment of court-fees.

13. All matters arising between the ¹[Provincial Government] and any party to the suit under rule 10, rule 11 or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47.

Provincial Government to be deemed a party.

14. Where an order is made under rule 10, rule 11 or rule 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector.

Copy of decree to be sent to Collector.

LEG. REF.

¹ Substituted for "Government" by A. O., 1937.

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O. 33, R. 12.—R. 12 of O. 33 is confined in its operation to cases in which the Court has not already *suo motu* passed an order either under R. 10 or R. 11 of that order. 1939 A.L.J. 125=1939 All. 327.

O. 33, Rr. 12 and 13.—It is not the function of a Court of appeal to give effect to the right of the Government conferred by R. 12, in respect of Court-fee and some other costs incurred by and due to the Government in the trial Court. R. 13 makes it clear that Government should proceed in trial Court for recovery of Court-fee and other costs due to it to which its right has been declared by R. 12. 1937 A.L.J. 171=1937 A. 280. Where a pauper plaintiff, whose suit has been dismissed and who has become liable to pay to Government Court-fee due on the plaint and other costs incurred by Government, prefers an appeal from the decree paying the necessary Court-fee on appeal, appellate Court which has registered the appeal cannot enforce the right of the Government in the matter of Court-fee and other costs either by issuing a process or by directing appellant to pay the said sums on pain of his appeal being dismissed. 1937 A. 280. If after having so directed the appellant, it dismisses the appeal on default of compliance with the direction, the order of dismissal is wholly without jurisdiction, subject to revision and interference by High Court under S. 115. The order of dismissal of the appeal under such circumstances is not a "rejection" and does not amount to a "decree" within the meaning of S. 2 (2), so as to be open to second appeal. 1937 A. 280.

O. 33, R. 13.—Where a pauper plaintiff whose suit has been dismissed has been

allowed to appeal *in forma pauperis*, there is no scope for the intervention of Government in the matter of Court-fee, and an application by Government for an order directing appellant to furnish security for payment of Court-fee due to Government in lower Court and appellant is unsustainable. The provisions of O. 41, R. 10 should not be made available or utilised for the benefit of the Government in order to enable it to collect the Court-fee due. Court-fee payable to Government is not the costs incurred by a party within the meaning of O. 41, R. 10. Nor can O. 33, R. 13 be invoked to support such an application by Government. 45 L.W. 186=1937 M. 267.

O. 33, R. 14.—All that the Code directs the Court to do is to send to Collector a copy of the decree which it has passed and which contains an order that plaintiff shall pay a certain sum to Government. What Collector does after receipt of the copy of the decree is no concern of Court. Collector is not the agent of the Court nor is the Court concerned with the collection of revenue. Therefore a decree drawn up in these terms: "It is ordered that a copy of this decree be sent to Collector for recovery of Rs. 700 from appellants" with a forwarding letters containing the words "for necessary action" is not justified by the Code. 8 R. 294. R. 14 appears to have been enacted with a view to enable the Provincial Government to appeal against the order passed by the Court as to the calculation or the payment of Court-fees in the event of being aggrieved by the same. Where the right of appeal is not however exercised by the Provincial Government within the time allowed by law, and the decree of the trial Court, had thereby become final, it cannot be allowed to be reopened by means of an application for amendment of the decree. 182 I.C. 337=1939 A. L.J. 125=1939 All. 327.

15. An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.

by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the

¹[Provincial Government] and by the opposite party in opposing his application for leave to sue as a pauper.

LEG. REF.

¹ Substituted for "Government" by A.O., 1937.

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O. 33, R. 15.—The provisions of R. 15 are imperative. A person instituting a suit in the ordinary manner cannot do so unless he pays the costs incurred in the application to sue *in forma pauperis* which was dismissed. 54 A. 390=1932 A.L.J. 254=1932 A. 312. See also 1939 M.W.N. 178=1939 Mad. 316; 41 Bom.L.R. 1269; 1940 A.L.J. 118. But where Court in dismissing the application has either disallowed costs or made no order as to costs, he is entitled to maintain his suit as an ordinary litigant without making any payment to Government or to the opposite party in respect of the costs incurred in opposing the application. 157 I.C. 150=1935 A.L.J. 857=1935 A. 723 (F.B.). The proviso in R. 15 of O. 33, requiring the unsuccessful applicant for leave to sue *in forma pauperis* can only come into play when there is a formal order of the Court drawn up, stating the amount of costs payable by him to the Government and the opposite party. The provision, though mandatory, has to be strictly construed, inasmuch as it puts a fetter on the inherent right of an individual to resort to a Court of law for the redress of the wrong done to him. 1937 A.L.J. 1208=1937 All. 781. See also 1939 Mad. 316. Where the Court dismisses an application for leave to sue *in forma pauperis* but at the same time directs that "the Court-fee shall be paid within two weeks and the plaint will then be registered", the Court really intends that the application to sue *in forma pauperis* should itself be treated as a plaint on the requisite Court-fee being paid. O. 33, R. 15 cannot apply to such a case, as there can be no question of the institution of a fresh "suit in ordinary manner" in such a case. The proviso in that rule as to payment of the costs of the Government and the opposite party cannot come into operation at all in that case, and if the applicant pays the Court-fee due within the time fixed, the Court cannot dismiss the suit on the ground of non-payment of the costs. 1937 A.L.J. 1208=1937 All. 781. The provisions of O. 33, R. 15 are mandatory, and when failure to comply with the rule is brought to the notice of the Court, the suit must be dismissed, if the objection as to the non-compliance of the rule has not been waived. The failure to comply with the condition in O. 33, R. 15, as to prior payment of costs

is an irregularity in the initial procedure which does not affect the inherent jurisdiction and competence of the Court to entertain the suit, and it may be waived. If the defendant in the subsequently instituted suit with Court-fee does not raise the objection, that the condition in O. 33, R. 15 as to payment of costs has not been complied with, at the initial stage of the trial, he cannot subsequently dispute the Court's jurisdiction. I.L.R. (1940) Bom. 17=1940 Bom. 44=41 Bom.L.R. 1269. R. 15 should be read along with Rr. 5, 6 and 7. 57 I.C. 9=31 C.L.J. 351. See also 43 P.L.R. 257; 7 Cut.L.T. 34. The refusal which is contemplated by R. 15 of O. 33, is a refusal to allow the applicant to sue as a pauper under sub-R. (3) of R. 7 of that order which must be the result of an inquiry into the merits of the application as directed by sub-Rr. (1) and (2) of R. 7. Dismissal for default of appearance of applicant cannot amount to such a refusal. R. 15 of O. 33 only authorises the application of the principle of *res judicata* to an application to sue *in forma pauperis* and prohibits the entertainment of a fresh application when the first has been dismissed on the merits. It does not contemplate that a summary order passed without inquiry or contest should be given the force of *res judicata*. 1941 A.W.R. (H.C.) 56=1941 A.L.J. 103. Orders under R. 5 or 7 bar fresh proceedings under R. 15. 33 I.C. 812=20 C.W.N. 669. But see 10 O. W.N. 1145=1933 O. 534; 31 N.L.R. 386=157 I.C. 294=1935 N. 168 (*ex parte* order of rejection). See also 156 I.C. 402=1935 P. 193, *contra*. Where the previous application to sue as pauper was rejected because the process-fee paid for the issue of notices on the opposite party was insufficient, *held*, that a subsequent application for the same purpose was not barred by R. 15 which applies only to applications which have reached the stage mentioned in R. 7. 60 C. 630=37 C.W.N. 309=1933 C. 549. See also 10 O.W.N. 1145=1933 O. 534. A petition to sue *in forma pauperis* can be registered as plaint in the suit if full Court-fee is paid. (24 C. 889, Foll.) 14 I.C. 297=16 C.W.N. 641. Dismissal of application for leave to appeal *in forma pauperis*—Applicant, if can be allowed to amend memo. of appeal and stamp it on new valuation. 1935 R. 336. R. 15 makes it a condition precedent for a petitioner, whose application to sue *in forma pauperis* has been rejected, to pay the costs of Govern-

16. The costs of an application for permission to sue as a pauper and of an inquiry into pauperism shall be costs in the suit.

Costs.

LOC. AM.—[RANGOON.] Substitute the following :—

“ORDER XXXIII.

Pauper Suits.

1. Subject to the provisions of this Order any suit may be instituted without payment of the Court-fee prescribed by law for the plaint if the plaintiff is a pauper,

“Pauper” exempted from Court-fee. that is to say if his property is not of the value of Rs. 100 or of the amount of the Court-fee (if more than Rs. 100), excluding from the computation the subject-matter of the suit and property exempted from attachment under S. 60.

Explanations.—(i) In a mortgage suit the subject-matter shall be estimated at the amount due on the mortgage ;

(ii) any part of the subject-matter of the suit which the opposite party relinquishes and places at the immediate disposal of the plaintiff shall be included in the computation of the plaintiff's property ; and

(iii) where the plaintiff sues in a representative capacity, such as trustee, executor or administrator or liquidator, the question of pauperism shall be determined with relation to the property of the estate which is so represented.

2. (1) A plaintiff may obtain leave to sue as a pauper by presenting his plaint with a petition signed and verified in the manner prescribed for the signing and

Application for leave to sue as a pauper. verification of plaints stating (i) that the plaintiff is a pauper and that all the property of the plaintiff consists of the items set out and valued in the schedule to the petition; (ii) that the plaintiff

has not within two months next before the presentation of the petition disposed of any property fraudulently or in order to enable him to plead pauperism; and (iii) that the plaintiff has not entered into any agreement with any person whereby such person has or will have an interest in the proceeds of the suit.

(2) The plaint and petition shall be presented by the plaintiff in person unless he is exempted from appearing in Court, in which event the petition may be presented by an authorized agent who can answer all questions relating to the application.

3. Subject to the jurisdiction of the Court to allow amendments to be made the Court shall reject the petition in any of the following cases:—

(a) where the plaint is not in the form prescribed ;

(b) where the plaint does not disclose a cause of action within the jurisdiction of the Court ;

(c) where the claim appears to be barred by any law ;

(d) where the applicant has within two months next before the presentation of the petition disposed of any property fraudulently or in order to be enabled to plead pauperism ;

(e) where the applicant has entered into any agreement with any person whereby such person has or will have an interest in the proceeds of the suit.

4. (1) If the petition is not rejected under r. 3 the Court shall fix a day (of which at least ten days' notice shall be given to the opposite party and the Govern-

Hearing of petition.

ment pleader) for the examination and cross-examination of the plaintiff (or his agent, where the plaintiff is allowed to appear by an agent) and the witnesses (if any) produced by either party in proof or disproof of the statement made in the petition.

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ment in opposing the application before a regular suit can be entertained; there should be a demand for it. Where there has been no such demand, suit should not be dismissed. 1935 R. 336. Where costs are not paid before institution of suit but afterwards, the suit should not be dismissed but must be treated at least as one instituted on the date on which the costs are paid and dealt with on that basis. Even an appellate Court has power to make such an order in an appeal from an order dismissing the suit; the appeal cannot be treated as not competent. 69 M.L.J. 791. Where an application for leave to sue *in forma pauperis* is dismissed, as not pressed, it bars a fresh application in respect of the same right. (20 B. 86, Foll.) 1924 L. 312. But see 56 I.C. 207=1 L.

151. Fresh application can be made if the application to sue *in forma pauperis* is dismissed for default. 1924 R. 161; 56 I.C. 207=1 L. 151. See 85 I.C. 982=1925 M. 986. See also 98 I.C. 26=4 R. 245=1926 R. 200; 96 I.C. 962=1920 M. 875=51 M. L.J. 79. If the Court rejects the petition *ex parte* on any of the grounds laid down in O. 33, R. 5, a second application is competent; but if the Court proceeds to issue notice to the respondent and takes evidence and finally refuses to allow the petition on merits, no second application is competent. 173 I. C. 647=1937 Pesh. 85 (2). See also 1941 A. L. J. 103. The words “right to sue” in R. 15 have substantially the same meaning as the words “cause of action”. The cause of action in the suit for specific performance of a contract is not the same

(2) Where the plaintiff appears by an agent the Court may, if it thinks fit, order that the plaintiff be examined on commission.

(3) The Court shall make a memorandum of the substance of the evidence taken at the hearing, and shall make an order allowing or rejecting the petition.

(4) Subject to any amendment which the Court may allow the petition shall be rejected under this rule if the Court is not satisfied of the truth of any of the statements made in the petition: provided that the Court may admit the plaint on payment of the Court-fee due thereon.

(5) If the petition is rejected the plaintiff shall be precluded from filing any further petition to sue as a pauper in respect of the same cause of action: provided that if the petition is rejected for default of appearance or due prosecution it may be revived on good cause being shown.

5. If, in any suit an order is made for the payment of an additional Court-fee in respect of the plaint, the plaintiff may apply by petition, for leave to continue the suit as a pauper; and the provisions of this Order shall apply to such petition.

Pauperism pending suit.

6. In a pauper suit the Court may, at any time, on the application of any party or of the Government pleader (on seven days' notice to the plaintiff) order that the suit be stayed until the Court-fee prescribed for the plaint is paid, on proof that the circumstances existing at the time when leave was given to the

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plaintiff to sue as a pauper were such that the leave ought not to have been given, or that the plaintiff has ceased to be a pauper or has made an arrangement with any person whereby the latter has or will have an interest in the proceeds of the suit, or where a new plaintiff who is not a pauper is substituted or added as a party.

7. (1) At the conclusion of a pauper suit the Court shall order the Court-fee prescribed for the plaint to be paid to the Collector by any party to the suit or by the parties in any proportion as may seem to the Court to be just, and shall cause a copy of the order to be forwarded to the Collector.

Recovery of Court-fees after decree.

(2) The Collector may at any time after the conclusion of the suit apply to the Court to make or amend an order under sub-r. (1).

(3) Without prejudice to the right of the Collector to take proceedings for execution of an order under sub-rule (1) the Court which executes the decree the suit shall cause the Court-fee or the proportion thereof ordered to be paid by any party to the suit under sub-r. (1) to be paid to the Collector out of any money or other property held or recovered by the Court on behalf of such party or his representative."

ORDER XXXIV.

Suits relating to Mortgages of Immovable Property.

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as in a suit for refund of the consideration. Hence where leave to sue *in forma pauperis* for specific performance of a contract to sell immovable property is refused, a subsequent application for leave to sue for refund of money paid under the contract is not barred. 1936 N. 280. Limitation is computed from the date when the pauper petition is filed, a pauper suit being converted into a regular suit. 28 I.C. 504=1915 M.W.N. 228. The Court should not refuse leave to an applicant to sue *in forma pauperis* on the ground that he has not stated in accordance with the provisions of O. 33, R. 2, the estimated value of his property and that he has not disclosed all his movables, when it is not apparent that he has deliberately concealed his assets. In such circumstances, the Court should allow the applicant to amend his list of property. 39 P.L.R. 665. Application to sue as pauper dismissed—Court-fee paid beyond limitation but within time granted by Court—Date of institution of suit is date of petition—Notes under S. 149, *supra*. 1938 Cal. 730.

O. 34: GENERAL.—It is this order and not S. 34, which determines the question of the rate of interest in the case of mortgages. 54 I.A. 1=54 C. 161=1927 P.C. 1=52 M.L.J. 373 (P.C.). The fact of an instalment decree being passed in a mortgage suit

on the consent of the parties does not appear to be a circumstance which can *per se* exclude application of this order. 111 I.C. 294=25 N.L.R. 175. This order does not apply to decrees passed in accordance with an award on a reference to arbitration. 121 I.C. 79=1930 L. 116; 33 P.L.R. 975. Nor to a mortgage executed in favour of a Co-operative Society which is enforceable in the manner prescribed by the Co-operative Societies Act (IV of 1912). 142 I.C. 487=1933 N. 211. Nor to compromise decrees. 14 P. 488=16 Pat.L.T. 311=1935 P. 385. As to applicability of O. 34 to charges created by decrees, see 1941 Bom. 71. The principles underlying O. 34, although they may not strictly apply in the case of a charge, may be applied and ought to be applied by analogy to charges created by a decree, unless indeed the terms of the decree make it clear that the remedy of recovering the decretal amount from the property charged was not given in lieu of the personal remedy, but in addition to it. In every case it is essentially a question of construction of the decree. 42 Bom.L.R. 1113.

SCOPE AND OBJECT.—O. 34 was substituted for sections in the T. P. Act which dealt only with mortgages of immovable property. A presumption can therefore be drawn that in taking those provisions out of an Act relating to property

1. Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Parties to suits for foreclosure sale and redemption.

Explanation.—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

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and incorporating them in an Act relating to procedure the legislature did not intend to extend the scope of the provisions. The heading of O. 34 defines the general words in the substantive provisions and limits their operation to mortgages of immovable property. 34 Bom.L.R. 1615. But see 59 C. 667=36 C.W.N. 263=1932 C. 524. As regards scope and object of O. 34, see also 25 C.L.J. 553=40 I.C. 845=21 C.W.N. 920; 1925 N. 15. Order 34 is self-contained and meant to provide for all matters it refers to. Its provisions do not allow of the application provided by O. 40 and a Receiver cannot, therefore, be appointed in execution of a mortgage decree. (100 I.C. 735, Foll.) 14 L. 457=34 P.L.R. 815=1933 L. 687.

O. 34, R. 1: OBJECT AND APPLICABILITY.—The object of R. 1 is that all claims affecting equity of redemption should be disposed of in one and the same suit. 54 I.A. 68=50 M. 180=1927 P.C. 32=52 M.L.J. 338 (P.C.) and to prevent the multiplicity of mortgage suits. 31 C. at 432; 33 C. 425 (433); 28 B. at 16; 32 C. 746; 28 A. 174 (F.B.); 21 A.L.J. 701=1924 A. 107; 50 M. 180. For scope and object of, see 53 M.L.J. 647; 25 C.L.J. 553=21 C.W.N. 920; 1925 N. 15. R. 1 is a rule of procedure and does not purport to deal with substantive rights of parties or the extinguishment of such rights. 30 S.L.R. 42=164 I.C. 69=1936 S. 87. This rule does not require that in a suit on a mortgage, the owner of equity of redemption must always fill in the roll of a defendant. It is enough if all the interests in the property are represented in the suit. A suit by a purchaser of mortgaged property to enforce a mortgage which he has paid off is competent. 59 M. 1042=1936 M. 814=70 M.L.J. 719. The provisions of this rule do not apply to a suit under S. 12 of the Punjab Redemption of Mortgages Act (II of 1913). 14 L. 218=34 P.L.R. 149=1933 L. 179. A charge which has been created by the decree in a suit for money does not convert the suit into a mortgage suit and make this order applicable. 49 M.L.J. 490=1925 M. 1101. As to the effect of S. 22 of the Limitation Act, see 1929 A. 941=121 I.C. 106. As to whether rule requires that persons whose rights are admitted should be made parties, see 29 M. 84; 29 M. 217 at 224; 27 A. 511; 28 C. 517; 25 M. 568; 25 M. at 113; 30 M. 353. But see 20 A. 322. Persons not impleaded as parties to mortgage suit cannot be proceeded against in execution proceedings. 153

I.C. 870=1935 L. 203. Rule only lays down a principle as to who must be made parties, and does not prohibit the joinder of any person as a party. 55 I.C. 433. In a case where the question is who may be made parties or whether an existing party may raise a particular defence, this rule does not apply. 1928 M. 764=113 I.C. 865. It is well known that people are often joined as parties to a mortgage suit to prevent further complications, but the mere fact that a person is joined as a party to the suit, possibly *pro forma*, does not necessarily give the plaintiff a right to sell his interest in the property, particularly when he has entered into no contract with the plaintiff and has no privity of estate with him. 167 I.C. 449=1937 R. 56. When the purchaser is obstructed from taking possession in execution of a mortgage decree, by an alleged purchaser from the mortgagor, his only remedy is a suit for possession against him, giving him an opportunity to redeem. A mortgage suit will as well lie if it is in time. 11 I.C. 74=16 C.L.J. 33. Also 1923 A. 232=65 I.C. 654. Mortgagor cannot bring separate redemption suits for redemption of a single mortgage debt where the interest of mortgagees is divided among several co-sharers. 104 I.C. 648=1927 Bom. 513.

MEANING OF TERMS.—"Mortgaged security" does not mean the mere lands which the mortgagor professes to mortgage, nor the physical object; but it means the interest therein which the mortgagor is competent to transfer by way of mortgage at the date of the transaction. (1926 R. 208, Foll.) 162 I.C. 731=1936 R. 198.

NON-JOINDER—EFFECT OF.—If a person interested in equity of redemption is known, he ought to be made a party to a redemption suit in order to safeguard his right. But if he is not known or if it was not possible to have made him party, due provision may be made in the decree for safeguarding his rights. Where he is deliberately omitted, still relief can be given to the parties before Court. 1936 M.W.N. 1005=1937 Mad. 136. See also I.L.R. (1941) Nag. 615=1941 Nag. 5; 18 Pat. 141=19 Pat.L.T. 875=1939 Pat. 49. Where in a mortgage suit the plaintiff had failed to bring all the parties concerned on the record and had also failed to bring before Court materials sufficient to enable it to work out the account, the suit should not, on a Letters Patent appeal, be sent back to the trial Court for the addition of the parties and for accounts to be taken on a proper basis, as that would mean a

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complete rehearing involving the leading of a considerable amount of new evidence. The suit, in such circumstances, can rightly be dismissed. (59 I.A. 106, Rel. on,) 1937 R.L.R. 13=1937 Rang. 220; 1940 N.L.J. 151. Although it is ordinarily undesirable to implicating in a mortgage suit persons claiming adversely to either the mortgagor or the mortgagee, this does not apply to the case of a person who has an interest in the mortgage security and whose claim is not in any way in derogation of the rights of the mortgagee or the mortgagor, notwithstanding that his claim is adverse to the plaintiff in the mortgage suit. If the person applying to be impleaded as a party in a mortgage is interested in the mortgage suit, he should be added as a party before a decree is given in the suit. O. 34, R. 1 requires that all persons having an interest in the mortgage security shall be joined as parties to any suit relating to the security. (1941) 1 M.L.J. 626. A suit can be filed by a second mortgagee without impleading the first. Similarly if the prior mortgagee brings his suit without impleading the subsequent mortgagees, decree that he may obtain would not prejudicially affect the rights of any person interested in the property. This would be so irrespective of the fact whether he had or had not notice of the subsequent incumbrances. 56 M. 846=1933 M. 583=65 M.L.J. 108 (F.B.). See also 156 I.C. 318=1935 R. 139; 1937 Cal. 717. If a decree can be passed and given effect to in so far as the rights of the parties actually before the Court are concerned without interfering with the interests of others, there is no reason why the suit should not proceed. 10 P. 341=132 I.C. 100=1931 P. 164. Also 21 A.L.J. 701=1924 A. 107; 43 C.W.N. 458=1939 Cal. 403=I.L.R. (1939) 1 Cal. 493; 1923 N. 234. O. 1, R. 9 provides that no suit shall be defeated by reason of non-joinder of parties and O. 34, R. 1 is subject to O. 1, R. 9. (1923) 2 P. 175=69 I.C. 677. See also 54 C.L.J. 113=1932 C. 34; 15 Luck. 399=1940 O.W. N. 209=1940 Oudh 235; 1940 Sind 195; I.L.R. (1940) Kar. 447; 36 C.W.N. 1138. Non-joinder due to want of notice ought not to be penalised. 66 I.C. 631=1922 N. 89 (F.B.). Non-joinder of parties is no ground for reversal of decree by an appellate Court. 5 L.W. 615=40 I.C. 414. Even if non-joinder is a fatal defect, it can be cured under O. 1, R. 10 (2). 27 A. 75; 30 C. 755; 161 I.C. 579=1936 Pat. 153. See also 30 S.L.R. 42=164 I.C. 69=1936 Sind 87. Failure to join some of the heirs of the mortgagor in an appeal by one of the heirs for redemption is not fatal to appeal and a decree can be passed which will bind all the heirs of the mortgagor. In such cases plaintiff will be deemed to be litigating, in absence of fraud or collusion, in the common interest of himself and the other heirs of the mortgagor. 148 I.C. 903=11 O.W.

N. 524=1934 O. 220. Non-joinder of one of two divided heirs of deceased mortgagor, enjoying in separate shares is not fatal and the whole amount can be recovered from the impleaded son's share. 35 A. 441=20 I.C. 41; 43 B. 575=51 I.C. 223. Non-joinder of all heirs is not fatal. A decree for a proportionate share of money as against heirs on record should be passed. 66 I.C. 312=25 C.W.N. 594; 89 I.C. 121. But see 1940 N.L.J. 151. Similarly where some of the co-mortgagors owning distinct shares were not made parties, a decree for a sum proportionate to the interest of the parties impleaded could be given. 35 A. 247=19 I.C. 614. But see 90 I.C. 80; 89 I.C. 121; 48 A. 171; 66 I.C. 312. Where the terms of a lease contain a clear stipulation that the rent is a charge on the property and the lease further stipulates that half rent shall be paid to one party and half to the other, decree for charge attaching to whole property in respect of the demand of one party cannot be refused, merely because the other party has not joined as plaintiff and is impleaded as *pro forma* defendant. 163 I.C. 175 (1)=1936 Pat. 306. In a suit for redemption, if one of the mortgagees was exonerated the suit must be dismissed. 45 I.C. 650=4 Pat.L.W. 291. Where a mortgagee in a suit for enforcement of his mortgage fails to implead a purchaser of a part of equity of redemption, though he has notice of the purchase, and does not take steps to implead him even after objection is taken to such nonjoinder, he cannot be granted a decree for the entire mortgage money. There should be proportionate abatement of the mortgage money in the decree. 159 I.C. 159=61 C.L.J. 560=1935 Cal. 667. The mortgagee-purchaser is not entitled to eject the purchaser of the equity of redemption when in the suit such purchaser has not been made a party. 25 I.C. 1. But see 20 I.C. 184=11 A.L.J. 362; 49 C. 1048; 22 C.W.N. 543=44 I.C. 521; 1927 A. 611. The transferee of the equity of redemption is not bound by any decree in a mortgage suit in which he was not a party. 45 I.C. 606=21 O.C. 70; also 34 I.C. 367=3 O.L.J. 494; 14 C.L.J. 530; 1927 A. 611; 138 I.C. 752=1932 C. 561. In a suit for possession from the purchaser by persons interested in the equity of redemption who have not been made parties, no decree can be passed without a provision for what may be due to the defendants under the mortgage. 29 I.C. 742. Where owner of equity of redemption was not a party to the mortgage suit, his subsequent dispossession in execution is wrongful. 36 I.C. 744. See also 1940 Sind 195; I.L.R. (1940) Kar. 447; 1940 M.W.N. 256. Where a simple mortgagee brought a suit for sale against mortgagor without impleading certain subsequent purchasers of equity of redemption and properties were sold by auction in execution of a decree in that suit, the purchasers are in the same position as puisne mortgagees

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and their rights are not affected by the suit and decree obtained in their absence. 133 I.C. 497=1931 M. 542=61 M.L.J. 316. [21 M.L.J. 213 (F.B.); 40 M. 77; 30 M. 500, Ref.] Further it is open to the simple mortgagee or purchaser in execution of mortgage decree to maintain a second suit for sale against the purchasers of equity of redemption. 61 M.L.J. 316. (47 M. 551; 24 Bom.L.R. 741; 24 A.L.J. 661, Ref.) As to effect of nonjoinder of necessary parties in a suit for sale, see 84 I.C. 262; 100 I.C. 198=1927 A. 290. As to right of auction-purchaser in case of non-joinder of subsequent mortgagee, see 134 I.C. 1=1931 A.L.J. 729=1931 A. 466 (F.B.). Where the first mortgagee obtained a decree on his mortgage without impleading the second mortgagee and purchased properties in execution including the one mortgaged to the latter, and, on failure to get possession, brought a suit against the second mortgagee, who claimed to redeem all the properties, *held*, that the second mortgagee could only redeem the property mortgaged to him. 134 I.C. 959=1931 P. 434. If in a suit for redemption a sub-mortgagee has not been impleaded, his right to bring his own suit for sale of the property mortgaged to him is not affected, but this cannot, however, alter the legal effect of the redemption suit as between mortgagor and mortgagee. 62 M.L.J. 272=55 M. 320=1932 M. 115. [43 A. 469 (P.C.), Dist.] In a suit for foreclosure the person who had a vested remainder and who had not been impleaded as a party to the suit was not bound by the decree. 134 I.C. 865=1931 O. 358. *Obiter*.—The right of a second creditor over a property is not affected by mortgagor being adjudicated an insolvent. But Official Receiver to whom equity of redemption has been assigned by operation of law should be made a party to the suit on the mortgage and Official Receiver should get himself impleaded as a party thereto. 62 Cal. 483=39 C.W.N. 384=1935 Cal. 460. Suit to enforce charge by holder of trust—Receipt—Omission to implead subsequent mortgagee—Effect. 39 C.W.N. 1018. Equitable mortgagee not added as party—Addition after final decree—Power of Court. 40 C. W.N. 1173.

JOINT FAMILY.—Code does not affect the rule regarding the indivisibility of a mortgage nor the Mitakshara rule that no coparcener has a definite share till partition is made. 24 I.C. 831=10 N.L.R. 72. See also 1927 B. 513=104 I.C. 648. All the members of a joint family are necessary parties to a suit on a mortgage of the joint family properties and their non-joinder is fatal to the suit. 24 I.C. 252=12 A.L.J. 794; 21 I.C. 712. But see *contra* 1925 P. 59. But in the case of a deceased mortgagee, if his estate is effectively represented by the persons on the record, the suit is good and not defective. In the case of a

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joint Hindu family, the karta effectively represents the minor sons of a deceased mortgagee, and even if the minor sons are not specifically impleaded, there is no legal defect in the suit. 16 P.L.T. 689. See also 1937 Nag. 121. A minor son in a joint Hindu family must be made a party. 28 C. 517. Where some refuse to join as plaintiffs they can be added as defendants. 14 I.C. 35=9 A.L.J. 410. Decree will be binding even on the minor members in the absence of fraud, where they have been represented by major members of the family. 21 I.C. 192. No question of non-joinder of sons can arise when the mortgage by father is not operative as against the sons. 42 C. 1068=19 C.W.N. 849 (F.B.). The essential point in suits by or against managers is not the distinct description of him as manager, but that he is sued or sues in respect of a family debt. 34 A. 549=9 A.L.J. 819 (F.B.). See also 1930 P. 293. No legal proceeding not filed expressly as manager, short of actual redemption, will deprive his coparceners of their right to redeem. 40 B. 248=18 Bom.L.R. 33. But see 2 P.L.T. 553=63 I.C. 564. The manager alone can file a suit on a mortgage without bringing the other members as parties. 2 P.L.T. 553=63 I.C. 564; 15 I.C. 876. But see 41 C. 727=19 C.L.J. 437. See also 29 I.C. 752=21 C.L.J. 452; 45 I.C. 76=7 L.W. 438; 46 I.C. 727; 37 I.C. 833. A foreclosure decree against a manager will bind all the members of the joint Hindu family where the manager effectively represents all the members. 36 A. 383=18 C.W.N. 968=41 I.A. 216 (P.C.). It is immaterial whether the suit is laid against him expressly as manager or not. 30 S.L.R. 42=164 I.C. 69=1936 S. 87. In a suit against the mortgagor's father or manager, the non-joinder of the sons is not fatal. 14 I.C. 38. See also 50 I.C. 243; 53 I.C. 411=125 P.R. 1919; also 18 I.C. 848=9 N.L.R. 1; 2 P. 435=1923 P. 290; 36 I.C. 542=1 P.L.J. 468; 47 A. 427=23 A.L.J. 246=1925 A. 355. But notwithstanding that manager is a party, Court should add as a party any member of the family who applies to be made a party, so as to put forward any defence challenging the mortgage as not having been made for purpose binding on the family. 19 O.C. 58=36 I.C. 64. See also 1937 N. 121. Suit on a mortgage executed by son in a Hindu joint family—Plaintiff seeking relief against whole family—Father insisting on issue that the property was his—Issue was allowed to be framed—Father not being stranger. 107 I.C. 814=1928 M. 199 (2). (1926 M. 744, Dist.) The sons or junior members cannot sue to redeem on the ground they were not parties to the suit in which the decree was passed against manager, unless they show that mortgagee was aware of their interest and yet omitted to implead them. 14 I.C. 333=16 C.W.N. 1019. See also 40 I.C. 525; 2 P.L.J. 306; 39 I.C.

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779. Mortgage suit against Hindu co-parceners *pending* partition suit—Non-joinder of one member—Decree does not bind that member. 38 C.W.N. 1045=1935 C. 141.

LANDLORD AND TENANT.—To a suit to enforce a mortgage of a non-transferable occupancy holding the landlord is not a necessary party. 46 I.C. 176=22 C.W.N. 662. A tenant of the mortgagee is a necessary party. At least he is a proper party. 52 I.C. 105. The lessee who has redeemed a mortgage by the lessor and forecloses the lessor, is not liable to be ejected by the lessor. 59 I.C. 511=16 N.L.R. 180. It is doubtful whether it is contemplated by the Encumbered Estates Act that the provisions of R. 1 of O. 34, should apply to proceedings under that Act. But in a case where a mortgage is the subject-matter of proceedings under the U. P. Encumbered Estates Act there would be no inconsistency with the provisions of the Act in allowing the persons interested in the mortgage, to be made parties to the case. 1940 O.W.N. 716=1940 Oudh 435.

NECESSARY PARTIES—ILLUSTRATIVE CASES.—All persons interested in mortgagee's interest are necessary parties. 1926 S. 145=91 I.C. 17. A person who obtains an order of attachment in his favour has no interest either in the mortgage security or in the right of redemption and so is not a necessary party to a mortgage suit. 58 C. 598=134 I.C. 561=1931 C. 763; *also* 1931 R. 108=133 I.C. 482; 1939 Pat. 7; 1938 M.W.N. 73=1938 Mad. 293; 1938 All. 651. *See contra* 17 C.W.N. 871; 42 C.W.N. 523=1938 Cal. 471; 1923 N. 311; 105 I.C. 427=23 N.L.R. 164. *See also* under heading "ATTACHING CREDITOR", *infra*. An attaching decree-holder is not a "person having an interest" within the meaning of O. 34, R. 1, and is not necessary party to a suit on a mortgage. An attachment merely prevents private alienation and does not create any title or legal charge upon the attached property; nor does it affect Court sales. It cannot therefore be said that a mortgage decree and sale in execution thereof are not binding on the attaching decree-holder who purchases the property in execution of his money decree, by reason of the fact that he is not impleaded as a party to the mortgage suit. 18 P. 155=19 Pat.L.T. 781=1939 P. 7. Where a property is sold in execution of a decree and the decree-holder is paid the amount and subsequently another person files a suit claiming relief on the ground of his alleged equitable mortgage over the property but the auction-purchaser is not impleaded, the suit is not maintainable for nonjoinder of the auction-purchaser nor is the decree-holder creditor liable to pay any money to the plaintiff. 156 I.C. 749=1935 S. 131. *See also* 1938 A.L.J. 1024=1938 All. 651. The entire suit fails if a necessary party is added after limitation. 36 I.

C. 542=1 P.L.J. 468. *Also* 25 I.C. 508; 24 I.C. 25=12 A.L.J. 619; 37 C.W.N. 478=1933 C. 621=60 C. 777. Where in a suit for sale of mortgaged property the alienee of the whole interest of the mortgagor in the property is made a party after expiry of the period of limitation, the suit must wholly fail. 150 I.C. 597=1934 Pesh. 38. The mortgagor is a necessary party. 36 B. 624=17 I.C. 87. *Also* 9 I.C. 940=9 M.L.T. 356. The mortgagor is not a necessary party to a mortgage suit, if the purchaser of the equity of redemption effectively represents him. 28 I.C. 386. In a suit by a sub-mortgagee defendant's mortgagor is not a necessary party. 27 A. 511. In a redemption suit against the sub-mortgagee, original mortgagor is not a necessary party. 24 Bom.L.R. 911=1922 B. 424. The mortgagor's mortgagor is not a necessary party. 67 I.C. 421. Neither the mortgagor's benamidar. 29 C.W.N. 784=1925 C. 973. Suit by only one of several heirs of a mortgagee is not maintainable; all must be made parties. 36 I.C. 77; 32 C. 746. Person claiming to be the adopted son of the plaintiff's husband if a necessary party. *See* 1928 M. 978=113 I.C. 310. Suit for redemption by one of several *urals* of a temple without impleading the others as parties is not maintainable. 13 I.C. 234=(1911) 2 M.W.N. 537. One co-mortgagee can sue by impleading the others as defendants. 20 I.C. 329. The *kanomdar* is a necessary party to a suit for redemption. 25 M. 568. In a suit for redemption of mortgage, alleged tenants of mortgagee are proper parties. 96 I.C. 848=1926 B. 522=28 Bom.L.R. 759. Mere presence of the purchaser of the equity of redemption as a witness in the suit, in the absence of proof of knowledge of the nature of the suit, does not amount to condonation of the omission to implead him, and the decree is therefore not binding upon him. 13 I.C. 874=(1911) 1 U.B.R. 92. Rights between the legal representatives of the deceased mortgagee *inter se* need not be gone into. 107 I.C. 805. The owner of a portion of the mortgaged property which has been released by the mortgagee is still a necessary party to the suit by the mortgagee. If the mortgagee fails to implead him, he is not entitled to a decree for the entire amount of the mortgage unless he proves that the other mortgagors have not been prejudiced by the omission. 27 N.L.R. 4=130 I.C. 809=1931 N. 44; 42 C.W.N. 721=176 I.C. 745=1938 Cal. 524. A decree-holder who in execution of a money-decree against the mortgagor purchases the mortgaged property in Court sale held after the mortgagee filed a suit on his mortgage, is not a necessary party to such a suit as on the day it is filed his position is that of an attaching creditor. 41 P.L.R. 629=1939 Lah. 146. As to whether purchaser of a part of mortgaged property need be impleaded, *see* 49 A. 923. Suit to recover money under Kootu Chit

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Fund—All subscribers to chit fund are necessary parties. 103 I.C. 814=53 M.L.J. 550=1927 M. 773. In a suit by a Company to have it declared that a mortgage entered into by its secretaries is void, no relief can be granted unless the mortgagee is made a party. 139 I.C. 556=1932 P.C. 244=63 M.L.J. 851 (P.C.). Mortgaged property attached and sold under S. 88, Cr. P. Code, after mortgage—What passes—Suit by mortgagee to enforce mortgage against purchaser at sale under S. 88, Cr. P. Code—Government is not necessary party. 18 Pat.L.T. 814=1937 Pat. 642. A trespasser is not a necessary party at all. 47 I.C. 536; 28 N.L.R. 69. Simply because a person has some title to the lands by reason of an entry in village papers, he is not entitled to be made a party in a redemption suit. 87 I.C. 679=1925 A. 593. In a suit to declare a right to redeem by a necessary party not impleaded in the prior suit, the mortgagee purchaser in execution of the decree in that suit, is entitled to raise all defences open to a purchaser. 47 C. 924=47 I.A. 91=39 M.L.J. 108=24 C.W.N. 254 (P.C.). See also 102 I.C. 645=1927 A. 611=25 A.L.J. 732; 18 Pat.L.T. 289. In a suit for accounts against the assignee decree-holder who had purchased the mortgage properties and who had been declared by Court to hold the property as trustee for the co-mortgagees who owned distinct interest therein, all the co-mortgagees are necessary parties to the suit, and a suit brought by some one of them without impleading the others is bad for nonjoinder of parties. 35 C.W.N. 977=1931 P.C. 229=61 M.L.J. 294 (P.C.). Where the mortgagor's (a Buddhist) wife dies leaving children, and the mortgagor states that he has transferred his right to another, subject to the mortgage, the transferee and children, though proper parties, are not necessary parties to a suit on the mortgage. 158 I.C. 828=1935 R. 315.

LEGAL REPRESENTATIVES OF A MORTGAGOR.—If in a mortgage suit, the equity of redemption is not entirely unrepresented but only some of the owners of the equity of redemption are left out without any negligence or fault on the part of the mortgagee, and a decree is passed on his mortgage, such a decree is not a void decree. It is only the right of redemption of the persons so left out which is not affected or cut off by the final decree. Such a mortgagee is entitled to recover his whole dues from the shares of those persons, who were parties to the suit in the hypothecated properties. Where, therefore, before the passing of the final decree, one of the mortgagors defendants dies and his legal representative is not brought on record the mortgagee having been ignorant of his death, and the final decree is passed against the deceased mortgagor also, such a decree is a valid decree against the other mortgagors. They cannot impeach

the sale in execution of that decree on the ground that the decree was not binding on the legal representative of the deceased mortgagor. Further it is doubtful whether they could raise the question in execution proceedings. I.L.R. (1939) 1 Cal. 493=43 C.W.N. 453=1939 Cal. 403.

PARAMOUNT TITLE.—Persons claiming paramount title are not to be made parties. 136 I.C. 728=33 Punj.L.R. 240. Also 138 I.C. 671=1932 C. 512; 1934 A.L.J. 1177; 144 I.C. 267=15 N.L.J. 17; 38 A. 488=43 I.A. 187=31 M.L.J. 571 (P.C.); 40 A. 584=46 I.C. 559=16 A.L.J. 639; 25 I.C. 233=12 A.L.J. 1088; 44 B. 698=57 I.C. 577=22 Bom.L.R. 815; 54 I.C. 806; 72 C.L.J. 493; 1941 N.L.J. 81; 40 I.C. 865; 24 I.C. 871; 44 C. 425=21 C.W.N. 177=37 I.C. 277. Their addition is bound to lead to confusion. 155 I.C. 156=1934 A.L.J. 1177=1935 A. 205. Where the defendants to a mortgage suit claim under a title quite independent of the mortgagors that title cannot be properly brought in issue in a suit based upon a mortgage to which the only proper parties are the mortgagors and mortgagees and the purchasers of the equity of redemption. It makes no difference that it happens to be the same individual who claims personal title and who is joined as interested in the equity of redemption. The defendant is not bound to raise a paramount title which is not impugned and which he did not even get from the mortgagors nor is he bound under S. 11, Expl. 4, to raise the question as it lies outside the scope and nature of the suit. I. L. R. (1940) Kar. 302=1940 Sind 103. In a suit on a mortgage executed by a Hindu father, his sons who were impleaded as defendants pleaded that they had separated from their father 25 years earlier and claimed a paramount title in the property mortgaged and asked to be discharged. *Held*, that the question of their paramount title in the mortgaged property cannot be investigated in the suit, and that they must therefore be discharged from the suit. 18 N.L.J. 291. But see 22 I.C. 976=1914 M.W.N. 623; 102 I.C. 435; 39 M.L.T. 459; 100 I.C. 195; 4 R. 214=98 I.C. 11=1926 R. 208; 23 L.W. 664=1926 M. 744=96 I.C. 26. Also 40 I.C. 288; 10 P.L.T. 645; 1927 S. 265; 1927 O. 607 (2); 1928 M. 764. They can be added where it may be convenient to decide such title in the suit. 1935 N. 68. But joinder of persons claiming paramount title does not make the proceedings irregular. 5 L.W. 615=40 I.C. 414. See *contra* 10 P. 234=130 I.C. 257=1931 P. 64. [38 A. 488 (P.C.); 32 C. 726; 33 C. 425, Ref.] But where a party has without jurisdiction gone to trial on the merits, he will not be allowed to plead after failing on the merits that his paramount title should not have been adjudicated upon. (*Ibid.*) Where in a mortgage suit defendant possesses both paramount title and interest in equity of redemption, he should not be allowed to rely on his paramount title and

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plead it, but in a subsequent suit he can plead his paramount title and cannot be estopped from pleading it as the question will not become *res judicata*. 58 C. 122=134 I. C. 892=35 C.W.N. 510. In a suit on a mortgage a third party claimed an interest in the fields, not in the mortgagor's interest. On their claim they had no right to redeem, so no decree should be passed against them. They can in no way be disadvantaged by the fact that their claim is not adjudicated on in the mortgage suit. 162 I.C. 731=1936 R. 198. The rule that in a mortgage suit persons claiming under a paramount title are not proper parties is not inflexible. An adopted son is a necessary party in a suit on a mortgage by the executrix of the estate of his deceased adoptive father. 11 I.C. 826=14 C.L.J. 108. See also 1935 N. 68. Where the non-determination of the title of persons claiming paramount title leads to inconvenience or hardship, it must be tried in the suit itself. 45 I.C. 691. Where in a mortgage executed by the son plaintiff seeks relief against the father also, the issue as to whether the property was the self-acquired property of the father, the son having no right to it, must be raised and determined in the suit itself and not left to be determined in execution. 107 I.C. 814=1928 M. 199 (2). See also 1928 M. 764. Where such a person is made a party and his title gone into, he cannot ask for a reversal of decree on the ground of his title not being triable in suit. 10 O.L.J. 263=1924 O. 19. Rights between legal representatives of a deceased plaintiff mortgagee *inter se* need not be gone into. 1927 M. 1071=107 I.C. 805. Where the plaintiff in a mortgage suit dies and only some of the representatives are brought on record and others not, the whole suit must be decreed. 1927 M. 1071=107 I.C. 805. See also 1926 C. 1192=96 I.C. 698. Order 2, R. 3 cannot apply to a case where the defendant is added as party in one capacity but pleads paramount title in another capacity. 1928 M. 764=113 I. C. 865. Vendee from mortgagor prior to mortgage, if proper party in a suit on mortgage. 1936 A.W.R. 157=1937 A. 251.

PRIOR MORTGAGEE.—A prior mortgagee need not be added in a suit by a puisne mortgagee. 13 I.C. 182=1912 M.W.N. 41; 2 Pat. L. J. 118=1917 Pat.H.C.C. 194. Nor the purchaser of the prior mortgagor's rights. 88 I.C. 803. Where a prior mortgagee, on being joined in a suit on a subsequent mortgage raises no objection to his being joined as a party, and, does not object to the issues framed by the Court as to the genuineness or otherwise of his mortgage, but on the contrary accepts the issues and offers evidence in support of his title as a mortgagee and each party has full opportunity of adducing evidence as it wishes and the merits of the case have not been affected by the introduction of the issues, the Court has

jurisdiction to decide the matters raised in the suit on the contention of the prior mortgagee being joined as a party. Having assumed the role of being a proper and a necessary party to the suit, he cannot, after the issues have been decided against him, contend that he was not properly joined as a party in the suit. 164 I.C. 445=1936 R. 340. Where a prior mortgagee has allowed himself to be joined in a suit by the puisne mortgagee, he is bound to redeem the subsequent mortgage and he can therefore claim subrogation. 25 N.L.R. 171=118 I.C. 54=1929 N. 135. The mere fact that the prior mortgagee was impleaded by mistake does not affect the nature of the decree that should be passed. 1930 A.L.J. 321=1930 A. 113. A prior mortgagee decree-holder who has obtained the decree without impleading the puisne mortgagee is entitled to use prior mortgage as a shield for prior payment, when he is sued by the puisne mortgagee on his mortgage. 43 A. 469=48 I.A. 365=42 M.L.J. 15=1922 P.C. 11 (P. C.). In such a suit by the puisne mortgagee, the prior mortgagee purchaser cannot set up any higher rights than any stranger purchaser, but can set up only the amount of the decree made in his suit. 42 A. 364=47 I.A. 71=38 M.L.J. 419 (P.C.). Where a prior mortgagee is not impleaded, the decree on the puisne mortgagee's suit is not a bar to a suit by the prior mortgagee on his own mortgage. 47 C. 662=47 I.A. 11=38 M.L.J. 424 (P.C.). When the prior mortgagee obtains a decree in a foreclosure suit without impleading the puisne mortgagee, it is open to him subsequently to deposit the money due to the puisne mortgagee and redeem him. 20 A.L.J. 401=44 A. 462=1922 A. 135. But see 40 M.L.J. 126=62 I.C. 833. A puisne mortgagee decree-holder purchaser can redeem the prior mortgage, or at least his rights as second mortgagee are not extinguished. 38 B. 24=21 I.C. 39=15 Bom.L.R. 817. A foreclosure decree without impleading a subsequent mortgagee amounts to nothing. 39 I.C. 849=13 N.L.R. 69; 1912 M.W.N. 41. The object and nature of relief claimed should be clearly stated, when a prior mortgagee is made a party. Otherwise the decree will not bind him. 58 I.C. 33=1 Pat. L.T. 629. Where the puisne mortgagee impleaded the prior mortgagee and claimed priority over him, a defence ought to be raised. Where the priority raised was adjudicated, it would be *res judicata* in a subsequent suit by the prior mortgagee. 4 Pat. L.T. 108=2 P. 435. See also 1937 O.W. N. 1118. A first mortgagee, in possession under a prior sale, may always shield himself under his mortgage and purchase though his right to possession may be defective. 1923 R. 107; 9 R. 1=132 I.C. 281=1931 R. 105. See also 33 I.C. 243; 1937 A.L.J. 710=1937 All. 646.

PUISNE MORTGAGEE.—A puisne mortgagee must be joined as a party to a redemption

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suit. 28 A. 162; 28 A. 174 (F.B.). He is a necessary party to a suit by the prior mortgagee. 81 P.W.R. 1916=33 I.C. 815=86 P.R. 1916. Also 39 B. 138=27 I.C. 1005=17 Bom. L. R. 144. But see also 9 A.L.J. 323=14 I.C. 674 (2)=34 A. 323. When he was not impleaded, and a second suit was brought by him, the prior mortgagee is entitled only to the decree amount on his mortgage and not to any interest subsequent to his decree. 42 A. 364=47 I.A. 71=38 M.L.J. 419 (P.C.). Where he is not made a party, he is not bound by any order for sale obtained in such suit by the prior mortgagee. Neither is he bound to pay off the decree on the prior mortgage if at the time of his own suit for sale the execution of the decree had become barred. 40 A. 407=45 I.A. 130=35 M.L.J. 1 (P.C.). Also 115 I.C. 552=1929 P. 94; 1937 Cal. 717. See contra 23 M.L.J. 284=17 I.C. 291=1912 M.W.N. 1119. A sale of the property at the instance of the prior mortgagee in a suit by him without impleading the puisne mortgagee as a party, does not affect the puisne mortgagee's right to redeem or sue on his own mortgage. 13 P. 364=1934 P. 648; 38 C.W.N. 1178; 21 M.L.J. 213=9 I.C. 513; 58 I.C. 295=16 N.L.R. 215. See also 39 C. 527=39 I.A. 68=22 M.L.J. 468 (P.C.); 38 B. 24=21 I.C. 39=15 Bom.L.R. 817; 33 I.C. 815=86 P.R. 1916; 44 I.C. 753=1918 M. W. N. 251=7 L.W. 420; 21 I.C. 554. Mortgage suit—Subsequent mortgagee not made party—Auction-purchaser taking possession of property from the subsequent mortgagee—Ejectment suit against purchaser—Maintainability. 45 C.L.J. 4=100 I.C. 420=1927 C. 259. See also 24 A.L.J. 661=1926 A. 480=97 I.C. 4 (2); 1937 Rang. 56. Where in a mortgage suit one of the defendants is impleaded as a subsequent purchaser of the mortgaged property along with other defendants, and such defendant disclaims all interest under the sale and asserts that he has no claim upon the property conveyed thereby the Court should at once discharge him from suit without putting in issue the controversial points between defendants *inter se* and giving decision thereon. 27 N.L.R. 312=134 I.C. 274=1931 N. 161. See also 1937 Rang. 351. Where a prior and a puisne mortgagee each brings a suit without impleading the other as a party, and the properties are sold by different parties, it is incumbent on the Court in a suit for establishing the priority of claim as between the purchasers, to grant relief according to equities on the basis of the exact position of the parties. 37 I.C. 343=14 A.L.J. 1146. But see 28 I.C. 67=8 S.L.R. 264; 24 A.L.J. 661=1926 A. 480. Where a prior mortgagee gets a money decree on his mortgage without impleading a puisne mortgagee and purchaser of the property in execution, he could not claim the property free of the puisne mortgage. 29 I.C. 757. In a subsequent suit for redemption by a puisne mort-

gagee while in the prior suit he was not made a party by a prior mortgagee, the decree, should direct a redemption upon payment of what was found due on such prior mortgage up-to-date of sale. 36 A. 123=22 I.C. 387=12 A.L.J. 41. Also 33 A. 370=9 I.C. 670=8 A.L.J. 155; 38 I.C. 179; 24 A.L.J. 661=1926 A. 480. Prior mortgagee not impleaded in second mortgagee's suit but second mortgagee impleaded in prior mortgagee's suit. The purchaser in the prior mortgagee's suit was entitled to priority as against the purchaser in the other. 1928 L. 505=112 I.C. 699 (2). The omission to implead a puisne mortgagee over a portion of the properties, does not render the suit wholly dismissable but affects only such of the properties as have been mortgaged to him. 45 A. 484=21 I.C. 271=11 A.L.J. 749. Failure of a puisne mortgagee to appear and contest when impleaded estops him from claiming any priority as having paid over any prior lien. 29 I.C. 875=19 C.W.N. 947. Where a person is made a party and he claims priority as the assignee of a prior mortgagee, it is not necessary to decide his priority. 9 I.C. 643. Where a puisne mortgagee was a party to the suit but not to a compromise decree passed therein, and execution was taken on the compromise decree, the puisne mortgagee's rights are not affected, and the proceedings in execution are a nullity. 41 M.L.J. 547=15 L.W. 123=1922 M. 307. See also 58 I.C. 295=16 N.L.R. 215. A suit for sale of property on a subsequent simple mortgage can be maintained subject to the prior usufructuary mortgage, though the mortgagee in both cases is the same. 50 I.C. 40. See also 69 I.C. 897=10 L.B.R. 360. Neither this rule nor any other provision of law requires the holder of a first mortgage to disclose his second over the same property. There is nothing to prevent him from obtaining a decree for sale on each of them in a separate suit. 86 I.C. 748=1925 O. 379 (2). But see also 53 I.C. 753=6 O.L.J. 482. There is nothing in law to prevent the prior mortgagee from bringing a suit without impleading a second mortgagee. Where the same person holds two mortgages, there is some risk of curtailment of some rights of the mortgagee when he chooses to sue separately on his mortgages. He may not be allowed to sell the properties in a subsequent decree when they were already sold in a prior decree. 4 Pat.L.T. 546=2 Pat. 874=1924 P. 77. See also 50 A. 742=1928 A. 378=114 I.C. 38. The omission to implead the puisne mortgagee as a party to the suit within limitation time does not involve a dismissal of the suit. 2 P. 175=4 Pat.L.T. 698=1922 P. 651; 2 Pat.L.J. 118=1917 Pat.H.C.C. 194; 16 I.C. 674=10 A.L.J. 134. Suit for sale—Subsequent mortgagee joined beyond limitation—Whole suit cannot be dismissed—Decree can be passed subject to subsequent mortgagee's rights. 101 I.C. 775=1927 A. 488 (1).

ATTACHING CREDITOR.—Where a decree-

Preliminary decree in foreclosure suit.

¹[2. (1) In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree—

LEG. REF.

¹ Rules 2 to 8 substituted by S. 4 of the Transfer of Property (Amendment) Supplementary Act (XXI of 1929).

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holder attaches the property of the judgment-debtor which is already mortgaged, the attaching decree-holder does not acquire any interest in or charge on the mortgaged property which he attaches having regard to S. 64, C.P. Code, and as such he is not a necessary party to a suit on the mortgage by the mortgagee. I.L.R. (1936) N. 127 = 165 I.C. 939 (1) = 1936 N. 209. Although it is open to the attaching creditor to come into the mortgage suit and claim redemption before the Court sale put an end to his attachment and to his character of attaching creditor, he is not entitled to disturb the title acquired by any person under the mortgage decree on the ground that he has not been impleaded in the mortgage suit. (*Ibid.*) The holder of a money decree against the mortgagor who has obtained an order for a receiver in execution of his decree is not a person having an interest in the mortgaged property or in the right of redemption so as to make him a necessary party to a suit on the mortgage under O. 34, R. 1. Such a person is not a party whose presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle questions involved in the suit. The Court has consequently no power to add him as a party under O. 1, R. 10 (2). The fact that the decree in his favour is a consent decree which provides that the property comprised in the mortgage will remain charged for the decretal amount cannot give him the right to redeem the mortgage under S. 91 of the T. P. Act, when that decree has not been registered. 164 I.C. 1009 = 40 C.W.N. 974. Attaching creditor not impleaded—Purchase by him in execution sale—Subsequent addition in execution of decree on mortgage—Pleas open. 1934 A.L.J. 1085 = 1934 A. 1027. The amended S. 91 of the T.P. Act does not mention an attaching creditor as one of the persons entitled to redeem a mortgage and under the present law he can in no sense be said to be a necessary party to a mortgage suit. Assuming that he is a necessary party under that section before its amendment, the result of his non-joinder cannot be fatal to the rights of the mortgagee, but the obvious result would be that the rights of the attaching creditor would not in any way be affected either by the decree in the mortgage suit or even perhaps by the sale on the basis of the said decree. 1936 A.L.J. 708 = 1936 A. 512.

RECEIVER.—In a foreclosure suit instituted while the mortgagor was alive and he died and his representatives are declared insolvent, the Receiver is not a necessary party. 29 C.W.N. 771 = 86 I.C. 1042 = 1925 C. 785.

A Receiver appointed in partition suit previous to the mortgage suit is not necessary party especially when his possession is not disturbed. 7 P. 520 = 111 I.C. 57 = 1928 P. 304.

EXECUTOR.—In a suit on a mortgage by an executor under a Mahomedan will a decree can validly be passed against the executor alone as he represented sufficiently all persons beneficially interested within the meaning of O. 34, R. 1. 1931 B. 533 = 33 Bom.L.R. 1056.

OFFICIAL RECEIVER.—*Obiter*.—The rights of a secured creditor over a property are not affected by the mortgagor being adjudicated an insolvent. But Official Receiver to whom equity of redemption has been assigned by operation of law should be made a party to the suit on the mortgage and Official Receiver should get himself impleaded as a party thereto. 39 C.W.N. 384.

SIMULTANEOUS MORTGAGES.—In a suit for sale by one of two simultaneous mortgagees without impleading the other, the whole property is liable to be sold and the other has only a right of redemption. 10 I.C. 422.

O. 34, R. 1 and Form 9, Appx. D: PUISNE MORTGAGEE-DEFENDANT, CLAIMING DECREE IN FORM NO. 9 OF APPX. D—JURISDICTION—COURT-FEE.—Where in a mortgage suit the puisne mortgagees impleaded as defendants ask for a decree in form No. 9 of Appx. D, the suit for purposes of jurisdiction has to be valued *ad valorem* on the amount due on the plaintiff's prior mortgage and jurisdiction is not lost if the amounts claimed on the prior and subsequent mortgages taken together exceed the pecuniary jurisdiction of that Court. The relief which the puisne mortgagees ask for does not require to be stamped at all. 1941 N.L.J. 105.

O. 34, Rr. 2-8-A: LEGISLATIVE AMENDMENTS.—O. 34, new Rr. 2 to 8-A have been substituted for old Rr. 2-8 by Act XXI of 1929. The reason for the substitution of these new rules has been explained as follows in the Report of the Select Committee: "This order relates to mortgage suits and its provisions were originally in the Transfer of Property Act (Ss. 85 to 99), but were transferred to the C.P. Code in 1908. The amendment of the T.P. Act, particularly the provisions relating to mortgages, necessitated the amendment of Rr. 2 to 8, 10, 11 and 15 of the Order.

We propose to make the following amendments in this rule, *vis.* :—

(1) It should be expressly stated that the decree passed under this rule is "preliminary."

(2) In Cl. (a) of the present rule, the Court is merely directed to take an account of what would be due to the plaintiff on account of (a) principal and interest on the mortgage, and (b) the costs of the suit. Under Ss. 72 and 76 of the

(a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for—

- (i) principal and interest on the mortgage,
- (ii) the costs of suit, if any, awarded to him, and
- (iii) other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage-security, together with interest thereon ; or

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T.P. Act, a mortgagee is authorised to spend money for certain necessary purposes in connexion with the mortgage security. Under S. 63-A of the T.P. Act, as proposed to be added, a mortgagee is allowed to spend money for improvements in certain circumstances. The above provisions also provide that the money so spent by a mortgagee should be added to the principal money. Cl. (a) is, therefore, amended to make it clear that in taking an account sums spent by a mortgagee for necessary costs, charges and expenses in respect of the mortgage security, together with interest thereon, must be taken into account.

(3) Clause (a) of the present R. 2 provides that the account of the sum due to the plaintiff will be taken up to the date fixed for payment in the preliminary decree. The date so fixed is to be within six months from the date of the decree. Cl. (b), however, which relates to the declaration by a Court of the amount due to a mortgagee, merely provides that the amount due at the date of the decree is to be declared. Although Cl. (c) provides that the Court has to fix a date for the payment of the amount so declared within six months, no provision is made for awarding costs, charges and expenses incurred by a mortgagee in respect of the mortgage security subsequent to the date of the declaration or the decree. This seems anomalous. There is no reason why a mortgagee should lose subsequent costs, charges and expenses where the Court declares the amount. The scheme of O. 34 of the C.P. Code is to draw a clear distinction between a preliminary and a final decree; R. 2 is amended to make it clear that the amount to be declared or found due on taking accounts should be up to the date of the preliminary decree. The defendant will then be in a position to know what sum he has to pay in order to claim redemption. Care is taken to provide in Cl. (c) of sub-R. (1) of the amended rule that after tendering the amount so declared or found to be due, the defendant has to pay the amount which the Court may adjudge for subsequent interest and subsequent costs, charges and expenses. Rr. 10 and 11 have been amended to empower a Court to adjudge the amount due in respect of such interest and costs.

(4) Although Cl. (a) of this rule refers to the date fixed for payment of the amount found to be due on taking accounts, Cl. (c) refers to the date within six months from the date of the declaration of the amount due by the Court under Cl. (b). This

appears to be an error. The date fixed for payment must be within six months from the date when the Court declares the amount due or, where it directs an account to be taken, from the date when such account is confirmed by the Court. Our amendment makes this clear.

(5) As the mortgagor or any other person seeking redemption, has to bear all costs and expenses of the redemption, in Cl. (c) of sub-R. (1) it is made clear that the costs of re-conveyance or re-transfer by the mortgagee on payment of the amount due by the mortgagor shall be borne by the mortgagor or such other person.

(6) The proviso to sub-R. (2) to R. 3 provides for the extension of the time fixed for payment in the final decree. The power of the Court to extend the time fixed for payment is well recognised and is exercised at any time before a final decree for foreclosure is passed. The proper place for this provision is in the rule relating to the preliminary decree. The proviso is, therefore, placed in R. 2 as sub-R. (2). The expression "postpone the day" in this proviso has been replaced by the words "extend the time" to make it clear that the time can be extended even after the expiry of the period once fixed. Sub-R. (2) also makes it clear that the extension of the time fixed for payment must be subject to such term as the Court may fix. It is not fair that after the plaintiff has obtained a decree for payment of the amount due on the mortgage and when the payment has been already postponed for six months, the plaintiff should be made to wait for payment for a further period without getting compensation. A defendant who applies for an extension of time must be put on terms before his application is granted.

(7) As clauses (a) and (b) of sub-R. (1) will provide for the adjudication of the amount due to a mortgagee till the date of the preliminary decree, in sub-R. (1), clause (c), it is made clear that after the payment of that amount the defendant is bound to pay subsequent costs and subsequent interest due to the plaintiff till the date of actual payment, which may be on or before the date fixed in the preliminary decree or such other date to which the time for payment may have been extended under sub-R. (2). It has been well established that the mortgagee can add to the mortgage-money the amount spent by him between the passing of the preliminary decree and the final decree. (44 C. 448.)

(8) It has been held that the right of a mortgagor to redeem the mortgaged pro-

- (b) declaring the amount so due at that date ; and
 (c) directing—

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erty subsists till a final decree for a foreclosure is passed. (27 C. 705.) Default in payment on the day originally fixed in the preliminary decree for payment or on the day to which the time for payment may have been extended by the Court does not *ipso facto* extinguish the mortgagor's right of redemption. It is open to a mortgagor to apply for extension of time till a final decree for foreclosure has been passed, and he can do so even after the expiry of the period once fixed. 39 M. 882; 28 B. 102. Cl. (d) of R. 2, as at present worded, is not consistent with the above rulings. It provides that, if payment, as provided in the rule, is not made, the defendant will be debarred from all right to redeem the property. In sub-R. (2) of the amended rule, therefore, it is made clear that, on non-payment of the amount due, the plaintiff will have only a right to *apply for* a decree for foreclosure. We propose to make it clear that the right of the plaintiff to file an application arises not only when the amount adjudged due in the preliminary decree is not paid in full, but also if any portion of the sums for subsequent costs and subsequent interest remains to be paid.

(9) Rules 2 to 8 of O. 34 do not specifically provide for decrees in suits for foreclosure or sale in which, besides the mortgagor, other persons who are entitled to redeem, such as subsequent mortgagees or persons subrogated to their rights, are joined as parties. This omission was sought to be remedied by providing forms for decrees in such suits—Form Nos. 9 to 11 in Appendix D to the Code. Under O. 48, R. 1 of the C.P. Code forms are not binding and can be varied by the Courts. An express provision in O. 34 itself is necessary to give full statutory force to the forms. As such cases will be of varied type and cannot all be anticipated, it will suffice to enact in O. 34, that in such cases the rights of the parties will be regulated in accordance with the forms given in the Appendix, with such variations as the circumstances of the case may require. Provisions to that effect are embodied in sub-R. (3) of R. 2 and sub-R. (3) of R. 4. In a redemption suit by a mortgagor such difficulties will not arise. Consequential amendments have been made in Rr. 7 and 8.

We propose to amend this rule in accordance with the alterations made in R. 2. It is expressly stated that the decree made under this rule is final. For the reasons stated in paragraph (5) above, it is made clear in this rule that the payment by the mortgagor can be made at any time till the final decree for foreclosure is actually passed. It is also made clear that on payment of the amount declared or found to be due in the preliminary decree, together with the amount due for the subsequent

costs and subsequent interest, the mortgagee can, on the application of the mortgagor, be ordered to re-convey or re-transfer the mortgaged property. The provision regarding the application by a mortgagor has been added to avoid difficulties which arise in such cases, as 50 B. 730. Owing to the absence of words to that effect in the original R. 8, the Court found it difficult to hold what article of limitation applied to a final decree on payment by the mortgagor. In sub-R. (3) of the proposed rule it is provided that on foreclosure the liability of the defendant not only in respect of the mortgage but for the costs of the suit also, is discharged and extinguished. The effect of a final decree for foreclosure is to vest the mortgaged property absolutely in the mortgagee and to extinguish not only the debt due on the mortgage but all liability arising in respect of the suit brought to enforce it. It is desirable that foreclosure, which is an exceptional remedy, should extinguish *in toto* the whole of the liability of the mortgagor.

We propose to amend this rule, which relates to a preliminary decree for sale, on the lines of R. 2. As by the amendment in the T.P. Act it is proposed to allow the remedy of foreclosure only in the cases of a mortgage by conditional sale and an anomalous mortgage providing the remedy of foreclosure, the power of the Court to grant the alternative relief of sale can only be exercised in the case of such an anomalous mortgage. By the very nature of the mortgage by conditional sale the Court cannot order a sale of the property. We propose to amend Cl. (2) by stating clearly that it applies only to an anomalous mortgage which provides for foreclosure. Sub-R. (3) is added to R. 4 on the same lines as R. 2 (3). It provides for a case where, besides the mortgagor, there are other parties in a suit for sale. It should, however, be noted that in the case of a decree for sale there is no reason why the Court should extend the time for payment. Even after the sale is held, there is an opportunity to a mortgagor to redeem before the confirmation of the sale. No necessity, therefore, exists for empowering Courts to enlarge the time before passing a final decree for sale. 20 A. 354. S. 89 of the T.P. Act which was replaced by R. 5 of O. 34, C.P. Code, contained at the end the words "and thereupon the defendant's right to redeem and the security shall both be extinguished". These words gave rise to the view that an order absolute under the section had the effect of extinguishing the rights arising out of the mortgage and substituting for them rights under the decree and the mortgagor could not redeem after the order absolute was made. (45 I.A. 130; 47 I.A. 71.) To avoid this result the words quoted above which occurred in

(i) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a),

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S. 89 were omitted in the corresponding R. 5 of O. 34. No doubt is, therefore, left that the right of a mortgagor to redeem is not extinguished by the mere passing of a final decree. (42 A. 517. *See also* 48 I.A. 465 at 472.) We propose to lay it down definitely that the right of a mortgagor to redeem subsists till the confirmation of the sale held in execution of the decree passed against him under R. 4 or 7. We have, however, made a provision for compensating the purchaser when a mortgagor seeks to redeem after the sale has taken place but before it is confirmed.

The words 'any such sale' in R. 6 and its position after Rr. 3 to 5 led to the view being taken that the personal decree for the balance of the amount due to a mortgagor after the sale can only be passed in a suit by a mortgagee for sale, and not in a redemption suit by a mortgagor, although in a redemption decree in default of payment by the mortgagor a sale of the mortgaged property can be ordered. In 42 C. 294, it is held that as this rule does not require an application by a mortgagee for the passing of a personal decree for the balance of the mortgage-money, no period of limitation applies for claiming such relief. This view is not followed by other Courts. (40 A. 551.) This point is made clear by introducing the words "on application by the plaintiff" in R. 6, and the words 'on application by the defendant' in R. 8-A'. (*See* Statement of Objects and Reasons and Report of Select Committee.)

O. 34, R. 2.—The words "derived title" in sub-cl. (1) (c) (i) will apply to a sub-mortgage which is derivative mortgage. 20 A. at 401. This rule and R. 4 do not contemplate two successive suits on one and the same mortgage. 39 A. 506=41 I.C. 233. In executing mortgage decree Court can sell the items in a particular order to adjust the equities of the parties before it. 29 M. 217. In a suit where mortgagor claimed decree for money against mortgaged property and person of mortgagor, Court cannot direct possession to be given to mortgagee on default of payment of decree amount. It is bound to decree sale only under O. 34, R. 4. 167 I.C. 26=1937 Pesh. 31.

ACCOUNTS.—Relationship as mortgagor and mortgagee does not cease with the decree. 28 I.C. 571=21 C.L.J. 284. Mortgagee who pays arrears of revenue to save the property from sale, after the preliminary decree, has a charge for the amount over the property. 43 I.C. 190=12 Bur.L. T. 36; 144 I.C. 392=1933 R. 112. Accounts should be taken before final decree. Provision for taking accounts in execution is not in accordance with law. 15 I.C. 362=1912

M.W.N. 400. *See also* 23 M.L.T. 158=7 L.W. 269; 5 P.L.J. 595. Compromise of suit by same defendants—Necessity of evidence to found decree against others—Failure to take accounts if fatal. 31 C.W.N. 804=1927 P.C. 17=52 M.L.J. 407 (P.C.).

COSTS.—Costs in suit form part of the entire amount to be realised from the property. 41 C.L.J. 607=1925 C. 1135. In absence of express provision to recover costs personally, mortgagee can add costs of appeal to mortgage security. 45 A. 630=21 A.L.J. 617; 41 A. 473=17 A.L.J. 582. *See also* 129 I.C. 554=1931 A. 124. Court can order costs to be recovered personally if there is a condition to that effect in the mortgage-deed, and an appeal lies from such an order. 47 I.C. 542. But where mortgagor has chosen to raise an untenable defence, it is proper to direct him to pay costs if the security is not sufficient. 52 B. 459=108 I.C. 794=1928 B. 123. When a final decree for foreclosure is passed, it is in lieu of principal and interest as well as costs of suit. 88 I.C. 203=1925 O. 351.

DATE OF PAYMENT.—Effect of fixing a time for payment in a compromise mortgage decree in a foreclosure suit is that ownership passes to the mortgagee when the payment was not made in time. 2 L. 53=3 L. L.J. 68. *See also* 58 P.L.R. 1919. It is not an absolute rule of law that less than six months cannot be allowed for redemption. 31 C.W.N. 804=1927 P.C. 17=52 M.L.J. 407 (P.C.).

EXTENSION OF TIME.—Where a preliminary consent decree for payment in instalments is passed, decree-holder must apply for final decree before proceeding to execute, and Court can extend time. 1922 N. 182. *See also* 1928 N. 333. But *see* 9 I.C. 771=4 Bur. L.T. 43. *See also* 10 I.C. 536=14 C.L.J. 648. Payment after final decree cannot be accepted. 32 I.C. 779. The words "good cause" must be literally interpreted and is not to be assumed from non-payment or delayed payments. 26 I.C. 701=10 N.L.R. 150; 1930 N. 55 (1)=119 I.C. 680; 116 I.C. 511=1929 N. 263; 122 I.C. 443=1930 N. 198; 55 I.A. 207=55 C. 821=32 C.W. N. 796 (P.C.); 28 L.W. 9; 109 I.C. 467; 1928 P.C. 139; 55 M.L.J. 31 (P.C.). Extension is not a matter of right but is discretionary. 39 M. 882=31 I.C. 200. In foreclosure suits discretion must be exercised liberally. 90 I.C. 936. Where appellate Court confirms lower Court's decree the time fixed in the preliminary decree runs from the date of the preliminary decree. 16 I.C. 799=14 M. L.T. 194. *See also* 63 I.C. 799; 7 P. 76. Appellate Court can extend time for payment and fix a date itself independently of lower Court's date. 66 I.C. 673=8 O.L.J. 407.

or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and

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Until an order for foreclosure absolute in proper form is made, mortgagor can, upon a proper application, redeem the mortgage. 27 C. 705. And the mere fact that the mortgagee has been put in possession does not matter. 25 A. 231. See also 23 M. 133. Court can extend time when application for final decree is filed and no further separate application is necessary. 21 N.L.R. 47=1925 N. 291.

FINAL DECREE.—After a final decree on appeal on preliminary decree is not open. It may be amended as an appeal on the final decree. 33 C.L.J. 414=61 I.C. 923=25 C. W.N. 776. The mere fact of an instalment decree having been passed in a mortgage suit by consent of parties does not dispense with a final decree before execution. 1928 N. 333=25 N.L.R. 175. Where a preliminary decree was passed on a mortgage by a Hindu father, for the entire amount, but the mortgagor's sons obtained a decree declaring the mortgage to be binding for a smaller sum only, the mortgagee should ask Court at the time of the final decree to re-affirm his right, if he wanted the balance to continue as a mortgage debt, to incorporate it in that decree also. 1929 A. 15=26 A.L.J. 374.

FORM OF DECREE.—In a suit by one co-owner for redemption of the whole mortgage, Court can ascertain the plaintiff's share and pass a decree both for partition and redemption. 32 M.L.J. 489=39 I.C. 46.

INTEREST.—The question as to rate of interest in mortgages is to be determined under O. 34 and not S. 34. 54 C. 161=54 I.A. 1=52 M.L.J. 373 (P.C.). Section 34 does not give any jurisdiction to Court with regard to interest after the date of the suit in cases to which O. 34, Rr. 2 and 4 apply, and further since R. 11 makes full provision for payment of interest during the period while the matter rests within the domain of contract, the discretion under S. 34 cannot be exercised in mortgage suit where the law of *damdupat* prevents the inclusion of any interest *pendente lite* in the calculation. 27 N. L.R. 312=134 I.C. 274=1931 N. 161. [26 C. 39 (P.C.); 34 C. 150 (P.C.); 54 C. 161 (P.C.), Foll.]; 1935 P. 98. See also 130 I.C. 159=1931 N. 88. Interest after date of suit when not provided for in judgment, must be deemed to have been refused. 37 B. 326=40 I.A. 68=17 C.W.N. 573=25 M. L.J. 101 (P.C.). Court has power to award interest in final decree when by inadvertence it is not provided for in preliminary decree. 42 I.C. 625=2 P.L.W. 208.

Mortgagee can get a decree for interest on the amount decreed from date of suit to date of realization. 37 P. W. R. 1911=10 I.C. 846. As to rate of interest up to date of decree, see 1935 P. 98. Mortgagee is ordinarily entitled to interest at rate stipulated in bond till date fixed for payment. From that date to date of realization he is entitled to reasonable interest. 31 C. 138. Also 36 A. 220=12 A.L.J. 283; 18 C. 965=17 C.L.J. 221; 17 C.W.N. 457=17 C.L.J. 120; 20 I.C. 917=1913 M.W.N. 649; 30 C. 953; 31 C. 138; 29 A. 322; 29 C.W.N. 118=85 I.C. 218. Though it is correct to allow interest at the bond rate up to the expiry of the period of grace, there is nothing in the Code compelling Court to do so. The statutory authority for allowing interest at bond rate beyond the date of the preliminary decree appears to be in O. 34, R. 11 and even that only says that the Court "may" order. 140 I.C. 104=1932 P. 332. Court must award interest at contract rate even after the date fixed for redemption though the mortgage deed is silent as regards the same. 28 I.C. 195=2 L.W. 236. Interest subsequent to date fixed for redemption is calculated on the aggregate of principal, interest and costs declared to be found payable on the date fixed for redemption. 42 M. 465=36 M.L.J. 288. Also 31 I.C. 320. Court can relieve penal interest or reduce it when the transaction is substantially unfair. 29 C. W.N. 118=85 I.C. 218=1925 C. 268 (2); 34 I.C. 745=19 O.C. 166. In a preliminary decree payment of interest till realization means interest up to the days of grace. 2 Pat.L.T. 78=5 P.L.J. 598. If mortgagor wishes to redeem earlier than the date fixed for payment, he must pay interest up to the day so fixed, and not only up to the date of his payment. 49 I.C. 160=12 S.L.R. 59. Interest at the contract rate need not necessarily be given after date fixed for redemption. 29 A. 322. Also 6 Pat.L.T. 459=88 I.C. 323=1925 P. 455. After date fixed for payment in the decree, interest must be allowed at Court rate and not at a contract rate. 10 I.C. 695=7 N.L.R. 14. The period for payment fixed in the preliminary decree cannot be extended by an unsuccessful appeal either by the mortgagor or mortgagee, so as to secure interest at contract rate. 17 C.W.N. 457=17 C.L.J. 120. See also 7 P. 76. Though in a previous decree which has become inoperative no future interest was allowed, it does not bar the allowing of interest in a subsequent fresh suit. 58 P.R. 1915=30 I.C. 104.

shall, if so required, re-transfer the property to the defendant at his cost free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him or where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property; and

(ii) that if, payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) Where, in a suit for foreclosure, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D, with such variations as the circumstances of the case may require.

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NOTICE.—Notice to mortgagor between preliminary and final decrees not necessary. 24 A.L.J. 914=1926 A. 757=97 I.C. 277. (27 M. 40; 29 C. 644, Rel. on.)

PAYMENT INTO COURT.—The payment must be in Court. No other settlement can be recognised. 12 P.R. 1913=16 I.C. 987. Also 42 M. 61=35 M.L.J. 579; 30 L.W. 551=1929 M.W.N. 867. But see contra in 25 C.L.J. 553=21 C.W.N. 920; 27 I.C. 919=11 N.L.R. 16; 57 I.C. 473=5 P.L.J. 672. No uncertified adjustment can be recognised, even though the adjustment was agreed upon even before the passing of the preliminary decree. 54 I.C. 137=37 M.L.J. 356.

MODE OF CALCULATION.—The period of six months fixed in the preliminary decree runs from date of that decree and not from date of dismissal of an appeal from that decree, in the absence of enlargement of time by appellate Court. 25 C.W.N. 440=36 C.L.J. 159. Also 37 I.C. 779; 104 I.C. 730=1927 P. 345=8 P.L.T. 597. When accounts are directed to be taken, date of payment should be fixed within six months from date of declaring in Court the amount due on taking accounts. 27 I.C. 813=21 C.L.J. 75.

CONSENT DECREE.—Where a consent decree for instalment payment is passed whether execution can proceed even without a final decree. 10 I.C. 536=14 C.L.J. 648. See also 1922 N. 182; 1928 N. 333=111 I.C. 294.

FINAL DECREE.—An application for final decree is expressly required and necessary. 1 Pat.L.J. 368=38 I.C. 385. Also 51 I.C. 881=4 Pat.L.J. 347. No notice need be given to the judgment-debtor before

order absolute for foreclosure is made. 29 C. 644. See also 27 M. 40. But see 42 I.C. 750=20 O.C. 268. But an *ex parte* order can be set aside. 32 C. 253 L.B.). See also 27 A.L.J. 376=119 I.C. 246=1929 A. 279. Right to redeem revives even after foreclosure, if mortgagee pursues his remedy on the personal covenant. 10 I.C. 748=13 Bom.L.R. 162. Suit by the holder of two independent mortgages over same property—Sale subject to mortgages—Form of decree. 8 Pat.L.T. 255=98 I.C. 968=1927 P. 47.

LIMITATION.—When mortgage decree was passed before the new Code an application for order absolute was governed by Art. 182 of the Limitation Act. 36 A. 350=27 M.L.J. 17=23 I.C. 649 (P.C.). Art. 181 of the Limitation Act applies to applications for final decree for foreclosure. 3 Pat.L.T. 565=1 P. 435. But see contra 30 I.C. 719=42 C. 294. The passing of final decree is not a process in execution for the purpose of limitation. 39 M. 488=28 M.L.J. 491. There is no limitation for an application to pay money into Court as it is a continuing right till final decree. 25 I.C. 752=17 O.C. 347.

MERGER.—The mortgage debt merges in the final decree. 42 A. 364=47 I.A. 71=38 M.L.J. 419 (P.C.); 40 A. 407=45 I.A. 130=35 M.L.J. 1 (P.C.). See also 35 A. 250=18 I.C. 923. For the same reason no interest can be demanded on the mortgage amount after the mortgagee has purchased the properties in execution and been put in possession. 21 I.C. 592. On account of this merger no payment after final decree can be taken to be a payment by way of redemption. 23 O.C. 334=60 I.C. 213. The merger does not affect the security

LOC. AM.—[PATNA.] O. XXXIV, r. 2.—In r. 2 (2) insert the words “ of its own motion or ” after the words “ the Court may.”

3. (1) Where, before a final decree debarring the defendant from all right Final decree in foreclosure to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 2, the Court shall, on application made by the defendant in this behalf, pass a final decree—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary,—

(b) ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the said decree, and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

(3) On the passing of a final decree under sub-rule (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged.

LOC. AM.—[RANGOON.] R. 3 (4) :—

Where the proceeds of the sale are not sufficient for the payment of money due to the plaintiff or any other party to the suit and the balance due to the plaintiff or such other party is legally recover-

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though the security becomes merged in the decree. 27 I.C. 780=21 C.L.J. 104. The view that the prior mortgage subsists even after passing of the final decree is no longer law. Such a view was expressed in 44 I.C. 753=7 L.W. 420.

RIGHT OF REDEMPTION.—The right of redemption exists even after preliminary decree till passing of final decree even though the six months allowed has passed. 70 I.C. 152=26 C.W.N. 532. Also 18 I.C. 357; 130 I.C. 196=1931 A. 223=1931 A. L. J. 265. The right of a puisne mortgagee to redeem survives even after a final decree in a suit by a prior mortgagor to which he was not a party. 49 C. 626=1922 C. 23. As to rights of a purchaser at a sale by prior mortgagee, when the decree in favour of the puisne mortgagee is allowed to be barred, see 83 I.C. 1033=1925 A. 6.

APPEAL.—The fact that an appeal has been preferred does not operate to stay proceedings under this rule. 1930 P. 227. Order declining to extend time cannot be appealed against. 124 I.C. 241 (1)=1930 N. 240.

O. 34, R. 3: SCOPE OF.—Power of Court to amend preliminary decree. 147 I.C. 788=11 O.W.N. 35=1934 O. 45. It is open to the parties to contract themselves out of the provisions of R. 3 and agree to have a consent decree passed in such terms as would make it operate as a final decree at once, or even to modify a preliminary decree for foreclosure or sale by agreed terms and conditions as to obviate the necessity

of getting it made final through Court under this rule. But the intention of the parties as expressed in the terms of the compromise on which the decree is based has to be determined and given effect to in all such cases. Held, in this case, that in spite of the variation in the terms of the original preliminary decree for foreclosure, the parties intended to treat it essentially as a preliminary decree which required to be made final under R. 3. 143 I.C. 787=29 N. L. R. 227=1933 N. 164. But an undertaking given by the mortgagor in the deed of compromise that he would not oppose the application for making the preliminary decree final would not avail the mortgagee, for directly the application is made, under R. 3 for making the preliminary decree final the mortgagor gets a statutory right to pray for extension of time for good and sufficient cause. 143 I.C. 787=29 N.L.R. 227=1933 N. 164., Rule 3 should not be read independently of other provisions of law, e.g., S. 52; T.P. Act; and hence a final decree for foreclosure would extinguish not only the rights of the mortgagor but also the rights of his transferee *pendente lite*. 55 A. 235=144 I.C. 70=1933 A.L.J. 113=1933 A. 201. A final decree for foreclosure passed according to O. 34, R. 3, which has become an absolute decree by reason of no appeal having been filed against it cannot be varied or altered. An order of Court the effect of which would be to interfere with its terms, is irregular and without jurisdiction. 39 P.L.R.J. & K. 138.

O. 34, R. 3 (4): RANGOON HIGH COURT.—Where the parties agree that the mortgaged

able by him from the mortgagor the Court shall, on application made in this behalf by the plaintiff or some other party, pass a decree against the mortgagor personally for the payment of such balance.

4. (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree in suit to the effect mentioned in clauses (a), (b) and (c) (i) of sub-rule (1) of rule 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to

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property should be taken over by the plaintiff at a valuation in lieu of a Court sale, a personal decree can be passed without sale of the mortgaged property for the balance. 1938 Rang. 353. There is only one cause of action on a mortgage giving rise both to a relief by way of final decree for sale and also to an additional remedy by way of a personal decree for the balance. There is no separate cause of action for the personal remedy accruing after the mortgaged property is found on sale to be insufficient to satisfy the mortgage debt. Accordingly a decree under O. 34, R. 3 (4), C.P. Code, as amended by the Rangoon High Court, cannot be obtained when at the date of filing of the suit the personal remedy in the mortgage suit is barred. Where, therefore, a suit on a mortgage by deposit of title deeds is filed more than three years after the date of the promissory note given by the mortgagor for the amount of the mortgage debt, the personal remedy is barred by limitation. A fresh promissory note given by the mortgagor will be of no assistance to the mortgagee by way of an acknowledgment under S. 19 of the Limitation Act, if such note was executed more than three years after the date of the first promissory note. The fresh promissory note, no doubt, constitutes a new promise under S. 25 (3) of the Contract Act, but it cannot alter the pre-existing cause of action though it does give rise to a new one. The failure of the mortgagee to bring an action on the new promissory note would, therefore, be fatal to his cause of action for a personal remedy. 1938 Rang.L.R. 6=1938 Rang. 134.

O. 34, R. 4: SCOPE OF.—Where the words in a mortgage deed with regard to redemption after the period of three years has elapsed clearly indicate that the redemption was considered to be *derigueur* at the end of the stipulated period and that it was not intended that the mortgagee should continue to occupy the land afterwards, it will be inequitable to refuse relief to recover the mortgaged money by sale of the property as plaintiff is entitled to a decree for the sale, as contemplated by O. 34. 160 I.C. 986=1936 Pesh. 43. See also 1941 A.L.J. 111 (anomalous mortgage). Where the compromise between the parties on which the consent decree is based does not contain any provision which entitles the decree-holder to have

the hypothecated property sold straight away without obtaining a decree under O. 34, R. 4 but it merely declares the right of the decree-holder to obtain satisfaction of his decree by sale of the hypothecated property and is silent as regards the manner in which the sale of such property is to be obtained and does not contain any words to signify that the decree-holder can have the sale of the hypothecated property under the consent decree itself the provisions of R. 14 apply to the case. The decree-holder can proceed against the person and other property of the judgment-debtors in execution of the consent decree but if he desires to have the hypothecated property sold he should institute a suit under R. 4. 138 I.C. 603=1932 A. 439=1932 A.L.J. 486. Even in the case of anomalous mortgages a decree for sale and foreclosure can be passed. 18 I.C. 24. See also 115 I.C. 839 (2)=1929 O. 282. Even in cases where the doctrine of marshalling does not strictly apply, the Court has power under R. 4 to direct in what order the mortgaged property shall be sold, and this right has now been expressly set forth in cl. (4) of the amended R. 4 and although in that clause only subsequent mortgagees are mentioned, or persons deriving their title from them, it must be taken to include subsequent purchasers also. 130 I.C. 817=1931 N. 91. A decree under this rule is only a decree *nisi* and not a final decree, and the suit in which such decree is passed does not terminate until an order absolute is made under R. 5. 23 A. 331; 29 A. 76. A combined decree cannot be passed under this rule and under R. 6. 31 C. 792. But see 25 A. 541; 29 A. 12. A decree under this rule must not order defendants personally to pay costs. 30 M. 464. Property comprised in the mortgage, which is subject to a charge for maintenance, can be sold. 29 A. 205. As to powers of a Receiver appointed under this rule in a mortgage suit against the decree-holder for account and possession, see 29 C.W.N. 413=1924 P.C. 202 (P.C.). Where a plaintiff in a mortgage suit has no right to a personal decree he cannot apply for enforcement of personal remedies. Until auction sale he has no right to take possession of the property or any income of the property. Under those circumstances the Court has no jurisdiction to appoint a Receiver under O. 40 or pass an order of attachment before judgment under O. 38, R. 5 or a temporary injunction

the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same.

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under O. 39. 150 I.C. 1035=1934 A.L.J. 561=1934 A. 772. The Court has under O. 34, R. 4, the power to direct the order in which the various items of the mortgaged properties are to be sold, provided the order laid down by the Court does not prejudice in any way the rights of the mortgagee decree-holder. I. L. R. (1939) All. 150=1939 A.L.J. 53=1939 All. 314. In the case of a *lahan gahan* mortgage, the Court can pass a decree either for foreclosure or for sale. Where the interest under the mortgage was excessive and where it was allowed to accumulate for a number of years, it was held that the circumstances warranted the exercise of the Court's discretion in ordering only sale. I.L.R. (1941) Nag. 607=1940 Nag. 156=190 I. C. 641. A suit to enforce a charge is treated as one to enforce a mortgage and the decree passed in such suit is in the form of a preliminary decree as prescribed by O. 34, R. 4, C.P. Code. There is no direction in the form prescribed against the defendant personally to pay the amount. I.L.R. (1940) Bom. 640=42 Bom. L. R. 592=1940 Bom. 276. Under O. 34, R. 4 (4) subsequent mortgagee who is impleaded as a party to a suit on a prior mortgage is entitled at least to redeem the plaintiff or to receive his own mortgage money out of the surplus sale proceeds remaining after satisfaction of the plaintiff's mortgage. If they pay off the plaintiff he becomes entitled to apply for a final decree for sale in the plaintiff's stead. I.L.R. (1940) 2 Cal. 436=1940 P.C. 134=67 I.A. 309=(1940) 2 M.L.J. 505 (P.C.). A Court has jurisdiction to order a sale in a foreclosure suit, under O. 34, R. 4 (3), C.P. Code, in the case of an anomalous mortgage. Under S. 67 of the T. P. Act as amended by the Amendment Act of 1929, two remedies can alternatively be given in the case of an anomalous mortgage which by its terms confers the right to foreclosure, namely, sale or foreclosure. I.L.R. (1938) Nag. 91=20 N.L.J. 285=1938 Nag. 112. Mortgage by satutory agriculturist—Suit on—Form of decree. 42 P.L.R. 110.

CONSENT DECREE, RR. 4 AND 5.—See 27 C. W.N. 621=50 C. 650. Also 4 Pat.L.T. 311=2 P. 538; 49 A. 297=100 I.C. 59=1927 A. 167. Rule 5 applies to a decree prepared under this rule when the decree directs the payment of the full amount due thereunder on a fixed date. 49 A. 297=1927 A. 167=100 I.C. 57. In a compromise decree time for payment may be extended beyond six months. 1929 A. 881. Rule 4 has no application to compromise decrees providing for instalment payment. 49 A. 297. See also 48 C.L.J. 357=114 I.C. 156=1929 C. 11.

A mortgage suit was compromised and the terms of compromise provided that mortgagor was to pay the decretal amount by nine annual instalments of Rs. 2,000 each, and in default of any instalment, decree-holders were given right to realize the amount due by sale of mortgaged property without the necessity of getting a final decree prepared. Judgment-debtor committed default and applied for extension of time to make the deposit. Held, that as the decree that was passed in the case was in no sense a preliminary decree for sale under O. 34, but a composite decree in terms of the compromise under O. 23, R. 3, the provisions of R. 4 did not apply and the Court had no power either under that rule or S. 148 to extend the time fixed in the compromise for payment of instalments. 9 Luck. 387=147 I.C. 559=1934 O. 44. See also 152 I.C. 854=1934 C. 735. A decree passed in accordance with a compromise is a final one and capable of execution. 55 I.C. 816=5 Lah.L.J. 67. In such a case it is open to the parties to dispense with the formal passing of a final decree. 134 I.C. 80=35 C.W.N. 332=1931 C. 546. Similarly a decree based on an award is itself executable. 4 Pat.L.T. 694=3 P. 221.

COMPROMISE DECREE.—Per *Dhauve, J.*—A compromise decree in a mortgage suit, expressly called a preliminary mortgage decree, and providing for payments in instalments and also providing that it is not to be made final until a specified date over twelve years later, does not come under R. 4. Rule 5 is not accordingly applicable to the case. 14 P. 488=16 Pat.L.T. 311=1935 P. 385. See also 1937 Oudh 453. When a decree is in the nature of a composite decree (a money-decree with a lien on the property hypothecated, fixing a time for payment and in default ordering sale of property) no final decree is necessary. 7 Lah.L.J. 397=1925 L. 640. See also 1937 Oudh 453. Preliminary decree is not executable—Personal liability of mortgagor arises only when proceeds of sale are insufficient—Decree under R. 6 necessary. 1926 M. 415=50 M. L.J. 39=93 I.C. 99.

FORM OF DECREE.—Form No. 10 of Appendix D applies to a case where a puisne mortgagee sues for redemption of the prior mortgage and foreclosure or sale on subsequent mortgage. Where the puisne mortgagee impleads in his suit as a defendant a person who, in respect of the plaintiff's mortgage, is in the position of a prior mortgagee with regard to certain properties, and subsequent mortgagee with regard to the remaining properties as also with regard to an additional property, and does not offer to redeem the prior mortgage but impleads the defendant merely to give him an oppor-

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tunity to settle the order in which the properties should be sold, the latter is not entitled as of right to get a decree in Form No. 10 in respect of the properties covered by the prior mortgage. It is for the plaintiff to seek relief and a decree in favour of the prior mortgagee as such in accordance with Form No. 10 may result in hampering the relief which the plaintiff is entitled to get in his suit. In such circumstances, the Court would be acting properly in directing a decree to be drawn up in Form No. 9 with the necessary variations. 65 C.L.J. 1=1937 C. 446. With regard to the properties covered by the subsequent mortgage, the defendant is not entitled to get a mortgage decree for sale in respect of the additional property which is not included in the mortgage in favour of the plaintiff. Forms Nos. 9 to 11 mentioned in R. 4 (4) relate to the same property which is the subject-matter of the mortgage whether as between the mortgagor and the mortgagee or as amongst successive mortgagees. If the additional property is to be excluded from the decree for sale, it follows that the defendant is not entitled to get a personal decree. This view is consistent with para. (4), cl. (iv) of Form No. 9. 65 C.L.J. 1. Where in a suit on the first mortgage the rights of the subsequent mortgagees are adjudged, it is necessary to safeguard their interests including the right to obtain an order that the property be sold. The subsequent mortgagees cannot be deprived of the right of putting up the property to sale in all circumstances. Para. 7 of Form No. 9 of Appendix D must be interpreted as authorising the Court to pass suitable orders so as to safeguard the right of the subsequent mortgagees, if any, to obtain a final decree or to sell the property. 160 I.C. 165=1936 O. 183. Where sale is impossible, Court can give directions for the disposal of the fund which represents the property. 20 C.L.J. 469=19 C.W.N. 537. This rule should not be overlooked in framing mortgage decrees. 20 P.L.R. 1915=26 I.C. 913. See also 103 I.C. 437=1927 L. 445. Where a co-mortgagee sues for sale making the other co-mortgagee party defendant and the decree specifies the amounts to be paid to the plaintiff and to the defendant co-mortgagee, there cannot be said to be two decrees. 1930 A. 634. Where the decree is irregular not being in accordance with this rule, a sale held under it is not void. 41 M. 403=34 M.L.J. 463=45 I.A. 54 (P.C.). Preliminary decree made final by endorsement on preliminary decree—Absence of a formal decree is only a mere irregularity. 94 I.C. 58=1926 L. 364. Nature of subsequent mortgagee's right to marshal. See 1930 M. 178=125 I.C. 66.

INTEREST.—The "subsequent interest" which R. 4 (1), before its amendment in 1929, provided for payment out of the sale

proceeds could only be the interest on the decretal amount awarded under S. 34. 63 I.A. 114=15 P. 210=40 C.W.N. 328=1936 P.C. 63=70 M.L.J. 355 (P.C.). Mortgagee is entitled to claim interest from the date of suit till the date for redemption at the rate fixed in the mortgage deed as still the period for redemption has expired the matter remains in contract, and the interest has to be paid at the rate and with the rests, specified in the contract of mortgage. 1940 Lah. 333. Mortgage decree prior to 1929—Interest from date fixed for redemption to date of realisation—Award of—Power of Court before and after amendment. 70 M.L.J. 355 (P.C.). Where in a mortgage-deed it is provided that interest is to be made a charge on the property, the decree should be prepared on that basis, as the mortgagee is entitled to follow the mortgaged property for the full satisfaction of his claims under the mortgage. 1933 L. 941. Where in a mortgage suit interest is calculated at the contract rate up to the date *dies datus* the decree is subject to the rule of a damdupat up to that date. 59 I.C. 121. Where preliminary decree in a mortgage suit provides for interest up to date of realisation decree-holder is entitled to such interest even though final decree does not give any express direction regarding the same. (Nature of preliminary and final decree discussed.) 130 I.C. 337=7 O.W.N. 1205=1931 O. 47. Interest up to realization at Court rate means interest on the whole amount due, i.e., principal and interest at the contractual rate. 26 O.C. 59=1923 O. 241. Interest to be awarded at the contractual rate up to date fixed for payment. 8 L. 721=103 I.C. 437=1927 L. 445; 1935 A.L.J. 1161=1935 A. 1003; even up to the extended time granted by appellate Court. 1930 P. 380. Interest should be calculated as ceasing from date of deposit of money in Court and not from date of removal by decree-holder. 145 I.C. 144=1933 L. 126 (1). Interest after date of sale in mortgage-decree—Court has discretion to grant or not. 1926 L. 11. See 8 L. 721. There is no provision which enables a Court which has passed a decree bearing interest to disallow further interest on that decree, except when the decree can be altered on review, or to correct a clerical mistake or to bring the decree in conformity with the wording of the judgment. 1933 R. 323. Where a decree fails to provide for the extinguishment of the right to redeem a fresh suit for redemption is not barred. 15 I.C. 15=10 A.L.J. 36. In a suit for mortgage money and personal decree, the stage at which the mortgagor should ask the Court for ordering payment by instalments and fixing the instalments would be reached, when decree-holder applied under O. 34, R. 6 to the Court to proceed against the person of the mortgagor. 167 I.C. 26=1937 Pesh. 31.

LIMITATION.—Art. 181 of the Limitation

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

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Act applies to an application for passing of final decree. 48 I.C. 934=15 N.L.R. 36. There is no period of limitation for deposit of money directed by preliminary decree. It can be paid at any time before passing of final decree. 9 O.L.J. 14=1922 O. 33. Where there has been an appeal from preliminary decree, the period of 3 years fixed by Art. 181, Limitation Act, runs from date of decree of appellate Court and not from the expiry of the term fixed by preliminary decree. 54 I.A. 52=8 L. 253=1927 P.C. 25=52 M.L.J. 366 (P.C.). Where a compromise mortgage decree itself makes provision for a preliminary and a final decree, there could be no objection to the passing of a preliminary decree under O. 34, R. 4 and to its being made absolute on the expiry of the time fixed in the compromise. Nor could there be an objection to a personal decree for the balance being subsequently awarded to the decree-holder. Time for purposes of S. 48, C.P. Code, would run from the date of the passing of the final decree. 1939 O.W.N. 927=15 Luck. 95=1940 Oudh 90.

NATURE OF PROCEEDINGS.—Till passing of final decree suit is considered pending. Suit will abate if the legal representatives of a deceased plaintiff are not brought on record. 40 A. 203=16 A.L.J. 85; also 33 I.C. 496=12 N.L.R. 50. A final decree against a mortgagor dead at the time is void and incapable of execution. 4 P.L.J. 240=50 I.C. 529=1919 P.H.C.C. 105 (F.B.). An application for a final decree is not one in execution. A second application therefore cannot be regarded as revival of an application which has been disposed of. 43 I.C. 518=16 A.L.J. 143. See also 39 I.C. 849=13 N.L.R. 69. Where an *ex parte* mortgage-decree is set aside, the suit would be considered pending during the period when the proceedings to set aside the *ex parte* decree were pending. 65 I.C. 709. The rule does not expressly provide for the issue of notice before passing of final decree; yet an *ex parte* decree in such a case is liable to be set aside. 1922 N. 175=67 I.C. 282; 120 I.C. 332=1930 N. 136.

EXTENSION OF TIME FOR PAYMENT.—Whatever may be the view before the Amending Act (XXI of 1929) it is now clear that under R. 4 (2) the Court that passed the preliminary decree could, on good cause being shown, postpone the date fixed by the Court from time to time before the plaintiff could be entitled to ask for a final decree under R. 5 (3). 53 A. 283=1931 A. 386=1931 A.L.J. 508 (F.B.). Circumstances to be considered by Court regarding grant of time.

1933 R. 323.

PAYMENT INTO COURT.—Where payment of a prior mortgage is directed before sale of mortgaged property, but does not specify the date of payment, the payment must be made within six months of the date of the decree. 43 A. 320=19 A.L.J. 83. If a mortgagor pays into Court the amount determined to be due, it is a good tender though it may be finally adjudged that a larger sum is due from him. 16 I.C. 374. Court should take into account payments by the judgment-debtor out of Court for purpose of determining the amount to be entered in final decree. 1 P.L.T. 416=5 P.L.J. 672. Where a payment was actually made in Court by a judgment-debtor to the attaching creditor of the plaintiff, and it was noted to have been made in the presence of the presiding Judge, there is very little distinction between such a payment "in" Court and payment made "into" Court. 158 I.C. 419=1935 O.W.N. 1087. The terms of a preliminary decree passed according to the provisions of O. 34, R. 4, as regards payment in Court, etc., are imperative. Any payment or adjustment out of Court is not intended to be recognised under O. 34. If, of course, both the parties appear in Court and agree to a certain adjustment and the Court sees no reason otherwise to disallow it as "unlawful", the position may be different. In such circumstances, the adjustment may be taken to have been made with the express or implied permission of the Court and consequently there will be no objection in principle to the variation of the terms of the decree. I. L. R. (1939) Lah. 313=41 P.L.R. 26=1939 Lah. 79.

COSTS.—Ordinarily costs must be included in the amount due on the mortgage and the property must be sold for the total amount and decree for costs cannot be executed separately as a personal decree against the mortgagor. 129 I.C. 554=1931 A. 124. After date fixed for payment interest on the costs awarded by the preliminary decree should be allowed. 89 I.C. 228=L.R. 6 A. 479. See notes under R. 2. Where the mortgagor appeals against the preliminary decree and the appeal is dismissed with costs, such costs also can be added to the mortgage security though, of course, the Court of appeal can order otherwise. As a matter of practice such costs are added to the mortgage money. 157 I.C. 625=1935 O. 452.

APPEAL.—It is generally expedient that proceedings for the preparation of final decree should not be stayed pending an appeal from preliminary decree because the mere passing of a final decree will not in any way affect the rights of the parties to

(3) In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the Court may, at the instance of any party to the suit or of any other person interested in the mortgage-security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms.

(4) Where, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11, as the case may be, of Appendix D, with such variations as the circumstances of the case may require.

LOC. AMS.—[ALLAHABAD AND OUDH.] O. 34, r. 4 (2) :—

After the words "the Court may", insert the words "of its own motion, or",

[CALCUTTA.] Re-number sub-rules (3) and (4), r. 4, O. 34, as sub-rules (4) and (5) respectively and insert the following as sub-r. (3) :—

"(3) The Court may in its discretion direct in the decree for sale that if the proceeds of the sale are not sufficient to pay the mortgage debt, the mortgagor shall pay the balance personally."

5. (1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of

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the appeal from preliminary decree. 54 A. 344=1932 A. 238=1932 A.L.J. 43; 13 P. 379=15 P.L. T. 205=1934 P. 225. There is no duty on appellate Court to fix or extend time for payment. 118 I.C. 670=1929 A. 677. Where a preliminary decree is passed in a mortgage suit and an appeal is preferred therefrom, a final decree can be prepared by trial Court at the end of the period allowed for payment of the mortgage debt. 53 A. 283=1931 A. L. J. 508=1931 A. 386 (F.B.). Order regulating sale of mortgaged property—If appealable—Question left undecided. I.L.R. (1939) All. 150=1939 A.L.J. 53=1939 All. 314.

O. 34, R. 5.—Scope of, and how it differs from S. 89, T.P. Act, see 90 I.C. 746. The Court has jurisdiction to make a final decree during the pendency of an appeal against the preliminary decree. The final decree so made is not wiped off or destroyed by the affirmance of the preliminary decree by the Appellate Court. I.L.R. (1939) 1 Cal. 477=69 C.L.J. 355=43 C.W.N. 401=1939 Cal. 601. This rule if overrides Art. 66, Limitation Act—Sale in execution of mortgage-decree—Application to set aside beyond 30 days of sale but before confirmation—If barred. (1937) 1 M.L.J. 569. The amendment to O. 34, R. 5 by Act IX of 1929, has no retrospective operation. 36 C.W.N. 955. It is well settled that the law of procedure governs all pending cases from the time it comes into force, unless there is anything in the amending Act to the contrary. The provisions of R. 5, as amended by Act XXI of 1929 which came into

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force on the 1st April, 1930 are, therefore, applicable to a sale which takes place thereafter, and the right to redeem is available to the judgment-debtor till the date of the confirmation of the sale. 164 I.C. 53=38 P.L.R. 259=1936 L. 562. R. 5 has no application to a compromise decree. Decree is executable without final decree. 106 I.C. 395=1928 M. 38. Proceedings under this rule are not proceedings in execution of a decree, but in continuation of the original suit. 29 C. 651; 27 A. 625. See also 25 M. 537. R. 5 recognizes only one method of payment into Court under preliminary decree and when no such payment is made Court is bound to pass the final decree. 1926 M. 1069=24 L.W. 520=97 I.C. 989. A payment which is made out of Court, whether or not it be certified under O. 21, R. 2, C.P. Code, cannot be taken into consideration by the Court at the time of passing final decree in a mortgage suit. 174 I.C. 295=1938 Pesh. 12. Mode of payment under—Mortgagee purchasing mortgaged property by private sale from mortgagor after preliminary decree does not operate as satisfaction of or payment under decree. See (1940) 1 M.L.J. 134=51 L.W. 191=1940 Mad. 461. Where a preliminary decree expressly directs the defendant to make payment into Court, the Court is bound to pass a final decree for sale, if the money has not been paid in the manner directed by the preliminary decree, and cannot be asked to recognize a payment out of Court as an adjustment, compromise or satisfaction under O. 23, R. 3. 158 I.C. 83=1935 L. 168. However, in such cases, if the payment is

rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order—

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admitted by both parties, the satisfaction based on such payment ought to be recorded under O. 23, R. 3, in spite of its not being made into Court. 155 I.C. 231=1935 O. 313. By force of S. 141, the provisions of O. 9, R. 14 are applicable to an application for a final decree on a mortgage and so before dismissing such an application for failure to serve the defendants, Court should satisfy itself that the terms of O. 9, R. 5 were complied with. 1931 M.W.N. 1002=1931 M. 795. A decree-holder who attaches in execution of his decree a preliminary mortgage decree obtained by his judgment-debtor in a certain suit, has no *locus standi* to apply under R. 5 (2), for the preparation of a final decree. 1936 A.L.J. 1154=1936 A. 857. Under this rule the property which can be sold in execution of mortgage-decree is the mortgaged property only, and no other property, and therefore where property sold in execution of a mortgage-decree and bought by the mortgagee purchaser was not included in the mortgage suit or decree, but was fraudulently inserted in the sale certificate, the purchaser can get no more property than that which was really included in the mortgage-decree. (27 B. 334 and 10 M. 241, Foll.) 162 I.C. 383=1936 R. 127. Under O. 34, R. 5, the Court in passing a final decree has to follow the terms of the preliminary decree already passed in the suit. If however, the final decree passed is at variance with the terms of the preliminary decree, the Court executing the decree would take the final decree as it stands. It is of course open to the executing Court to interpret the final decree in the light of the preliminary decree. But when no objection was taken to be passing of the final decree in variance with the terms of the preliminary decree or to the execution of such final decree, and the mortgaged property has been sold in execution and the sale confirmed, the judgment-debtor cannot be heard to say afterwards that the final decree and the sale in execution thereof is not binding him or does not affect his rights under the preliminary decree. 1938 P.W.N. 776. Although the decree is not made out in the proper form in accordance with the provisions of O. 34, the decree-holder is entitled to realize his decree from the mortgaged property. 183 I.C. 833=1939 Pesh. 34.

CONSTRUCTION OF RULE.—See 29 M. 37; 28 A. 778; 1935 O.W.N. 541=155 I.C. 231=1935 O. 313.

CONSENT DECREE.—There is nothing in law which prohibits the payment towards a compromise decree out of Court. 20 A.L.J. 602=44 A. 668. Strictly speaking this rule has no application to a compromise decree—Compromise decree—No final decree made—Decree is executable. 106 I.C. 399=1928

M. 38; 31 Bom.L.R. 439. See also 1937 O.W.N. 796=1937 Oudh 453; 1937 Lah. 874. But where a preliminary decree for sale based on a compromise is not only headed and described as a preliminary decree but expressly contemplates and provides for the passing of a final decree in certain eventualities, an application for a final decree should not be rejected on the ground that the decree being one based on a compromise, no final decree is required and that the decree passed in terms of the compromise is itself executable. 160 I.C. 174=1936 O. 173. A mortgage of an impartible estate contrary to S. 4 of the Madras Act II of 1904 cannot be validated by the device of a consent decree. The mortgagor can resist an application for a final decree on the ground the mortgage was not binding. 50 I.C. 577=37 M.L.J. 65. As to objection by legal representatives of mortgagor-defendant, see 1937 Mad. 918.

EXECUTION PROCEEDINGS.—A prior mortgagee getting a decree without impleading a puisne mortgagee can execute his decree for sale. 43 A. 204=61 I.C. 942 (F.B.). Execution proceedings do not terminate with sale. If sale proceeds are insufficient the holder may take further steps to recover the balance. 35 B. 452=18 Bom.L.R. 661. Proceedings to get a decree absolute for sale are not proceedings by way of execution of preliminary decree but are proceedings in suit to obtain a final decree for sale which would be the only decree capable of execution. 136 I.C. 732=1932 L. 231=33 P.L. R. 138; 14 P. 488=16 P.L.T. 311=1935 P. 385. Decree-holder bound to apply for final decree, and barred from making an application for sale in an execution Court. 1929 A. 881. Where a preliminary decree was executed without objection by judgment-debtor, the order operates as *res judicata*. 26 M.L.J. 225=23 I.C. 390. In the execution of a mortgage decree executing Court has power to order sale of the property mortgaged, even though the property may be situated beyond local limits of its jurisdiction. (14 C. 661; 21 C. 639; 15 C. 667; 49 M. 746; 80 I.C. 901, Foll.) 14 L. 457=143 I.C. 574=34 P.L.R. 815=1933 L. 687. A mortgagee decree-holder is entitled at his option to execute his decree against some of the mortgaged properties which are covered by his decree. This view finds support in the language of O. 34, R. 5 (3). The intention of the Legislature by this provision of the law is to confer a right upon the mortgagee ordinarily to realize his security by bringing only a part of the mortgaged property to sale, provided he is satisfied that the sale of a portion of such property will be sufficient for the purpose of enabling him to realize his dues. This right, however, is subject to certain exceptions in the case of

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a *bona fide* purchaser of the mortgaged properties. I.L.R. (1939) 2 Cal. 455=1940 Cal. 159.

FINAL DECREE.—Court-fee for an appeal against an order rejecting an application for a final decree is an *ad valorem* fee on amount claimed. 57 I.C. 67; also 39 C.W.N. 315; 35 A. 476=11 A.L.J. 801. It is on the appellate decree when an appeal is preferred against a preliminary decree that the final decree ought to be passed. 39 A. 641=15 A.L.J. 734. Final decree can be passed even during the pendency of an appeal from the preliminary decree. 108 I.C. 751. Where a preliminary decree expressly directs the defendant to make payment into Court, Court is bound to pass a final decree for sale, if the money has not been paid in the manner directed by the preliminary decree, and cannot be asked to recognize a payment out of Court as an adjustment, compromise or satisfaction under O. 23, R. 3. 145 I.C. 117=1933 L. 168. A mortgage-decree passed under S. 15-B of the Dekkhan Agriculturists' Relief Act need not be made final. 25 Bom. L.R. 1214=48 B. 172. A mortgage suit must be considered to be pending till a final decree under O. 34, R. 5 (1) or (3) is passed, and it is open to the plaintiff to ask for a final decree to be made for the balance due to him under the preliminary decree. The fact that a final decree has been once refused on the ground that decree has been discharged under S. 19 of the Madras Act IV of 1938, and that the order of refusal has not been appealed against within the period prescribed for appeal, does not preclude an application for a final decree for the balance, if any, found to be due to the plaintiff. The refusal to pass a final decree is not and cannot be a dismissal of the suit. 54 L.W. 107=(1941) 2 M.L.J. 125. Once the final decree is passed the mortgage-deed as well as the right to redeem are extinguished so that the security cannot be the basis of a second suit. 40 M.L.J. 126=62 I.C. 833. Cf. 3 P.L.T. 232. A final decree is essential before execution can be taken. 42 B. 309=20 Bom.L.R. 481; also 32 I.C. 981. Omission to draw up a formal decree is only a formal defect. 51 B. 125=1927 B. 131=100 I.C. 956. See also 94 I.C. 58. Notice to judgment-debtor is not prescribed by law before passing of final decree, but in practice it is given. 19 N.L.R. 124=1923 N. 320. If application is made within one year from date of the decree, no notice to defendant need be given. 1925 M. 506. But *ex parte* order can be set aside. 32 C. 253 (F.B.). See also 30 L.W. 551=1930 M. 105. While it is not obligatory upon a Court to issue notice to judgment-debtors on application of decree-holder for a final decree on his mortgage, it is nevertheless advisable to do so and Court will not be acting *ultra vires* in adopting such a course. 1931 M.W.N. 1002=1931 M. 795 (1929 M.W.N. 867, Ref.)

See also 31 S.L.R. 180=1937 Sind 273. Where no date is fixed for the passing of final decree, notice is necessary. 29 L.W. 393=118 I.C. 831=1929 M. 393. A final decree extinguishes a personal covenant, but the charge subsists. Mortgagor's right to redeem remains in force till the actual sale and distribution of proceeds. 3 P.L.T. 232. Cf. 40 M.L.J. 126=62 I.C. 833. An application for final decree is essential and an application for execution cannot be treated as an application for a final decree. 1923 S. 14. An oral application is sufficient and it may be presumed when an order has been made. 87 I.C. 820 (2). When payment under preliminary decree has been made there is no necessity for an application for a final decree. 23 A.L.J. 405=47 A. 546. In a suit for sale on a mortgage only one decree for sale can be passed. 9 I.C. 835=8 A.L.J. 364. The intention of the legislature in enacting O. 34, R. 5 (3), is to confer a right upon the mortgagee ordinarily to realise his security by bringing only a part of the mortgaged property to sale provided that he is satisfied that the sale of a portion of such property will be sufficient for the purpose of enabling him to realise his dues. If in execution proceedings against a portion of the mortgaged property only, the mortgagee fails to realize his full dues, there is no reason why he should not proceed against some other items of the mortgaged property; and it certainly cannot be said that by failure to proceed against the entire property he waives his right to do so in a subsequent execution case. I.L.R. (1940) 2 Cal. 520. See also 7 Cut.L.T. 49; I.L.R. (1939) 2 Cal. 455=1940 Cal. 159. A transfer of a final decree for sale does not require registration. 86 I.C. 591=1925 O. 399. Mortgage suit—One of the mortgagors dead before preliminary decree—Application for exoneration of his share filed after preliminary decree and before final decree is not maintainable. 49 A. 809=102 I.C. 1=1927 A. 589. Purchaser of equity of redemption obtaining assignment of mortgagee's rights has right to apply for final decree—Rights of assignee may be traced back to the date of suit itself. [45 C. 94 (P.C.), Rel. on.] 100 I.C. 338=1927 M. 560. Application for final decree against legal representatives—Defences open. See 123 I.C. 376=1930 A. 348. Where a preliminary decree is properly passed in a mortgage suit the final decree passed thereon is not invalidated by reason of any defect as to parties. Final decree is only voidable at instance of the heirs of the deceased mortgagor who have not been formally brought on record after death of the mortgagor during the interval. 37 C.W.N. 812=1933 C. 798. Question of personal liability for costs is one of construction of decree. 109 I.C. 63=1928 M. 604. See also under R. 2.

APPROPRIATION OF PAYMENT—INTEREST AND COSTS.—The general rule of appropriation of

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary,—

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payments towards a debt is that in the absence of a specific indication to the contrary by the debtor, the money is first applied in payment of interest and then when that is satisfied, in payment of the capital. This principle applies even to the sale proceeds of the properties sold in execution of a mortgage decree. Therefore, in the absence of a direction to the contrary in the decree, the sale proceeds of the properties sold in execution of a mortgage decree must be applied first in payment of subsequent interest and costs, and thereafter the balance to discharge the principal sum declared as payable in the decree. (19 Lah. 403, Overr.) 1941 Lah. 386 (F.B.).

LIMITATION.—Art. 181 of the Limitation Act applies to an application for final decree and time runs from date when the default occurred, i.e., when payment ought to have been made. 22 C.L.J. 66=19 C.W.N. 473; 39 A. 532=15 A.L.J. 448; also 87 I.C. 746=1925 C. 1030; 40 Bom.L.R. 507. But see 29 I.C. 120=19 C.W.N. 470, *contra*. See also 32 I.C. 39; 25 C.W.N. 376=33 C.L.J. 260. When prior to 1909 an application for an order absolute was barred under Art. 17 of the Limitation Act, the present rule does not entitle the decree-holder to apply for a final decree. 22 I.C. 40. When time fixed for payment expired after the passing of the Code but the preliminary decree was passed prior thereto, Art. 182 applies. 48 I.C. 32=5 O.L.J. 572. When an appeal has been preferred on preliminary decree, period of limitation commences from date of the decree in appeal. 47 I.C. 206=21 O.C. 176; also 1 P. 444=3 P.L.T. 329. This applies also to cases where final decree has been passed by lower Court pending appeal from preliminary decree, and the appellate Court merely confirmed the preliminary decree. [39 A. 641; 6 P. 24 (P.C.); 5 L. 257; 1930 M.W.N. 104 and 1933 M.W.N. 623, Foll.] 38 L.W. 946=66 M.L.J. 24. But see *contra* 41 I.C. 858=20 O.C. 205. A final decree in a mortgage suit can be pending after disposal of the appeal. 1926 A. 291=92 I.C. 608. Where after a preliminary decree for foreclosure was confirmed by appellate Court and a final decree was passed, an application was put in by the mortgagors for amendment of the preliminary decree by excluding proprietary rights in the mortgaged *sir* land, *held*, that the application was not maintainable. The decree that could be amended was the decree that was sought to be executed. Though the amendment of the preliminary decree would have the effect of automatically amending the final decree is cases where the final decree is passed either before the appeal is filed against the preliminary decree or

during its pendency, that principle did not apply when the final decree is made after the decision of the appeal against the preliminary decree. 142 I.C. 880=15 N.L.J. 124. When after the limitation period has run against the plaintiff, one of the defendants applies to set aside the preliminary decree, this fact does not revive plaintiff's right to apply for final decree. 87 I.C. 746=1925 C. 1030. If a preliminary mortgage-decree under R. 4, purporting to be in terms of the compromise of parties, provides for payment of mortgage amount in instalments payable on fixed dates, has not been appealed against, it becomes final and there is nothing to debar decree-holder from applying for preparation of the final decree under R. 5 within three years from the date of default in payment of an instalment. The fact that three years have elapsed from the date of the preliminary decree is immaterial. 130 I.C. 487=1931 A. 340=1931 A.L.J. 58. After a preliminary decree was passed in a mortgage suit, the application by the decree-holder for the preparation of a final decree was dismissed for default. Decree-holder died two years later and his sons applied for substitution of their names and the restoration of their father's application for final decree. Lower Court allowed the former and dismissed the latter on the ground that it was time-barred. *Held*, that the rights and liabilities of the parties having been fixed by the preliminary decree, lower Court ought to have passed a final decree even though the application was out of time. 151 I.C. 145=11 O.W.N. 495=1934 O. 209.

O. 34, R. 5 overrides Art. 166, Limitation Act—Sale in execution of mortgage decree—Application to set aside beyond 30 days of sale but before confirmation not barred. See (1937) 1 M.L.J. 569=45 L.W. 486=1937 Mad. 560.

ORDER ABSOLUTE.—On passing of an order absolute for sale, the mortgage right is extinguished and only the right under the decree subsists. 40 A. 407=45 I.A. 130=35 M.L.J. 1 (P.C.) (affirming 20 I.C. 59=11 A.L.J. 634). See also 1937 Nag. 196; 55 I.C. 969=42 A. 364 (P.C.). An application for an order absolute under S. 89 of the T. P. Act is an application in execution. 40 B. 321=18 Bom.L.R. 38. An order absolute against a widow as mortgagor and one of her heirs brought on record after her death, does not bind the other heirs. 39 A. 67=14 A.L.J. 982. In an execution application a prayer for sale implies also a prayer for making the decree absolute. 34 I.C. 756=3 L.W. 468. Where a preliminary decree was passed before the passing of the new Code and the order absolute was made after the passing of the Act, no final decree need be passed. 4 P.L.T. 213=48 I.C. 245. A

(b) ordering him to transfer the mortgaged property as directed in the said decree,
and, also, if necessary,—

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decree for sale does not extinguish the equity of redemption until the sale is confirmed. Therefore if a person who is interested in the mortgaged property, pays into Court the decretal amount before a sale is held the mortgage is thereby redeemed, he is entitled to be subrogated to the rights of the mortgagee decree-holder so far as the sale of the mortgaged property is concerned. 171 I.C. 612=1937 Nag. 196.

SECOND ORDER.—A second order absolute for sale can be obtained for the amount for which the first order was obtained, including the interest since accrued due. 25 A. 264. Also for selling portion of mortgaged property not sold under the first order. 25 A. 212.

POWERS OF COURT.—At the time of the passing of the final decree Court has no power to go behind the preliminary decree. 27 A.L.J. 425=115 I.C. 462=1929 A. 252. A final decree should be made in accordance with the preliminary decree; but where there is an obvious mistake in the preliminary decree the Court is not bound to repeat that mistake, when passing the final decree. Particularly in the case of a final decree for sale in a mortgage suit, the Court must not direct the sale of any mortgaged property which is no longer available for sale under the mortgage, though it is wrongly included in the preliminary decree. 7 Cut.L.T. 49. Plaintiff in the application for final decree need not give the description of the property, unless he desires to omit any property. 27 A.L.J. 1097=117 I.C. 102=1929 A. 551 (1). This rule says nothing about the specification of the mortgaged property. All it says is that the mortgaged property which the plaintiff is entitled to sell shall be sold. 38 A. 398=34 I.C. 79. Court may direct that the interest of mortgagor shall be put up for sale in the first instance, and if insufficient, then his son's if the son also promised to pay the amount. 36 B. 68=13 Bom.L.R. 1161. The rights of the mortgagee under a final decree for sale cannot be interfered with by Court by intercepting the rents or profits or by the appointment of a Receiver. 43 I.C. 22. Court is not justified in fixing instalment where amount is agreed to be paid in lump sum. 1930 L. 132. Court can fix the order in which the properties are to be sold. 36 I.C. 516=4 L.W. 327; 31 C.W.N. 521=101 I.C. 124=1927 C. 522. But see 51 I.C. 444=4 Pat.L.J. 207. Court has no power to extend time after final decree is passed in a suit for sale. 9 O. & A.L.R. 319=1924 O. 179. A mortgagee decree-holder is not entitled to dictate to Court the order in which the properties should be sold though he has a paramount right to have his claim

satisfied by sale of every part of the mortgaged property. Court has full power to regulate the order in which and the conditions subject to which the properties should be sold. 53 A. 391=129 I.C. 708=1931 A. L.J. 108. When mortgage-deed provides in what order properties are to be sold, it is not open to the decree-holder to change that order. 51 I.C. 444=4 Pat.L.J. 207. Properties belonging to a stranger vendee from the mortgagor need not be sold prior to selling those of judgment-debtor. 22 M. L.J. 125=12 I.C. 429. See also 1940 M. W.N. 551=(1940) 2 M.L.J. 27 (Power of Court as to marshalling apart from S. 56, T. P. Act). Applications for passing final decree could be dismissed on the ground that list of mortgaged property was not given and because of mistake in calculating interest. 49 A. 592=1927 A. 439=101 I.C. 676. Dismissal of an application for a final decree in a mortgage suit for failure to pay batta cannot be construed as a dismissal of the suit itself; after a preliminary decree has been passed Court has no power to dismiss the suit. Nor does the application preclude another application for the same purpose. 140 I.C. 324=63 M. L. J. 719=56 M. 310.

RIGHT OF REDEMPTION.—After the dismissal of an application under O. 21, R. 90, and before confirmation of sale, if judgment-debtor pays the necessary amount and applies to have the sale set aside, Court under O. 34, R. 5 as amended must set aside the sale, notwithstanding that the applicant by his own actions and manœuvres prevents the confirmation of sale for a long period. R. 5 (amended) as it stands enables judgment-debtor to apply at any time before confirmation. 152 I.C. 1059=38 C.W.N. 924=1934 C. 822. Till actual sale right of redemption subsists. 18 A.L.J. 622=42 A. 517. Also 9 I.C. 158; 34 P.L.R. 373=142 I.C. 313=1933 L. 361. But see contra 43 I.C. 399. Where a mortgagor wants to redeem the property after the decree for sale obtained by the mortgagee, he must pay the amount mentioned in the mortgage-decree for redemption. He cannot ask the mortgagee to account for the profits subsequent to the date of the decree for sale as the mortgagee is deemed to have given up all rights under mortgage after such decree. If mortgagee has realised anything unlawfully, mortgagor may be entitled to recover the same by separate proceedings. 34 P.L.R. 373=142 I.C. 313=1933 L. 361. A final decree for sale if not executed within the period of time allowed by law will not bar a subsequent suit by mortgagor to redeem. 86 I.C. 527=1925 M. 1191. The right of a subsequent mortgagee, who is a party to a suit on a prior mortgage, to redeem the prior mortgage continues only up to date of

(c) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4.

LOC. AM.—[MADRAS.] For O. 34, r. 5 (3) substitute "Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf and after notice to all the parties, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt in the manner provided in sub-rule (1) of r. 4."

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the confirmation of the sale in execution of the decree obtained in that suit. 1 P.L.J. 261=37 I.C. 433. On this rule, *see also* 33 C. 890; 31 C. 863; 28 A. 28; 26 A. 185; 28 C. 73; 28 A. 193; 26 A. 318; 26 A. 504. *See* 25 A. 42. In a sale held in pursuance of R. 5, the stranger auction-purchaser acquires the right of the mortgagee and also of the mortgagor and it cannot be said that the right of redemption remained in the mortgagor after sale or in any event after confirmation thereof. 35 C.W.N. 877. Even where purchaser is not a stranger but the puisne mortgagee himself, his purchase is competent and then too the mortgagor's right to redeem the first mortgage is extinguished. 59 C. 117=35 C.W.N. 877=1932 C. 126.

APPLICATION OF SALE PROCEEDS.—There is no doubt that a creditor to whom principal and interest are due, is entitled to appropriate against the interest any sum the debtor pays without stipulating that it is to be appropriated against the principal. But there is no reason why this principle should be imported into the execution of decrees which are provided for by the C.P. Code. In cases in which a decree has been passed in the usual form, prescribed under R. 5 of O. 34, costs and interest cannot have priority over the actual mortgage debt declared to be due in the preliminary decree and the rule laid down in O. 34, Rr. 10 and 13, relating to properties which are subject to prior mortgages cannot be inferentially applied to cases in which the property sold is not subject to any mortgage other than the one for the realization of which the property of the judgment-debtor was ordered to be sold. 1931 Rang. 153, App.) I.L.R. (1938 Lah. 403=1938 Lah. 289.

APPEAL.—An order directing drawing up of a final decree is not a decree nor an appealable order within the meaning of O. 43.

57 M. 437=1934 M. 198=66 M.L.J. 178. *See* 25 M. 244 (F.B.). Appeal from a preliminary decree may be preferred even after passing of final decree. At least Court can order amendment to convert it as an appeal from the final decree also. 106 I.C. 128=1928 C. 167. Where after a preliminary decree for foreclosure was confirmed by appellate Court and a final decree was passed, an application was put in by mortgagors for amendment of preliminary decree by excluding proprietary rights in the mortgaged *sir land, held*, that the application was not maintainable. 142 I.C. 880. When passing a final decree Court can recognise a payment made out of Court even though it has not been certified. 20 A.L.J. 602=44 A. 668. At the time of final decree Court can set right any patent error or omission which is discovered in the preliminary decree. 38 A. 398=14 A.L.J. 502. An application for execution may be treated as one for final decree though the latter has not specifically been prayed for. 7 L.L.J. 397=1925 L. 640. Suit for redemption of mortgage—Mesne profits left unascertained—Application for ascertaining mesne profits—Nature of—Decree in such a case. 92 I.C. 314=1926 M. 305. Once an application for final decree is dismissed only an appeal lies and no second application can be filed. 42 M.L.J. 51=16 L. W. 198=1922 M. 65. *See also* 137 I.C. 273=1932 L. 214=33 P.L.R. 56 (42 M. 52, Foll.). When an appeal is preferred from a decision of a Court dismissing an application under this rule, it is not necessary to make the auction-purchaser a respondent. 164 I.C. 53=38 P.L.R. 259=1936 L. 562. Appeal from preliminary decree dismissed with costs—Final decree already passed—Application for its amendment so as to include costs of appeal—Order allowing application—Effect of. 155 I.C. 495=1935 A.L.J. 289=1935 A. 606.

6. Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the plaintiff, the Court, on application by him may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance.

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O. 34, Rr. 5 and 6.—Parties entering into arrangement to discharge final decree for sale—*P*, a third person, paying off decree-holder and obtaining assignment of decree—*P* also advancing loan to judgment-debtor on his executing mortgage—Mortgage comprising of properties originally mortgaged and also additional properties—Clause in mortgage empowering *P* to include additional properties within order for sale made in pursuance of final decree—Enforceability—*P*'s right is to bring suit on his mortgage. 64 I.A. 302=I.L.R. (1938) 1 Cal. 66=1937 P.C. 256=(1937) 1 M.L.J. 743 (P.C.).

O. 34, R. 5 & O. 22, R. 4.—Where on the death of a mortgagor after the passing of a preliminary decree, his brother and nephew are brought on record as his legal representatives and an application is made for a final decree it is not open to the legal representatives to plead that the property covered by the decree is joint family property and that the mortgage was not binding on them as being without legal necessity and that a final decree could not be passed. These defences have reference only to the personal rights of the objectors and they could not be raised under O. 22, R. 4. I.L.R. (1940) All. 153=1940 A.L.J. 32=1940 All. 99 (F.B.).

O. 34, R. 6.—An unpaid vendor who has a statutory charge on the property sold by him, has all the right of a simple mortgagee under S. 100 of the T. P. Act. In a suit to enforce the charge, he can, when the net proceeds of the sale have proved insufficient and if the balance is legally recoverable from the defendant-vendee, claim a personal decree for such amount. 157 I.C. 533=1935 A.L.J. 279=1935 A. 411. The object of the present rule is to benefit the mortgagor and if he waives his right by consenting to a money decree he cannot subsequently object to the mortgaged property being sold in execution of such decree. 9 I.C. 939=9 M.L.T. 261. A simple money decree cannot be passed unless the contingency contemplated by O. 34, R. 6 has occurred; there is no other rule of law under which a simple money decree could be passed in a suit which has been concluded by a final decree. A Court cannot pass a decree on equitable grounds, when a mortgage decree becomes useless. 1937 A.L.J. 1181=1937 A.W.R. 1116. Rule 6 makes no specific reference to Form No. 8 in the Appendix to the Code and is not controlled by the latter. *Held*, that an application for a personal decree is governed by Art. 181, Limitation Act, and time commences to run from date of the order confirming sale. In this connection the

fact that the taxation of costs has not been completed is immaterial. 60 C. 19=143 I.C. 679=1933 C. 251. If a personal remedy against the mortgagor is barred the decree ceases to be a decree for payment of money and Rr. 18 and 19 of O. 21 will not apply because there is no possibility of there being a decree enforceable against the person and other property of the mortgagor. 143 I.C. 542=14 Pat.L.T. 189=1933 P. 210 (2). Where consent preliminary decree was passed in respect of mortgaged property outside original jurisdiction of Rangoon High Court and later personal decree was applied for after exhausting the properties, question of jurisdiction cannot be raised at that stage. 167 I.C. 80=1937 R. 12.

SCOPE OF.—Where the mortgaged property cannot be sold at all, no question of the net proceeds of the sale being insufficient arises and O. 34, R. 6 has no application. 1935 L. 536. Decrees passed under this rule are supplemental decrees, separate and distinct from the original decree. 21 C. 26. Application under this rule is not an execution application. It is by itself the starting point of a fresh simple money decree. Order 9 would apply to it. 124 I.C. 729. Rule 6 only says "any sale". It does not lay down that the sale must be of entire mortgaged property. Even if only a portion of mortgaged property has been in fact sold and the remainder is no longer available for sale, owing to the action of other claimants, and not through any act or default of the mortgagee, the latter is entitled to a personal decree under R. 6. 9 O.W.N. 1128; but not where the other portion is no longer available for sale owing to the act of the mortgagee himself in releasing it in favour of one of the heirs of the mortgagor on receipt of a certain sum of money from him. 166 I.C. 673=1937 O.W.N. 100=1937 O. 252. *See also* 164 I.C. 817=1936 O.W.N. 732 (Release in favour of a subsequent purchaser). Where a mortgage decree merely declared a charge on the properties, it is to be construed as a decree for a sale and the present rule is applicable thereto. 30 I.C. 280=2 L.W. 689. Where a decree for sale becomes inoperative on the mortgagor being declared not to have been the owner of the mortgaged property at the date of mortgage, R. 6 can have no application. Plaintiff cannot obtain a simple money decree before the sale of the mortgaged property and the sale proceeds proving insufficient to satisfy the mortgage-money. 136 I.C. 829=1932 A.L.J. 317=1932 A. 358. Where the mortgaged property had not been sold owing to a third party having been declared to be the owner

thereof, *held*, that the mortgagee could apply
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for a personal decree. 15 L. 607=147 I.C. 1018=1934 L. 174. Or where it was sold in execution of decree on prior mortgage, and no balance was left after satisfying it. 37 P.L.R. 285=1935 L. 850. *See also* 158 I.C. 422=1935 O.W.N. 1081. Or where it could not be sold on the ground that it was ancestral. 1935 L. 536. "Amount due" means the amount to recover which decree for sale was passed. 1929 A. 15. But *see* 39 C.W.N. 1229, where it was held it included any enhanced interest agreed to be paid by mortgagor in consideration of postponement of sale in execution. The words "the amount due" includes costs. 30 M. 464. Where a decree based on compromise was substantially in accordance with Rr. 4 and 5 of O. 34, and where the proceeds of the sale were not sufficient to satisfy the decree, *held*, that the mere fact that the sale was held under the compromise decree did not preclude an application under this R. 6, for a personal decree. 10 O.W.N. 1097=1933 O. 520. *See also* 1933 O. 214=10 O.W.N. 223. In a suit on a mortgage executed by a guardian the plaintiffs had prayed for certain reliefs including the relief of a personal decree. The plaintiffs' claim was admitted by the defendant's guardian, who allowed a decree to be passed without contest. The entire claim was thus decreed. Therefore the Court granted all the reliefs prayed for in the plaint and relief for a personal decree was entered in the preliminary decree as a decree over. *Held*, that the insertion of the clause relating to decree over was quite correct. 10 O. W. N. 653=1933 O. 352 (F.B.). Where a mortgage decree passed on a compromise expressly authorized the decree-holder to apply for a personal decree, and this was not contrary to the terms of the compromise but was in accordance with the intention of the parties, the decree-holder is entitled to a personal decree for the balance remaining due after the sale of the mortgaged property. 1936 O.W.N. 476=1936 O. 259. Even though the *decree* itself makes no mention of the personal remedy, if it was contained in the compromise, the party would be entitled to proceed in execution against the other properties without applying under this rule. 15 P. 345=17 Pat.L.T. 540=1936 P. 568. A decree which directs payment of the amount is *prima facie* a personal decree. O. 34 regulates the enforcement by suit of mortgages. The Court must read the decree as a whole, and if a preliminary mortgage decree provides in the first instance that the mortgagor should pay the amount, not into Court but to the mortgagee, the Court would not be justified in construing the decree as an executable decree for payments because, taking the decree as a whole, it provides that there is not to be a personal decree for payment until the mortgaged property has been sold and a deficit has resulted. But

there is no reason why one should apply the analogy of a mortgage decree to a consent decree which must be construed according to the language used. In the case of a consent decree, there is no justification for holding that by taking a charge upon specific property, the primary object of which is to secure the creditor against other creditors, the creditor abandons his right to proceed against other property of the debtor. Such an abandonment should not be presumed in the absence of language making clear the intention to abandon. To hold that the creditor can only attach other property after obtaining a fresh order for payment is to ignore the fact that the decree already contains an order for payment. 43 Bom.L.R. 26. Compromise decree in mortgage suits—Charge continuing on mortgaged property—Extinguishment of a portion of property by fire and acquisition of the remainder by municipality—Maintainability of application under this rule—Limitation. 30 Bom.L.R. 724. Application under this rule—Arrangement exonerating defendant from personal liability—Arrangement entered into after final decree for sale—If can be pleaded in bar—Adjustment. 69 M.L.J. 765 (F.B.). Hypothecation by lessee of minerals—Suit by lessor to enforce hypothecation against lessee and sub-lessee—Decree—Sale proceeds insufficient—Application for personal decree against sub-lessee not competent. 193 I.C. 32. This rule does not prevent attachment before judgment under O. 38, R. 5, being granted in suitable cases. 163 I.C. 336=1936 A.L.J. 314=1936 A.W.R. 362=1936 A. 408.

APPLICATION.—This rule does not permit of a personal decree being passed against the mortgagor or his surety unless on the date of the suit founded on the mortgage the balance is legally recoverable. 20 N.L.J. 42. A covenant to pay is implied in every transaction of loan; when a person borrows money he must be deemed to have entered into an implied contract to repay the money borrowed and plaintiff is entitled to sue for mortgage money on this implied contract. Unless there was some specific condition in the bond absolving the borrower from liability to repay the loan he must be held liable on the implied covenant contained in his unconditional acknowledgment of the fact that he was taking the loan. Mortgagee is entitled to add to mortgage amount any sum paid by him for saving the mortgaged property from sale and he is entitled to a personal decree for that portion of amount as well. 149 I.C. 1197=1934 P. 433. Preliminary decree reserving plaintiff's right to apply for personal decree—Defendant not appealing—Right to object to application for personal decree. 1935 O. 11=11 O.W.N. 1196. An application under this rule does not in any way resemble an application for attachment of property. 24 I.C. 35=18 C. W.N. 492. An application under this rule is an application in the suit. 33 C. at 873. But *see* 25 M. 244 and 21 A. 453. Proceed-

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ings under this rule are not in the nature of a separate suit but merely a final step in working out the mortgage decree and there is no question of limitation. 4 Luck. 237=114 I.C. 769=1929 O. 59. When a combined decree has been passed, an application under this rule is unnecessary. 33 M.L.J. 543=42 I.C. 282. Also 25 I.C. 50=1914 M.W.N. 497; 27 I.C. 72=18 O.C. 55; 25 I.C. 121=17 O.C. 153; 3 Luck. 411=108 I.C. 723=1928 O. 490. When a right to proceed under this rule has not been determined in the suit, an application under this rule can be objected to on the ground that part of the decree amount was barred at the time of suit. 46 I.C. 892. Question of personal liability can be decided at the time the suit is decided, and the matter so decided is *res judicata* when an application under this rule is made. 28 A. 365; 144 I.C. 738=1933 L. 329. A mortgage decree against a Hindu father had reserved liberty to apply for a personal decree against him. Property was sold but before confirmation the sons of mortgagor obtained a declaration that mortgage was not binding on them. Held, that the conditional clause in the decree regarding the personal decree became operative, that mortgagee was entitled to move executing Court for passing a personal decree under R. 6 in spite of the declaration obtained by the sons and in execution of that personal decree to proceed against the entire property. 1933 L. 768. A preliminary decree passed in terms of Form No. 4, Appendix D, C.P. Code, declaring that "Plaintiff shall be at liberty to apply for a personal decree," constitutes an adjudication on the point, and if defendant does not appeal from it, he is precluded from disputing its correctness afterwards. 10 O.W.N. 653=1933 O. 352 (F.B.). A mortgage decree carries with it the liability to pay the amount personally. The power of Court to give a mortgagee a relief by granting a personal decree does not depend upon this rule. In the case of a compromise decree or of an award even though the personal remedy is not mentioned, an application for the same is not necessary but Court can give relief. 32 Bom.L.R. 439=1930 B. 208. See also 115 I.C. 336=1929 S. 44. And much more so where though the award is silent about personal decree, the Court passes a decree on the basis of the award in the usual form, and there was no appeal against it. 158 I.C. 493=1935 O.W.N. 1103. As to applicability of this rule to an anomalous mortgage, see 1937 P.W.N. 60=1937 Pat. 261.

FORUM.—The supplemental decree can be passed only by the Court in which the original suit was instituted. 33 M.L.J. 382=42 I.C. 953; 27 C. 272. Where the mortgage suit and the mortgage come within the jurisdiction of the Court at A and not within the jurisdiction of the Court at F, the existence of a charge on the property at F does not give the Court at F jurisdiction

to entertain an application under O. 34, R. 6, because that rule only applies to a personal covenant arising from a mortgage. 1931 A.L.J. 893=1931 A. 192.

COMBINED DECREE.—The decree for sale can also provide that if the proceeds of sale are insufficient, the balance can be collected personally. 47 C. 370=36 M.L.J. 215=46 I.A. 294 (P.C.). Also 43 M. 421=38 M.L.J. 203. If a Court passes a composite decree, combining a decree for sale and a personal decree, the decree is valid and the personal decree, though made at the time of the decree for sale, operates at a future date when the sale takes place and fails to satisfy the mortgage debt. 10 O.W.N. 1087=1933 O. 529. Though a composite decree for sale and also in terms of R. 6 may be passed at one and the same time, yet neither a plaintiff is bound to ask for the second relief in the plaint of the suit nor is Court bound even where such a relief is prayed for, to adjudicate upon it. Hence where Court has not adjudicated upon it nor have the parties asked for such relief, the question can be considered when the contingency arises. 10 O.W.N. 1097=1933 O. 520. In a combined decree it is not proper to direct that in default of payment, plaintiff can recover the decree amount by sale of the properties. 24 Bom.L.R. 843=1923 B. 32. Where a preliminary decree provided also for personal decree for any "legally" realisable balance, and the final decree omitted it, held, it was not a combined decree, the question whether any legally realised balance existed, being yet to be determined. 53 I.C. 904=23 C.W.N. 924. When once such a decree is passed it cannot be questioned in execution proceedings. 24 I.C. 195=27 M.L.J. 25. When decree provides for a personal remedy, executing Court cannot enquire into defendant's personal liability. 32 I.C. 820. Where a party feels aggrieved by the provision for a personal decree in a preliminary decree, he must appeal; otherwise his remedy is barred. 6 O.W.N. 969. So also where the mortgagee made a claim for a personal decree in the original suit and the claim was rejected upon its merits and no appeal was lodged against that decree, the doctrine of *res judicata* applies, and a subsequent application for a personal decree under this rule is not maintainable. 1936 A.L.J. 1228=1937 A. 54. When a combined decree is passed the personal remedy may be availed of even before sale of the properties. 22 I.C. 293; 10 I.C. 975; 26 M.L.J. 83=21 I.C. 782. As to the validity of combined decree, see 59 C. 1314=140 I.C. 788=36 C.W.N. 709. See also 60 C.L.J. 522=38 C.W.N. 850=1934 C. 764 (2). Under R. 6, mortgagee is not entitled to apply for personal decree until the mortgaged property has been actually sold and the sale proceeds found insufficient to meet his claim. The original decree should, therefore, merely reserve the right to apply for a personal decree. 31 N.L.R. (Supp.) 124=160 I.C.

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196=1936 N. 34.

COSTS.—A mortgage decree-holder can realise his decree for costs otherwise than by proceeding under S. 90, T.P. Act, if the Court has passed a personal decree for costs. 15 I.C. 23=16 C.W.N. 731. Where in a suit for sale by the mortgagee against the mortgagor and his sons, the hypotheca was sold and plaintiff applied for a personal decree against father for the balance due under the mortgage and costs and against sons for the amount due for costs, *held*, that it was open to plaintiff notwithstanding the amalgamation of the amount due under the mortgage, subsequent interest and costs into one sum, to assume that costs were part of the remaining balance and to ask for a decree for costs as though they were still legally recoverable from the sons. 55 M. 332=1932 M. 155 (2)=62 M.L.J. 93. Where mortgaged property has been sold and found insufficient, a personal decree for costs is available. 12 M.L.T. 312=17 I.C. 244. Unless decree otherwise provides, costs may be recovered from the sale-proceeds of mortgaged property. 38 I.C. 241=2 P.L.J. 51. A final personal money decree for costs may be given against the mortgagor even in a case where the personal remedy of mortgagee against the mortgagor, for the mortgage money and interest thereon is time-barred. 9 R. 186=1931 R. 153. Where a prior mortgagee sued the mortgagor and a puisne mortgagee and was given a decree for sale of the properties mortgaged to him and an order for costs making the puisne mortgagee liable for them jointly with the mortgagor, the puisne mortgagee is, in the absence of a special order or special reasons to the contrary, personally liable for the costs. 133 I.C. 225=1931 R. 153. Mortgagee has a right to the execution against puisne mortgagee personally in respect of such part of the costs which was payable by him separately, although a final personal money decree could not be passed against him under O. 34, R. 6. 133 I.C. 93=1931 R. 181 (2).

LIMITATION.—In the case of an application under R. 6, the time from which limitation would run is the date of confirmation of the sale, for unless the sale was confirmed by Court after disposing of all the objections against it, the deficiency in the amount cannot be ascertained for the purpose of R. 6. 58 C. 741=35 C.W.N. 231=1931 C. 166. *See also* 30 Bom.L.R. 724. And where there is an appeal from an order dismissing an application by the judgment-debtor to set aside the sale, the period of three years under Art. 181, Limitation Act, for an application for a personal decree against the mortgagee begins to run from the date of the appellate order and not from the date when the sale was confirmed by the lower Court. 157 I.C. 942=42 L.W. 518=1935 M. 640; 1937 A.L.J. 135=1937 A. 285. A personal decree under this rule can be passed within six years from the date

provided in mortgage bond for payment. 17 A.L.J. 647=50 I.C. 640. Personal remedy can be enforced on the basis of a registered deed within six years under Art. 116, Limitation Act. 27 A.L.J. 1294=123 I.C. 321=1930 A. 69 (F.B.). An application for a personal decree may be made even after six years from the date of bond provided the suit has been filed within six years from that date. 27 I.C. 770=2 L.W. 66; 36 C.W.N. 117. Art. 181 does not apply to an application under this rule. 30 I.C. 719=42 C. 294. But *see contra* 1933 C. 251; 21 I.C. 530=1913 M.W.N. 867. *Also* 39 I.C. 854=13 N.L.R. 76; 10 I.C. 21. *See also* 111 I.C. 221. Sale in pursuance of mortgage decree subsequently held void—Application for personal decree three years after that is barred. 1927 M. 941=97 I.C. 502=24 L.W. 280. Where the mortgagee's claim for the principal amount is barred, the mortgagee is debarred from recovering from mortgagors personally the interest which accrued due during the six years immediately preceding the institution of the suit. 163 I.C. 100=1936 L. 387. (111 I.C. 808=1928 L. 653, Not Foll.) But, there can be a personal decree against the mortgagor for the amount of costs incurred in the mortgage suit, even though his personal liability for the principal amount and interest is barred by time. (*Ibid.*) But *see* 14 R. 538, which held, on a construction of R. 3 of O. 34, as amended by that High Court, that a personal decree for costs cannot be passed, under the above circumstances when there is nothing in the preliminary decree which says that the mortgagee shall be at liberty to apply for a personal decree in respect of the costs alone, or enforce payment independently of the amount which is otherwise due on the mortgage. Where a mortgage deed fixed eight years for re-payment, but also contained a default clause that if interest was not paid annually, the mortgagee may recover interest and principal without reference to the period fixed, *held*, that the limitation for a decree under R. 6 commenced to run not after the expiry of one year within which mortgagor continued default for payment of interest, but it commenced to run after the expiry of eight years' term stipulated in the deed. 1934 A.L.J. 261=1934 A. 397=56 A. 954 (F.B.). Where a person stands surety for a mortgage debt, giving a guarantee of the mortgagor's title to the mortgaged property and undertaking to compensate the mortgagee for any loss caused to him in consequence of proof of the mortgagor's title being defective, a suit against the surety on the contract of guarantee for a personal decree against the surety is governed by Art. 116 of the Limitation Act and must be filed within 6 years from the date on which the mortgage debt became payable. 20 N. L.J. 42.

NOTICE.—Before making a decree under this rule, it is right to issue notice to judgment-debtor to show cause, except possibly

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in cases where decree has made him personally liable. 35 I.C. 288=9 Bur.L.T. 245. Where Court has to decide whether the execution of the decree should proceed without a supplemental decree under this rule an order without notice to judgment-debtor directing execution to issue cannot be supported. 56 I.C. 801=31 C.L.J. 382. Also 17 I.C. 927=16 C.L.J. 394; 30 I.C. 188=29 M.L.J. 120. Preliminary decree specifying judgment-debtor's personal liability—Sale proceeds insufficient—Decree-holder obtaining order under O. 34, R. 6—Preliminary decree set aside on appeal—Effect on order under O. 34, R. 6—It *ipso facto* falls to the ground. 39 P.L.R. 165=1937 Lah. 6.

PERSONAL LIABILITY.—A charge-holder is, as much as a mortgagee, entitled to a personal remedy in the event of deficiency of the proceeds of sale. 59 C. 1314=140 I.C. 788=36 C.W.N. 709. See also 1935 A.L.J. 279=1935 A.W.R. 344. Ordinarily costs awarded to a mortgagee decree-holder in a mortgage suit or appeal in the absence of any express direction to the contrary would be part of the mortgage amount decreed and would be a charge on the mortgaged property. But where the trying Court imposes personal liability for costs on the mortgagor in express terms, the order is *intra vires* although his personal liability for the mortgage debt is time barred, and can be executed against the person of the mortgagor apart from the sale of the mortgaged property. I.L.R. (1938) Lah. 148=1938 Lah. 188. A personal decree cannot be obtained against a purchaser of the equity of redemption. 34 A. 63=39 I.A. 7=21 M.L.J. 1158 (P.C.). Also 38 A. 209=14 A.L.J. 151; 17 C.W.N. 457=17 C.L.J. 120; 95 I.C. 970 (2)=1923 P.C. 54 (P.C.). The secured creditor of a Hindu widow, on the security proving insufficient to satisfy his decree thereon, is entitled to proceed against the other properties. 85 I.C. 963=1925 A. 352. A minor mortgagee cannot get a decree under this rule against a puisne mortgagee for the costs due. 23 A. 439; 29 A. 12. See also 31 B. 244; 29 A. 260; 26 A. 93; 26 A. 25. An *ex parte* decree for personal liability against a person other than the mortgagor can be set aside. 60 I.C. 368=2 P.L.T. 251. An unsuccessful mortgagor-appellant must personally pay the costs of appeal but the mortgagee can also add it to the security. 41 A. 473=17 A.L.J. 582. The personal liability of a mortgagor when arises, see 50 C. 718=1924 C. 209. A personal decree can be made against mortgagor at the appellate stage. 26 C.W.N. 318=1922 C. 52 (47 C. 370, Foll.). Where mortgagor sells the equity of redemption and a pre-emption suit ensues in respect of such sale, the pre-emptors, in the absence of a contract to that effect, are not personally liable for the mortgage-money. 144 I.C. 738=1933 L. 329. A decree under R. 6 can only be made against defendants in the original suit. 1927 A. 691=103 I.C. 264

(1). Court cannot direct that no property other than those mortgaged be sold. Whether the other properties can be proceeded against is to be determined under an application under this rule. 23 I.C. 389. When mortgage decree directs that the defendants "do pay" they are personally liable. 1918 M.W.N. 146=43 I.C. 871=7 L.W. 36. When in a compromise decree there is no provision taking away the personal liability, the mortgagor was personally liable, if sale proceeds were found insufficient. 88 I.C. 507. Personal liability is ordinarily presumed to exist in the absence of a contract to the contrary. The right to proceed against the person must be specifically reserved by the decree itself. 42 I.C. 288=6 L.W. 692; 26 M.L.J. 375=23 I.C. 544; 1927 M.W.N. 330. But see 1927 M. 779=53 M.L.J. 489=103 I.C. 528. A personal relief against a defendant includes a relief against any property in his possession. 27 I.C. 72=18 O.C. 55. A formal decree under this rule is necessary even where the original compromise decree declared the other properties too as being liable. 48 I.C. 608=3 P.L.J. 649. Consent decree providing for further execution in case proceeds of sale of certain properties were found insufficient—No need for applying for further decree under O. 34, R. 6. 1928 O. 490=3 Luck. 411.

RIGHT TO PERSONAL DECREE.—Right to personal decree accrues when final decree is made though personal decree can be made only after exhausting property by sale. 54 I.A. 129=54 C. 500=1927 P.C. 73=52 M.L.J. 565 (P.C.). See also 50 A. 321=25 A.L.J. 1042=1928 A. 71; 111 I.C. 808=1928 L. 653. Where a decree is drawn up containing a provision that if the proceeds of sale were found insufficient, plaintiff would be at liberty to apply for a personal decree. *Held*, that an application for a personal decree in such a case, is not an application for execution. It is an application for a decree and as such not governed by the twelve years rule contained in S. 48, C.P. Code. 1937 A.M.L.J. 99. Where a member of a joint family mortgaged the family properties without necessity, a personal decree against him if unchallenged in appeal by the mortgagee is valid. 21 A.L.J. 754=46 A. 32. Also 38 I.C. 691. A mortgagee, if can proceed concurrently with all his remedies, 35 I.C. 43. For conditions to be satisfied before personal decree can be granted, see 17 I.C. 263=16 C.L.J. 318; 15 I.C. 911=15 C.L.J. 684; 21 I.C. 283=16 O.C. 238. Where there are two mortgage decrees in favour of different mortgagees, and the property had been sold and the entire equity of redemption in the mortgaged property had passed to the first mortgagee under the first sale, the second mortgagee would be at liberty to start a proceeding under O. 34, R. 6, and obtain a personal decree, even though the property was not sold in execution of his own decree. 42 C.W.N. 47. Upon a true reading of R. 6 of O. 34, the conditions

Preliminary decree in redemption suit.

7. (1) In a suit for redemption if the plaintiff succeeds, the Court shall pass a preliminary decree—

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under which a personal decree against the mortgagor may be asked are equally satisfied if the properties directed by the mortgage decree to be sold are no longer available. It is not incumbent on the plaintiff to go through the farce of selling those properties when they have ceased to be available to him, before he can apply for and get a personal decree. 17 Pat. 538=1938 Pat. 525. See also 6 Cut. L.T. 37=1940 Pat. 616. The omission to provide for a personal decree in the preliminary decree in a mortgage suit does not operate as *res judicata*, and the omission, therefore, to reserve personal liability of the defendants in the preliminary decree does not preclude the plaintiff mortgagor from applying for relief under O. 34, R. 6, if the sale-proceeds are not sufficient to satisfy the decree amount. 1939 M. 162=I.L.R. (1939) M. 223=(1938) 2 M.L.J. 999. When a mortgage decree for sale has been obtained, without executing it, a personal decree cannot be obtained. 42 A. 519=18 A.L.J. 628. Also 20 I.C. 829=17 C.W.N. 1039. Personal decree obtained without informing of a prior refusal to grant the same cannot be set aside as fraudulent. 88 A. 7=30 I.C. 792. Where an application for personal remedy is dismissed for default, fresh application is barred under O. 9, R. 9. 8 R. 316=1930 R. 257; 26 N.L.R. 154=1930 N. 188. If a person entitled to bring the properties to sale under a decree neglects and allows a third person having no such rights to sell a portion of the property, he cannot afterwards be allowed to have a relief under this rule. 20 I.C. 320. Court has a discretion in refusing a personal remedy when mortgagee wilfully omits to sell the hypotheca. 48 I.C. 322=45 C. 702; also 38 M.L.J. 93=51 I.C. 34. Personal decree cannot be granted where mortgagor is found to have no rights in the properties mortgaged even before sale. 14 I.C. 591=9 A.L.J. 569. But see *contra* 38 M. 677=23 I.C. 515; also 23 O.C. 145=57 I.C. 967; 9 I.C. 752=14 O.C. 62; 1928 A. 71=25 A.L.J. 1042. A decree against the assets in the hands of the sons can be passed where amount realised by sale of mortgaged property was insufficient. 14 I.C. 55 (1). When defendant becomes insolvent, a personal decree for balance of unsatisfied amount cannot be passed. 34 A. 106=12 I.C. 587. Where mortgagor has been adjudged insolvent with reference to certain debts which were provable in insolvency the order of discharge does not and cannot prejudicially affect the legal rights of the creditor against the debtor in respect of debts which were not provable in insolvency. The order of discharge cannot take away the statutory right of decree-holder to apply for a decree under R. 6, which right accrued subsequently. 1932 A.L.J. 237=

1932 A. 336=54 A. 428. When an application under this rule is refused, whether special remedy under S. 47, Provincial Insolvency Act, available. 6 O.W.N. 982. As to executability of decree where a judgment-debtor is insolvent, see 1939 A.W. R. (H.C.) 265. When personal remedy is barred it cannot be passed. 21 Bom. L.R. 410=46 B. 848. A personal decree cannot be obtained before a final mortgage decree is passed. 50 I.C. 924=46 C. 245. When in a decree for sale power is given both to the prior and puisne mortgagees to sell, either can apply for a personal decree. 33 M.L.J. 382=42 I.C. 953; also 34 I.C. 48=2 O.L.J. 614. When an application under this rule is disallowed, no separate suit for personal remedy is maintainable. 23 O.C. 145=57 I.C. 967. A personal decree may be obtained on abandonment of all claims against the property. 9 I.C. 403=14 O.C. 217. (26 A. 25; 29 A. 369; 25 A. 79; 28 A. 19, Foll.); also 53 I.C. 922. Also when the mortgaged property is not available for sale through no fault of the mortgagee. 25 A.L.J. 1042=50 A. 321=1928 A. 71; 144 I.C. 698=1933 L. 792. It is not necessary that mortgagee had to put to sale the mortgaged property before a personal decree can be passed. 32 C.W. N. 1160=117 I.C. 530=1929 C. 121; 144 I.C. 698=1933 L. 792. See also 14 Pat. L.T. 189=1933 P. 210 (2). Decree-holder can have a personal remedy when after selling a part, he is not permitted to sell the rest and his debt is unsatisfied. 61 I.C. 635=6 P.L.J. 106. Omission of a small portion of the property in the plaint does not bar personal remedy. 42 I.C. 56=2 P.L.J. 538; 1933 M.W.N. 744. Sale in execution of mortgage decree—Sale set aside—Right to maintain application for personal relief against any property in his possession. 49 A. 506=1927 A. 395. See also 1927 M. 941=97 I.C. 502.

APPEAL AND COURT-FEES.—An order holding that an application for simple money decree is not maintainable amounts to decree and is appealable. 144 I.C. 468=1933 A. L.J. 738=1933 A. 429. An appeal from an order refusing to make a decree under this rule must bear *ad valorem* Court-fee calculated on the subject-matter of appeal. 40 A. 553; also 35 I.C. 158=14 A.L.J. 328; 19 I.C. 971=18 C.L.J. 133; 30 I.C. 497=18 O.C. 121. An application for a decree under R. 6 cannot be considered to come under "plaint" and consequently an appeal does not lie under O. 43, R. 1 (1), from order returning such application to be presented to the proper Court. 1931 A. 192=1931 A.L.J. 893. Preliminary decree—Appeal by mortgagor pending—Personal decree—Appeal from—Court-fees—If to be *ad valorem*. 39 C.W.N. 315. O. 34, R. 7.—Scope of the rule, see 23 Bom.L.R. 1176=46 B. 348; 84 I.C. 67=

(a) ordering that an account be taken of what was due to the defendant at the date of such decree for—

- (i) principal and interest on the mortgage,
- (ii) the costs of suit, if any, awarded to him, and

(iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest therein ; or

(b) declaring the amount so due at that date ; and

(c) directing—

(i) that, if the plaintiff pays into Court, the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10 together with subsequent interest on such sums respectively as provided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints,

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1925 L. 31. Reversioners filed a suit for declaration that certain mortgage executed by the widow was invalid and for possession. It was found that part of the mortgage debt was valid and binding and decree conditional on payment of certain amount within certain time which was made a charge on the property. *Held*, that even though the suit was not for redemption, the decree was in the form of a decree for redemption, and that Court had discretion to extend time for payment under R. 7. (Cases ref.) 1933 M. 762=65 M.L.J. 592. A mortgage having been executed by a minor, his next friend sued to have it declared invalid and cancelled. Finding of Court was that mortgagor was a minor but that he had practised fraud on mortgagee in obtaining money and that the money was utilised for purposes binding on minor's family. Decree was passed that on payment of mortgage amount within a date fixed the mortgage-deed was to be cancelled. The amount not having been paid within the date, mortgagee applied for an order for sale. *Held*, that the decree should be treated as a decree for redemption and that mortgagee was entitled to claim the benefit of this rule. 68 M.L.J. 546=1935 M. 478. This rule applies only to a mortgagee and has no application to the case of a co-mortgagor who has redeemed the entire mortgage. 1923 L. 122. As to distinction between deposits under this rule and under S. 83, T.P. Act, see 2 O.W.N. 826=1926 O. 113. Under R. 7 (c) the money should be paid into Court. As to validity of payment made outside Court, see 102 I.C. 428=1927 O. 275. When deposit is made to discharge a valid mortgage a final decree itself may be passed without being preceded by a preliminary decree. 1922 A. 479. All proceedings till final decree are proceedings in suit. 37 A. 226=13 A.L.J. 307. As to form of decree, see 19 I.C. 856. In a suit for redemption of a usufructuary mortgage Court passed a decree on 4th November, 1925, "the suit decreed conditional on the plaintiff depositing Rs. 199-5-0 to the credit

of the defendant in this Court within six months; prepare a preliminary decree for redemption under O. 34, R. 7 on failure their suit shall stand dismissed". Plaintiffs failed to pay within time fixed and their application for extension of time was granted. On deposit of the money final decree was passed directing delivery of possession. In second appeal by mortgagee it was contended that the decree passed on 4th November, 1925 was absolute in its character and the Court had no power to extend the time. *Held*, the Court of first instance had power to grant extension of time under O. 34, R. 8 proviso or under S. 148. 145 I.C. 591=1933 A. 157. A mortgagor decree-holder who fails to pay within date fixed but pays it before the decree is made absolute, is entitled to redeem. 29 I.C. 438.

MESNE PROFITS.—A separate suit for mesne profits after date of payment fixed in the preliminary decree would lie. 2 O.W.N. 826=1926 O. 113. There is no provision in Rr. 7, 8 and 10, for taking into consideration any mesne profits that might become due to the plaintiffs by the failure of the defendant to deliver possession to plaintiff after the final decree. That question is outside the scope of a mortgage suit for redemption. Any amounts payable before the date of final decree will alone be taken into consideration. The suit continues until the passing of the final decree and when it is passed the relationship of mortgagor and mortgagee ceases, and thereafter the defendant remaining in possession is a trespasser. Plaintiff, therefore, has a fresh cause of action against him. 1935 A. L.J. 115=1935 A. 96.

ACCOUNTS.—Where mortgagor covenants in the deed of mortgage to pay the rent of mortgaged property to zamindar but fails to pay the same, and mortgagee in consequence pays the rent, the latter can ask for the amount paid by him to be added to the mortgage money in a suit for redemption. It is not necessary that the mortgagee should file a separate suit for recovery of the amount. 1934 A.L.J. 637=1934 A. 888.

all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interests, the defendant shall be entitled to apply for a final decree—

(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount, found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

8. (1) Where, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under

NOTES.

Only an interlocutory order and not a decree for accounts can be passed prior to preliminary decree. 23 A.L.J. 691=47 A. 803. A comparison of O. 34, R. 7 and O. 20, R. 17 makes it clear that directions by Court with regard to the mode in which the account is to be taken or vouched will not at least in redemption suits amount to preliminary decrees. 14 P.L.T. 735. An interlocutory order should be followed by specification of consequence of payment or non-payment of the ascertained amount on a day fixed to make it a preliminary decree. 10 O.L.J. 374=1924 O. 140. When a preliminary decree fixes the amount due instead of directing an account to be taken, it does not become a final decree. 22 C.W.N. 374=44 C. 448. Cf. 10 O.L.J. 374=1924 O. 140; see 87 I.C. 585=1925 A. 492. S. 13 of the Dekkhan Agriculturists' Relief Act provides for an account to be taken to the date of suit but not thereafter. In a suit on a mortgage executed by an agriculturist, accounts can therefore be taken only up to the date of suit. 37 Bom.L.R. 76=1935 B. 122=154 I.C. 770. The general law will apply in regard to accounts between the date of plaint and the date of the preliminary decree. The mortgagee is entitled to what is allowed by R. 7, i.e., principal, interests, costs and other costs, charges, expenses and interest thereon. The interest due would be governed by R. 11. 36 Bom.L.R. 1242=1935 B. 97.

APPEAL.—Where an appeal from a preliminary decree is dismissed it is the decree

of the appellate Court which constitutes the effective preliminary decree in the cause and it is therefore necessary for appellate Court to pass a fresh decree fixing a fresh date for payment and making a fresh calculation of the amount which will be due on that date. 29 N.L.R. 130=1935 N. 236.

LIMITATION.—Suit for recovery of overpayment or surplus profits from usufructuary mortgagee is governed by Art. 148 of the Limitation Act. 26 C.W.N. 123=1922 C. 189. As to form of decree where a sub-mortgagee is a party, see 4 O.L.J. 475=42 I.C. 66.

O. 34, Rr. 7, 8 and 10.—See 1935 A. L.J. 115=1935 A. 96 (noted under R. 7, *supra* under head 'Mesne Profits').

O. 34, Rr. 7 and 11.—See 37 Bom.L.R. 76=1935 B. 122 and 37 Bom.L.R. 1242=1935 B. 97. (Both noted under R. 7 *supra* under head 'Accounts').

O. 34, R. 8: SCOPE.—This rule applies to redemption suits only. 18 A.L.J. 771=43 A. 25. As to the application of this rule as it stood before the amending Act of 1929, see 35 A. 116=11 A.L.J. 62; 28 O.C. 261=90 I.C. 418; 146 P.W.R. 1913=19 I.C. 856; 28 O.C. 46=1925 O. 255. It is open to a defendant to ask upon the happening of a contingency such as on mortgagor's failing to pay before a certain date that mortgaged property or a sufficient part thereof be sold. 132 I.C. 562=1931 A. 427. A final decree could be passed under R. 8 (1) both at the instance of mortgagor as well as mortgagee. 1927 B. 32=50 B. 730=98 I.C. 943. The mortgagor himself

sub-rule (1) of rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the defendant to deliver up the documents referred to in the preliminary decree, and if necessary,—

(b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in the said decree, and, also, if necessary,—

(c) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the plaintiff in addition to the amount mention-

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can apply for sale in a redemption suit. If he does not pay the amount, suit need not be dismissed. 36 M. 32=21 M.L.J. 941. Conditional decree in redemption suit—Condition not fulfilled—Provisions of R. 8 not complied with by decree-holder—No final decree—A second suit for redemption is maintainable. 1927 L. 9=7 L. 420=27 Punj.L.R. 659.

FORUM.—The application under sub-rule (4) must be made to Court of First Instance even when the decree under R. 7 has been made by appellate Court. 23 A. 88; 23 M. 521; also 39 A. 396=39 I.C. 630; 39 M. 876=29 M.L.J. 708.

PAYMENT INTO COURT.—The rule distinctly lays down that payment must be made into Court. So, after the passing of the preliminary decree, no payment or adjustment of the mortgage money made out of Court can be pleaded against the passing of the final decree. There is no difference in this respect between the decree in a foreclosure suit and the decree in a redemption suit. 1931 M. 592=131 I.C. 487=54 M. 708. Though if after a preliminary decree the mortgagor alleges that he has paid the amount out of Court and the mortgagee disputes it, Court will not recognize a payment not made in accordance with the directions of the decree into Court, it does not, however, affect the right of the mortgagor and the mortgagee to settle between themselves out of Court and report the matter to the Court. 62 M.L.J. 272=55 M. 320=1932 M. 115. (42 M. 61, Ref.).

EXTENSION OF TIME.—According to the T. P. Act prior to passing of the new Code payment may be made before an order absolute, but according to the Code an extension of time has to be obtained. 9 I.C. 337=14 O.C. 19. Time allowed for payment can be enlarged; and this can be done even after time originally given has expired. 28 B. 102; 26 B. at 126. Delayed payment may be accepted if no loss is caused to mortgagee. 50 I.C. 201=6 O.L.J. 94; 101 I.C. 734=13 O.L.J. 828. Time cannot be enlarged merely because an appeal is preferred against the decree which is afterwards dismissed or withdrawn. 17 C. W.N. 457=17 C.L.J. 120; also 41 I.C. 268=32 M.L.J. 455. But a party who is not bound to perform anything under the decree and who appeals to enlarge his interests

under the decree is entitled to reckon the period in his favour from date of appellate decree. 41 I.C. 268=32 M.L.J. 455. A separate application for enlargement is not needed. 26 B. 126. Where in a partition suit an alienation was impeached as not binding and the alienee was made a party and Court directed possession from alienee, on payment of a certain amount and he defaulted, time can be extended for payment. 37 M.L.J. 695=43 M. 357. Court of first instance can grant extension of time under R. 8, proviso or S. 148 in case of failure to deposit amount within the time fixed. 1933 A. 157=145 I.C. 591. Court cannot extend time when the decree was a compromise decree by which possession was to be delivered if payment was made on a particular date and in default possession of the mortgagee was to continue. 28 I.C. 862=18 O.C. 58. When time for payment is extended, interest at contract rate ought to be paid for the time extended. 9 O.L.J. 439=1922 O. 268. Laches on the part of mortgagee—Extension of time allowed. 100 I.C. 1039=1927 B. 175=29 Bom.L.R. 228.

LIMITATION.—There is no period of limitation for passing a final decree in a redemption suit. 22 I.C. 283. For an application under Cl. (4), Art. 181 of the Limitation Act would apply. 28 O.C. 46=1925 O. 255. Mortgagor could execute decree at any time within limitation. If he failed, he would have right to sue again for redemption so long as his right to redeem remained alive. 146 P.W.R. 1913=19 I.C. 856. So long as no final decree for sale or foreclosure is passed, mortgagor had the right to pay the amount due under the preliminary decree even beyond twelve years from date fixed for payment under the consent preliminary decree. 28 O.C. 26=90 I.C. 418. No notice need be given to *kanamdar* after decree for redemption and before delivery of possession to the mortgagor. 45 M.L.J. 687=1924 M. 102.

ACCOUNTS.—In a decree for redemption, accounts must be carried forward up to the date when possession is given. 16 I.C. 184. The relationship of mortgagor and mortgagee subsists even after preliminary decree and mortgagee should account for rents and profits. 42 I.C. 230. After the decree for redemption, Court should see that all rights acquired by the mortgagee are transferred

ed in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the defendant in this behalf,—

(a) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is hereinbefore referred to in rule 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or

(b) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff, or other persons entitled to receive the same.]

¹[8-A. Where the net proceeds of any sale held under the last preceding rule

Recovery of balance due on mortgage in suit for redemption. are found insufficient to pay the amount due to the defendant, the Court, on application by him, may, if the balance is legally recoverable from the plaintiff otherwise than out of the property sold, pass a decree for such balance.]

9. Notwithstanding anything hereinbefore contained, if it appears upon taking the account referred to in rule 7, that nothing

Decree where nothing is found due or where mortgagee has been overpaid. is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required, to re-transfer the property and to pay to the plaintiff the amount which may be found due to him: and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

²[10. In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure, sale or redemption, the Court shall, unless

Costs of mortgagee subsequent to decree. in the case of costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto, add to the mortgage-money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since the date of the preliminary decree for foreclosure, sale or redemption up to the time of actual payment.

LEG. REF.

¹ This rule was inserted by S. 5 of the Transfer of Property (Amendment) Supplementary Act (XXI of 1929).

² Rules 10 and 11 were substituted by S. 6 of the Transfer of Property (Amendment) Supplementary Act (XXI of 1929).

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to mortgagor. 57 I.C. 763. Final decree should be for mortgage amount *minus* excess profits. 103 I.C. 290=1927 N. 302.

APPEAL.—An order granting time is appealable. 35 A. 116=18 I.C. 14. But no second appeal lies. 47 B. 956=25 Bom. L.R. 920.

O. 34, R. 8-A: APPLICABILITY.—R. 8-A of O. 34 inserted by Act XXI of 1929, does not apply to usufructuary mortgages. 9 O. W.N. 1059=1933 O. 40=141 I.C. 428.

O. 34, R. 9.—Applicability.—Suit for sale by some heirs of mortgagee—Other heirs joined as co-defendants along with

mortgagors—Decree for surplus amount in favour of mortgagors against co-defendants—Whether can be passed. 1936 O.W.N. 306.

O. 34, New Rr. 10 and 11 have been substituted for old Rr. 10 and 11. The necessity for the substitution of these new rules have been explained as follows:—

“Rule 10, as it stands, refers to the subsequent costs of the suit only. In finally adjusting the amount the Court has also to take into consideration other costs, charges and expenses which the mortgagee may have incurred since the date of the preliminary decree. The mortgagee must be entitled to the amount so spent. 44 C. 448. R. 10 is, therefore, amended to empower the Court to take such sums into consideration. After the account is once taken or the amount declared in a preliminary decree, it is necessary that the power of the Court to take into account sums spent subsequently should be expressly recognized.

11. In any decree passed in a suit for foreclosure, sale or redemption, where

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We have proposed that the provisions of R. 11 which lay down the principle of 'redeem up and foreclose down' should be embodied in the new S. 94 of the Act. This rule should, therefore, be omitted.

There being no specific rule as to interest, we propose that a new rule should be framed dealing exclusively with interest, and this rule we propose to number as 11.

Under S. 2 of the Usury Laws Repeal Act (XXVIII of 1855), in any suit in which interest is recoverable the amount is to be adjusted or decreed by the Court at the rate (if any) agreed upon by the parties. Again, this provision is subject to the provisions of the Usurious Loans Act, 1918, and S. 74 of the Indian Contract Act enabling the Court to reduce the rate if in its opinion it is penal or exorbitant. Under S. 3 of Act XXVIII of 1855, it is at the discretion of the Court to vary the rate agreed upon if it decides to allow further interest on the amount adjudged or decreed to be due. When no such rate has been fixed, the Court can award interest at the rate it deems reasonable. It was at one time thought that the Court was not competent to award interest after the date fixed for payment in a mortgage deed. It is, however, now well established that, even if there is no covenant for the payment of interest after the period fixed in the deed, interest can still be awarded by way of damages or under the Interest Act (XXXII of 1839); the rate allowed is generally the same as that stipulated in the deed. (L. R. 25 I.A. 9.) As observed by the Privy Council, the scheme of the provisions in O. 34 of the Code, is that a general account should be taken once for all and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day and that, after the expiration of that day, if the property is not redeemed, the matter should pass from the domain of contract to that of judgment and the rights of the parties should thenceforth depend not on the contract or the bond, but on the directions in the decree. 34 I.A. 9 at 21; 54 I.A. 1. Up to the day fixed for payment in the preliminary decree in a mortgage suit, interest is generally allowed at the contract rate and thereafter up to the day of realization or actual payment it is entirely at the discretion of the Court to allow it at such rate as it deems reasonable. 20 C. 360; 21 M. 364; 20 B. 744; 23 I.A. 138 (P.C.). The result of the above decisions has been embodied in the new R. 11.

The absence of any provision in O. 34 and corresponding old Ss. 85 to 99 of the T.P. Act regarding *post diem* interest has also led to curious divergence of views. Some Courts held that the portion of the decree which awards such interest is to be treated as a decree for the payment of money and executed as such. 17 A. 581;

18 A. 316. This view, however, has not been adopted by other Courts which held that it must be treated as part of the mortgage money and is to be recoverable out of the mortgaged property in the same way as the principal and the costs of the suit. 21 C. 274; 18 M. 248; 24 C. 766. This provision is intended to put an end to that divergence. It is proposed to provide that such interest is part of the mortgage money.

No change has been effected in Rr. 9 or 12 to 14.—(*Report of Select Committee.*)

O. 34, R. 10.—O. 34, R. 10, which was added to the C.P. Code in 1930, has no application to a decree for sale passed long prior to it, namely, in 1924. Nor can it affect rights which exist independently of the rights conferred by the preliminary decree. 50 L.W. 889=1940 Mad. 233. Costs which should have been included in the final decree and not so included are not claimable in execution. 44 A. 350=20 A. L.J. 170. Costs allowed in decree form part of the mortgage debt. 24 I.C. 63=A. L.J. 645. See 88 I.C. 829=1925 A. 68. This rule has nothing to do with costs awarded in execution proceedings. 48 A. 682=1926 A. 722 (1)=96 I.C. 592. In a suit under O. 34, the Court is bound to add the costs of the suit to the mortgage money when adjusting the amount to be paid to the mortgagee unless his conduct has been such as to disentitle him from recovering them. The provisions of S. 35, are inapplicable to mortgage suits to which those stated specifically in O. 34, R. 10, C.P. Code, apply. A mortgagee who has been deprived of his costs in a suit under O. 34, is therefore entitled as of right to prefer an appeal as to costs to a higher tribunal. A mortgagee who frivolously resists an application under S. 83, T.P. Act, made by a mortgagor, and contests a suit for redemption without any justification, raising false and frivolous and unfounded pleas, would not only be disentitled to costs, but would also be liable to pay the costs of the mortgagor. 49 L.W. 525=1939 Mad. 654=(1939) 1 M.L.J. 687.

COSTS IN APPEAL.—Decree for costs in appeal, if personal. 19 I.C. 384. But see *contra* in 48 I.C. 329. Where appeal was dismissed with costs and meanwhile final decree was passed by the lower Court appellant would be personally liable for costs. 24 I.C. 873. But see 93 I.C. 223=1926 A. 343, *contra*. Where only one of the defendants appealed, costs awarded are against him personally. 19 I.C. 729. Where application is made for final decree after an appellate decree for costs is passed against one defendant alone, decree-holder cannot ask for costs of appeal to be included with the amount finally held due. 20 I.C. 42=11 A.L.J. 975.

O. 34, R. 11 (new).—The new R. 11 as amended in 1929 only reproduces the view previously held by the majority of the High

Payment of interest. interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely :—

(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage—

(i) on the principal amount found or declared due on the mortgage,—at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable,

(ii) on the amount of the costs of the suit awarded to the mortgagee,—at such rate as the Court deems reasonable from the date of the preliminary decree, and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage-money,—at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine per cent. per annum ; and

(b) subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable—

(i) on the aggregate of the principal sums specified in clause (a) and of the interest thereon as calculated in accordance with that clause ; and

(ii) on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under rule 10.]

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Courts. 63 I.A. 114=15 P. 210=70 M. L.J. 355 (P.C.).

INTEREST PENDENTE LITE—DISCRETION OF COURT TO REDUCE CONTRACT RATE.—R. 11 of O. 34, C.P. Code (which was inserted by Act XXI of 1929), gives a certain amount of discretion to the Court so far as interest *pendente lite* and subsequent interest are concerned and it is no longer absolutely obligatory on the Courts to decree interest at the contractual rate up to the date of redemption in all circumstances if there is no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918. Whether Court would or would not give relief in respect of interest in excess of 9 per cent. per annum and if so, to what extent, will depend on the special circumstances of each case. I.L.R. (1940) Kar. (F.C.) 33=1940 P.W.N. 614=44 C. W.N. (F.R.) 21=72 C.L.J. 165=3 F.L.J. 46=1940 F.C. 20=(1940) 1 M.L.J. (Supp.) 14 O. 34, Rr. 2 and 4 deal respectively with a decree in a mortgage suit for foreclosure and for sale, and the words used in the rules seem to infer that the question of interest up to the date of the decree is one which is not within the discretion of the Court. But R. 11, dealing with interest after the decree, is clearly a matter within the discretion of the Court, as the word used there is "may". 14 Pat. 400=16 Pat.L.T. 579=1935 P. 98. O. 34, R. 11, which must be read with Rr. 2 and 4, gives a discretion to the Court to allow interest up to the date for redemption on the amount found or declared due by the preliminary decree. The interest must be calculated up to the contract rate unless the

Court finds that such a rate is penal or excessive. The Court has no option to disallow interest at that rate, even if it be compound interest, unless of course the rate is found to be penal interest. For the period subsequent to the date of the preliminary decree, however, the Court has under the rule the option to allow or refuse interest. 193 I.C. 661=22 P.L.T. 317. The discretion under O. 34, R. 11 is to be exercised judicially and the principles of S. 74 of the Contract Act must be taken to be the principle which would govern the exercise of such a discretion. 1937 A.M.L.J. 97. Even where there is no express stipulation in a mortgage document for *post diem interest*, such interest may be awarded either under a contract to be implied or as compensation and the usual practice is to award such interest at contract rate. 145 I.C. 762=1933 M. 171. Where a mortgage-deed provides that in case of non-payment of interest for a period of six months such interest was to be added to the principal and interest and compound interest is to run on it, Court can give effect to that provision and allow interest on the aggregate amount and not merely on the principal amount. 151 I.C. 856=1934 O. 473. But see 154 I.C. 46=1935 O. 263. Where in a mortgage bond there is no precise definition of the rate of interest prior to default, it is not possible to draw an inference that the parties intended that after the whole amount became due, interest should be paid at the rate which can be deduced from the arrangement regarding addition of *sawai* and payment by instalments. In such a case Court should allow a reasonable rate of interest after default. Interest allowed at 12 per cent. per annum. 28 N.L.R. 1=

12. Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

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136 I.C. 887=1932 N. 39. See also 1933 M. 171. Though it is correct to allow interest at the bond rate up to the expiry of the period of grace, there is nothing in the Code compelling Court to do so. The statutory authority for allowing interest at bond rate beyond the date of the preliminary decree appears to be in R. 11 and even that only says that the Court "may" order. 140 I.C. 104=13 Pat.L.T. 545=1932 P. 332. Under R. 11 (a) (ii) Court has power to award interest on costs of suit only from date of preliminary decree and not during the pendency of the suit. 154 I.C. 46=1935 O. 263. Under R. 11 (a) (i), Court has power to allow interest at the contractual rate up to the date fixed for payment only on the "principal amount", which means the principal money secured by the deed of mortgage and does not include interest which has accrued due before the suit. An order allowing interest at the contractual rate on the entire amount claimed in the suit, is therefore wrong. (*Ibid.*) As regards interest subsequent to the date fixed for payment, cl. (b) of R. 11 makes provision for interest on the aggregate of the principal sums specified in cl. (a) and of interest thereon as calculated in accordance with that clause at such rate as Court deems reasonable. The usual rate of interest allowed in such cases is 6 per cent. per annum and sufficient grounds have to be made out for allowing interest at a higher rate. (*Ibid.*) See also I.L.R. (1937) All. 584=1937 A.L.J. 324=1937 All. 442. The awarding of future interest rests on the discretion of trial Court, which will not without sufficient grounds be interfered with by appellate Court. 139 I.C. 64=9 O.W.N. 253=1932 O. 255; 8 Luck. 315=1933 O. 128, 1935 P. 98; (1940) 1 M.L.J. (Supp.) 14. Although the mortgage contract expressly provides for interest up to date of realization, the rate of interest after the date fixed by the decree for payment is a matter for the discretion of the Court, but this discretion cannot be exercised by the successor of the Judge who passed the decree. 39 P.L.R. 769=1937 Lah. 894. See also 154 I.C. 46=1935 O. W.N. 228=1935 O. 263 as to award of subsequent interest. In case of mortgage the question as to the rate of interest is to be determined under R. 11 and not S. 34. 1933 O. 128=8 Luck. 315. A decree-holder in a mortgage suit for sale is entitled to interest on the decretal amount from the date of the sale of the mortgaged property to the date of the confirmation of the sale. There is no reason why just because a sum of money which was lying in Court was taken

away by a decree-holder, the decree-holder must be deemed to have taken it away upon the footing of full satisfaction of the decree or of the amount legitimately due to him. He can claim interest due to him on his claim even when his original claim is satisfied from the deposit in Court. 169 I.C. 432=1937 Rang. 193.

O. 34, R. 12.—The provisions of this rule apply to usufructuary mortgages. 30 M. 408. The rights of a prior mortgagee though *ex parte*, can be determined in a suit by puisne mortgagee. 27 I.C. 164. A sale without reference to a prior mortgagee and without his consent free of his mortgage is irregular. 19 I.C. 2 (R.). Sale in execution of mortgage decree—Proclamation exempting purchaser from liability for outgoings prior to date of payment of purchase money—Charge for arrears of taxes to Corporation not mentioned—Rights of purchaser and decree-holder. 61 C. 956=38 C.W.N. 971=1934 C. 842. A puisne mortgagee has no power to sell free of prior mortgage without consent of prior mortgagee who therefore can subsequently sue on his own mortgage. 47 C. 662=47 I.A. 11=38 M.L.J. 424 (P.C.). See also 45 C.W.N. 705. The rule does not require that the consent of the plaintiff is necessary or of any other person besides the prior mortgagee. The rule does not moreover say that Court can make such an order only on the application of the plaintiff or any specified person. The rule confers a general power on Court which Court can exercise so long as the conditions are satisfied on the application of anybody or even of its own motion. Where in a sale of the mortgaged properties in execution of a decree in a suit on a subsequent mortgage the prior mortgagee applied praying the properties be sold free of his prior mortgages. Held, that R. 12 applied to the case and that executing Court had power to grant the order prayed for. 157 I.C. 40=1935 M. 453. But see *contra* 41 L.W. 565=1935 M. 660=68 M.L.J. 738, where it was held that a prior mortgagee can himself make no application under R. 12. It is the decree-holder in the suit who alone can make the application; when he makes it, the prior mortgage, whose rights must be safeguarded, has to be consulted as to whether he prefers to have the sale subject to or free of his mortgage. It is not necessary that the decree should reserve rights admitted by the parties and order the sale to be subject to them. As to how a decree which omits to reserve such rights is to be construed, see 29 M. 84. A sale cannot be held subject to a puisne mortgage, whether the same is in favour of a third party or the decree-

Application of proceeds.

13. (1) Such proceeds shall be brought into Court and applied as follows:—

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882.

14. (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage,

Suit for sale necessary for bringing mortgaged property to sale.

he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute

such suit notwithstanding anything contained in Order II, rule 2.

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holder. 25 M. at 114. O. 34, R. 12 does not contemplate an enquiry in execution as to whether a person who is a stranger to the suit is a prior mortgagee or not. R. 12 contemplates the admitted existence of a prior mortgage and lays down the procedure for bringing mortgaged property to sale, the prior mortgagee being given the option of having the property sold subject to his mortgage or free of it. In the latter case, he is entitled to have his mortgage discharged out of the proceeds of the sale. R. 12 does not in any case empower the executing Court, whose primary duty is to execute, to go into a full enquiry into the claims of a person who is not a party to the suit, but who claims to be a prior mortgagee and applies under R. 12 for sale of the property free of his mortgage, in order that an order may be passed under the rule in his favour. 45 L. W. 646=1937 Mad. 554. Where a purchaser in a mortgage decree by a prior mortgagee to which the subsequent mortgagee was not a party is impleaded by the subsequent mortgagee in his suit and the property is sold at auction against him, he is bound by the proceedings in that suit. He might either avail himself of the provisions of Rr. 12 and 13 and claim that the property should be sold free from his encumbrance and that his amount should be paid to him in the first instance, or he may redeem the subsequent mortgage and prevent the sale of property. By allowing the property to be sold against him, he loses his right of redemption. If he does not avail himself of either of these rights and rests content with sale of the property taking place, subject to his previous mortgage, he can have no remedy

except that of suing on the previous mortgage provided limitation has not expired. 147 I.C. 380=1934 A.L.J. 188=1934 A. 73. Order under R. 12 is not a decree—No appeal lies. See 45 L.W. 646=1937 Mad. 554.

O. 34, R. 13.—Rule applies to sales held free of prior mortgages and the principle of the rule applies also to the appropriation of sale proceeds held subject to a mortgage. 28 I.C. 691=25 M.L.J. 552. A puisne mortgagee who is not a party to the suit can claim the surplus sale proceeds. 90 I.C. 410. R. 13 does not apply to the case of a surety who is made liable for interest under a mortgage decree. The rule is meant to regulate the position as between the mortgagor and mortgagee and to protect the position of the mortgagee. Therefore when the mortgaged properties are sold under the decree, the surety cannot claim that the interest must be deemed to have been paid out of the sale proceeds under Cl. (3) of R. 13. The claim for interest due by the surety is a claim apart from the claim upon the mortgage. It is in reality a separate cause of action. The surety still remains liable to pay the interest due. 158 I.C. 126=1935 L. 334.

O. 34, R. 14: SCOPE.—See 1939 A. 579. This rule does not apply to consent decrees, because the mortgagor can waive the benefit of the rule. 157 I.C. 292=1935 N. 129. The protection which is given by O. 34, R. 14, can always be waived by the mortgagor. If the mortgagor waives his rights under the rule, although such waiver might not affect the position of persons deriving title from him, a creditor of the mortgagor who has attached the mortgaged property is not in a position to insist upon the provisions of the rule in spite of the waiver by the

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended.

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mortgagor. 41 C.W.N. 1133. The rule is really intended to create a prohibition to the mortgagee securing the sale of the mortgaged property without first bringing a suit for the sale thereof. 16 L. 640=1935 L. 672 (F. B.) And also to a creditor who has obtained a simple money decree in satisfaction of a claim arising under the mortgage to put the mortgaged property itself to sale in execution of his decree as long as the mortgage subsists. 1936 A.L.J. 692=1936 A. 663. The plain language of O. 34, R. 14 implies obviously that the claim arising under the mortgage must be a claim for which the mortgage is still enforceable and upon which a suit could be brought. Where a suit for sale on the basis of the mortgage has already been brought and a decree for sale has been refused, it is impossible to hold that in such a case the provisions of O. 34, R. 14 can have any application. 20 Pat. 751. Difference between the provisions of this rule and S. 99, T.P. Act is that by the repeal of S. 99, a mortgagee can sell the mortgaged property on a claim unconnected with the mortgage. See 1925 M.W. N. 907=49 M.L.J. 643; 33 M.L.J. 601=6 L.W. 701; also 35 B. 248=13 Bom.L. R. 245. This rule is an exception to O. 2, R. 2. The personal remedy under a personal covenant in a mortgage-deed cannot be had by sale of the property mortgaged. 63 I.C. 303; also 2 P.L.J. 55=38 I.C. 791. Where a lease back by a mortgagee is part of the same transaction of a usufructuary mortgage and is merely a piece of machinery for realising the interest on the mortgage, a suit for rent under that lease would in fact be a suit to realise the interest on the mortgage, and under the decree in such a suit the equity of redemption cannot be brought to sale unless the suit was actually framed as a suit on the mortgage. The fact that mortgage was executed on one day and the lease was on the next day has very little bearing on the question whether the two form part of the same transaction. 50 L.W. 677=1939 M.W. N. 1145=(1940) 1 M.L.J. 143. Where defendant brought a summary suit to enforce a charge which the mortgagors had created in his favour subsequent to the mortgage, but he omitted to sue on the mortgage or reserve his rights to do so, *held*, on a subsequent suit on the mortgage by the defendant, that the suit was barred by O. 2, R. 2; and that R. 14 did not apply as it was confined to mortgages of immovable property. 34 Bom.L.R. 1615. Where a mortgagee exempts a certain item of security from the mortgage suit and brings the remaining property to sale and on its being insufficient obtains a decree under O. 34, R. 6 it could be executed against the exempted item, as by the operation of O. 2,

R. 2 the mortgage security no longer exists; O. 34, R. 14 (1) is not a bar to the sale of such property, for the sub-rule cannot apply to a simple money decree under O. 34, R. 6. I.L.R. (1938) All. 466=1938 A.L.R. 423. The rule applies to enforcement of a charge for rent payable in money to the landlord by tenant. 39 M.L.J. 30=43 M. 786. See *contra* 48 I.C. 694=42 M. 114; 1927 C. 884=104 I.C. 353 (1)=55 C. 104. The rule does not apply to the case of a mortgage which did not or which could not come into operation. 55 I.C. 417. Nor to a consent decree in suit for dissolution of partnership, creating charge. 60 C. 1467=149 I.C. 224=1934 C. 327. Where the compromise in which the liability under the suit promissory note became merged created a mortgage or charge and the decree that followed related to the satisfaction of the claim arising under the mortgage or charge, *held*, that R. 14 applied even if it be assumed that mortgage or charge must precede the decree. 138 I. C. 603=1932 A.L.J. 486=1932 A. 439. An order directing security to pay does not amount to a decree for the payment of money within this rule. 38 I.C. 130. A sale in contravention of S. 99 is merely irregular and is valid unless set aside before confirmation. 97 I.C. 256. See also 11 O.W.N. 1403=1935 O. 183.

MEANING OF TERMS.—“Mortgagee” in this rule means the holder of a subsisting and effective mortgage. 39 A. 86=14 A.L.J. 902. The words “bringing the property to sale” include not only all the steps preliminary to sale but the sale itself. 41 I.C. 73=45 C. 530. Only sale should not be held, attachment in execution of money decree is not prohibited. 18 I.C. 201=4 O.L.J. 571.

CHARGE.—Rule applies only where the charge was created prior to decree. 46 I. C. 169; also 1925 M.W.N. 907=49 M.L. J. 643; and not where money decree itself creates charge, 36 Bom.L.R. 523=151 I.C. 96=1934 B. 241. See also 30 N.L.R. 325=150 I.C. 492=1934 N. 147. Where mortgagee pays Government revenue to protect his mortgage lien, his remedy is by suit under this order. 5 P.L.J. 248=1 P.L.T. 225. A charge created by will not compulsorily registrable, whose terms the auction-purchaser could not be cognizant of, cannot be enforced against the latter. 23 I.C. 867=1 O.L.J. 43.

CLAIM UNDER MORTGAGE.—A mortgagee granting lease of property to the mortgagor cannot bring to sale the property, under a rent decree based on the lease. To escape this rule, the claim should be unconnected with the mortgage transaction. 1 P.L.T. 694=57 I.C. 384; also 41 A. 399=17 A. L.J. 481; 1925 M. 127=47 M.L.J. 798; 44 B. 366=22 Bom.L.R. 131. See *contra* 47 C. 377=24 C.W.N. 229 (F.B.). A decree for costs in a suit for possession by

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mortgagee against mortgagor can be executed by sale of equity of redemption. It is not a claim arising under the mortgage. 35 A. 518=11 A.L.J. 841; *also* 20 I.C. 898=16 O.C. 350. A decree-holder seeking to execute his decree for costs of the Privy Council against the property offered as security must proceed by suit as it is a claim arising under the mortgage. 27 I.C. 365=19 C.W.N. 178. A decree-holder getting a money decree on a mortgage bond with a declaration of lien on the property cannot bring the property to sale but must sue on the basis of the declared lien. 40 I.C. 230=25 C.L.J. 354. A security bond for due performance of appellate decree can be enforced in execution. 18 I.C. 900=17 C.L.J. 267 (F.B.); *also* 1925 M.W.N. 907=49 M.L.J. 643; 149 I.C. 1104=1934 A.L.J. 865=1934 A. 524 (1). A mortgagee can very well purchase equity of redemption sold in execution of a money decree by a stranger. 43 I.C. 212=27 C.L.J. 431. A mortgagee can sell mortgaged property in execution, in a claim unconnected with the mortgage. 30 I.C. 988=42 C. 780; 18 P.R. 1916=33 I.C. 802; 20 I.C. 523=7 S.L.R. 11; 27 C.W.N. 38=37 C.L.J. 265. It is not sufficient if the claim is *connected with* the mortgage. It must also be one arising under the mortgage. Thus equity of redemption may be sold in execution of money decree obtained by mortgagee for payment of land revenue to save mortgaged property from revenue sale. 1935 R. 438. *See also* 1936 R. 47. O. 34, R. 14 can come into play obviously only if the mortgagee and the decree-holder can be identified as the same person or the same legal entity. Where a mortgage is executed in favour of a Hindu father, and afterwards a promissory note is executed by the mortgagor in favour of the son of the mortgagee for the amount of interest due under the mortgage, a decree obtained by the son on the promissory note can be executed by attachment and sale of the mortgaged properties. O. 34, R. 14 does not apply to such a case so as to bar the attachment and sale of the mortgaged properties in execution of the decree on the promissory note. The mortgagee (father) and the decree-holder (son) are two different persons, although both the mortgage money and the interest are due to the joint family of which the father and son are members. 49 L.W. 411. The word "mortgagee" in R. 14 of O. 34, Civil Procedure Code, is intended to mean the holder of a subsisting and effective mortgage which could still be set up by the mortgagee against the purchaser or would be purchaser of the mortgaged property. Hence where in a suit on a mortgage executed by the father of joint Hindu family, the sons impugn the validity of it, and the mortgagee abandons his claim on the mortgage and rests content with a simple money decree against the mortgagor, there is no subsisting mortgage after the decree and it is not open to

the mortgagee to bring a separate suit for the enforcement of such a mortgage as provided by O. 34, R. 14. He is clearly entitled to attach the interest of the mortgagor and put it up for sale and O. 34, R. 14 is no bar to his so doing, for it has no application to the facts of this particular case. 1939 O.W.N. 227=1939 Oudh 126.

MONEY-DECREES.—Where in a suit for sale only a money-decree was passed, the mortgage having been held to be unenforceable, this rule does not bar sale in execution of the money-decree. 18 A.L.J. 677=42 A. 566; *also* (1937) 1 M.L.J. 469; 41 M.L.J. 150=14 L.W. 331=62 I.C. 756; 19 A.L.J. 728=43 A. 677. Where therefore in a suit on a mortgage executed by a Hindu father the sons successfully impeach the mortgage as having been made without legal necessity or other justifying cause and a simple money decree is passed against the father, R. 14 is no bar to the decree-holder obtaining satisfaction of his decree by attachment and sale of the property covered by the mortgage-deed. 157 I.C. 1010=1935 A. 507; so also where it is found that amount claimed is not charged on mortgaged property, and money decree above is granted. 1936 A. 8=1935 A.L.J. 407. Mortgage—Suit on—Claim for money decree only—If bar to subsequent suit for sale. (1937) 1 M.L.J. 469. Mortgagee sued for money decree and stated in the plaint that he surrendered the mortgage security; on applying for leave to execute the money decree against property which was security for loan, *held*, that mere averment in the plaint that the mortgagee gave up the right under the mortgage for the purposes of the suit did not extinguish the mortgagee's rights and that therefore provisions of R. 14 would apply. 13 R. 292=157 I.C. 363=1935 R. 132. A sale in execution of a money decree for the mortgage debt in favour of the mortgagee can be set aside in a redemption suit by the mortgagor even after confirmation of sale. 46 I.C. 493=28 C.L.J. 151. *Also* 36 A. 516=12 A.L.J. 855. But *see contra* 37 A. 165=13 A. L. J. 138 (F.B.). *Also* 41 B. 357=19 Bom.L.R. 75; 47 C. 377=24 C.W.N. 229 (F.B.); 18 P.R. 1916=33 I.C. 802; 15 I.C. 589. The mortgagee purchaser in contravention of this rule is not a trustee for the mortgagor. 50 I.C. 472. *Also see* 47 C. 377=24 C.W.N. 229 (F.B.). But when in a consent decree a charge was created, the decree can directly be executed and no separate suit to enforce the charge is necessary. 35 C.L.J. 61=1922 C. 35. *Also* 2 P. 787; 103 I.C. 449. *Contra* 22 Bom.L.R. 650=44 B. 981. It can have no application where the charge is created by the decree itself. 43 B. 631=21 Bom. L.R. 698; 157 I.C. 292=1935 N. 129. But *see* 1935 M.W.N. 1236=69 M.L.J. 854, where it was held, that the holder of a decree which declares in favour of the plaintiff a charge on certain properties for unpaid purchase-money cannot bring the properties to sale by execution of the decree, without

¹[15. All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds within the meaning of section 58, and to a charge within the meaning of section 100 of the Transfer of Property Act, 1882.]

LEG. FEF.

¹ This rule was substituted by Act XXI of 1929.

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getting a preliminary decree for sale as contemplated by O. 34, R. 14. The rule does not apply to a case where a money decree is given under a different mortgage. 49 B. 208=27 Bom.L.R. 202; 1931 A.L.J. 159=1931 A. 350. Where the whole of the property mortgaged was leased to the mortgagor by the mortgagee, a decree for arrears of rent represents in substance the usufruct of the mortgaged property and the decree is a decree which the mortgagee has obtained for the payment of money in satisfaction of a claim arising under the mortgage. So, he could not by reason of the provisions of R. 14 attach the property and put the same up for sale. 1936 A.L.J. 1218=1936 A. 708. See also 40 C.W.N. 343. A maintenance decree-holder can proceed in execution against the property charged under the maintenance decree. 47 I.C. 630=23 M.L.T. 355; also 6 P.L.T. 802=4 P. 693. See also 12 P. 359=145 I.C. 1=1933 P. 306. Even a decree-holder attaching a maintenance decree with charge, is entitled in execution to bring the charged property to sale. 148 I.C. 196=1934 N. 83. Under this rule property given as security in a compromise decree could not be subject to sale in execution of the decree. 37 I.C. 397. Where a money decree is ordered to be paid in instalments on the judgment-debtor executing a security bond hypothecating immovable property for the satisfaction of the decree and default is committed in the payment of instalments, the hypothecated property can be sold in execution of the decree and a fresh suit is not necessary. 15 P. 545=1936 P. 289. The rule does not prevent sale of the mortgaged property of a surety under a compromise decree where the suit was for money. 38 A. 327=14 A.L.J. 385. Where security is given to a Court itself, a fresh suit upon the security is not necessary. The security can be realised in execution. 30 C.W.N. 683=95 I.C. 908=1926 C. 889. Where a security bond is executed to get a stay of execution of a simple money decree, and the amount is not paid as agreed, the property can be sold without having recourse to a separate suit. O. 34, R. 14 does not apply to such a case, as there is no decree for payment of money in satisfaction of any claim on any mortgage. 1940 A.L.J. 164=1940 All. 196. The defendant executed a security bond whereby he undertook to pay on behalf of another and he also undertook that if he failed to pay, the properties mentioned in schedule attached to the bond were to be security

and the plaintiff was to have first charge over them. The deed was duly registered. The amount was not paid by both and plaintiff sued defendant for payment of the amount and on non-payment, sale of land offered as security was asked for. Court gave only a money decree and plaintiff applied in execution for attachment and sale of property. Defendant objected that the properties cannot be sold except by a suit under R. 14, for enforcement of mortgage. Held, that the suit of the plaintiff must be considered as a suit on a mortgage, that as the relief as to sale of property was refused in the suit, a suit under R. 14 would be barred under Expl. 5, S. 11, that the mortgage was not existing after refusal of such relief and that plaintiff was entitled to have the decree executed by attachment and sale. 145 I.C. 373=1933 R. 158. R. 14 relieves a plaintiff from the bar of *res judicata* contained in O. 2, R. 2 but not the bar under S. 11. 145 I.C. 373=1933 R. 158. An arrangement for maintenance payable by a zemindar and his heirs to the junior members creates a charge on the assets of the Zemindary. 42 M. 581=36 M.L.J. 164=23 C.W.N. 549 (P.C.). The limitation period to set aside sale in contravention of this rule is three years. 1920 P. H.C.C. 259. Cf. 41 I.C. 533=2 P.L.J. 587. Where a person hypothecates his properties as security for mesne profits that might be awarded by an appellate Court and executes a bond without naming the obligee, a suit to enforce the obligation against the surety is not maintainable. The remedy is by application in the original suit itself to make the surety a party and pass a decree against him for mesne profits. 42 A. 158=46 I.A. 228=33 M.L.J. 302 (P.C.). By reason of the provisions of O. 34, R. 14 read with R. 15, C.P. Code, a chargee may bring a suit to recover the money charged on immovable property and may subsequently bring a suit to bring that immovable property to sale in satisfaction of his decree. A chargee cannot, on obtaining a money decree, execute that decree against the charged property. He must by a subsequent suit bring the charged property to sale. O. 34, R. 14 and 15 are an exception to the general rule laid down in O. 2, R. 2. 21 Pat.L.T. 262=1940 Pat. 283.

O. 34, R. 15.—A charge is not exactly identical with a mortgage, and although a similar remedy is available, a suit for the enforcement of a charge is not necessarily the same as a suit for sale on the basis of a mortgage deed. The general principle that, at a mortgage sale, the auction-purchaser takes the security free of the mortgage may

LOC. AM.—[OUDH.] In O. 34, r. 15, *read* r. 15 as r. 15 (1) and *add* the following as r. 15 (2):—

“(2) Where a decree orders payment of money and charges it on immovable property on default of payment, the amount can be realised by sale of that property in execution of that very decree.”

ORDER XXXV.

Interpleader.

1. In every suit of interpleader the plaintiff shall,
 Plaintiff in interpleader-suits. in addition to other statements necessary for plaints, state—
 - (a) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs ;
 - (b) the claims made by the defendants severally ; and
 - (c) that there is no collusion between the plaintiff and any of the defendants.
2. Where the thing claimed is capable of being paid into Court or placed
 Payment of thing claimed into Court. in the custody of the Court, the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit.
3. Where any of the defendants in an interpleader-suit is actually suing the
 Procedure where defendant is suing plaintiff. plaintiff in respect of the subject-matter of such suit, the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which

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apply in the case of a single charge because, by reason of the sale, all dues on the charge would usually be liquidated either by the sale proceeds or by means of a personal decree under O. 34, R. 6. In the case of a recurring charge however, even although the charged property might be sold in execution of a decree for arrears payable in respect of the sum charged, the liability in respect of future payments would ordinarily remain after the sale and would not be extinguished by the sale of the charged property in satisfaction of a decree for arrears which might have already accrued. In such a case the charge will not be extinguished by the sale and, as a charge is attached to the property charged, the auction-purchaser would ordinarily get the purchased property subject to the charge. (1933 All. 934, Rel. on.) 44 C.W.N. 240=1940 Cal. 60. Where in a suit for the recovery of money, defendants accept a personal decree against themselves, and submit to a declaration in the decree that a portion of their immovable property should be charged for payment of the decretal amount, the decree is nothing but a personal decree, and although it also creates a charge, it cannot be regarded as a decree under O. 34. 150 I.C. 95=1934 N. 140. The rule applies to enforcement of a charge, payable in money. 39 M.L.J. 30=43 M. 786. Because the words of S. 100 of the T. P. Act are very wide the provisions of S. 68 as to the liability of a mortgagor apply to a person creating a mere charge also. 33 I.C. 321=27 M.L.J. 494. A charge-holder is, as much as a mortgagee, entitled to a personal remedy in the event of deficiency of the proceeds of sale. 59 C. 1314=36 C. W. N. 709=1932 C. 775. See also I.L.R. (1937) 1 Cal. 203

=64 C.L.J. 280=1937 Cal. 129. Where in execution of a decree in a suit to enforce a charge the charged property is sold without there being any preliminary decree for sale as in ordinary mortgage suit, this can be regarded only as an irregularity. 44 C. W. N. 240=1940 Cal. 60. A person who has obtained a charge decree in respect of a property for royalties due to him from the property, has no right to insist on retaining possession of the property as against an execution purchaser till his dues are paid, when the possession held by him is not attributable, to the mortgage or charge. He can insist on his due being paid if he has been let into possession by the mortgagor on the person against whom the charge was held. But when his possession is not so attributable, but wrongful, as having been wrested from the execution-purchaser, he cannot insist on possession being retained till his dues, i.e., the amounts due under the charge decree are paid. I.L.R. (1937) 1 C. 203=64 C.L.J. 280=1937 C. 129. See also 1941 Bom. 71 (applicability of O. 34 to charges created by decrees).
O. 35, R. 1.—When the preliminary decree is passed in an interpleader suit it becomes to all intents and purposes a partition suit. 1930 M. 988=60 M.L.J. 79. Interpleader suit—Interest sufficient to disentitle plaintiff from suing—Applicability of English Law. See 4 R. 465. Where a mortgagee does not deny an assignment by him of his rights under the bond but contends that it is void, the mortgagor is not bound to bring an interpleader-suit making the mortgagee and his assignee to interplead as between them. 1 L. W. 419=23 I.C. 607=27 M.L.J. 134.
O. 35, R. 2.—Investment of money deposited in Court pending decision with a party is objectionable as the successful party is

the interpleader-suit has been instituted, stay the proceedings as against him ; and his costs in the suit so stayed may be provided for in such suit ; but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader-suit.

Procedure at first hearing.

4. (1) At the first hearing the Court may—

(a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit ; or

(b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit.

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—

(a) that an issue or issues between the parties be framed and tried, and

(b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff, and shall proceed to try the suit in the ordinary manner.

5. Nothing in this Order shall be deemed to enable agents to sue their principals,

Agents and tenants may not institute interpleader-suits.

or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

Illustrations.

(a) A deposits a box of jewels with B as his agent. C alleges that the jewels were wrongfully obtained from him by A, and claims them from B. B cannot institute an interpleader-suit against A and C.

(b) A deposits a box of jewels with B as his agent. He then writes to C for the purpose of making the jewels a security for a debt due from himself to C. A afterwards alleges that C's debt is satisfied, and C alleges the contrary. Both claim the jewels from B. B may institute an interpleader-suit against A and C.

6. Where the suit is properly instituted the Court may provide for the costs

Charge for plaintiff's costs. of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way.

ORDER XXXVI.

Special Case.

1. (1) Parties claiming to be interested in the decision of any question

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entitled to the money from Court without further proceedings. 24 M.L.J. 404=19 I. C. 219.

O. 35, R. 4.—A plaintiff in an interpleader suit is entitled to apply to the Court as soon as the pleadings have been completed, for an order that those persons who have adverse claims to the property in dispute should continue their contest without having the plaintiff retained on the record. This will save costs not only for the plaintiff but also for the defendants themselves. The expression "first hearing" in O. 35, R. 4, means the date on which the Court goes into the pleadings in order to undersatnd the contentions of the parties. 41 C.W.N. 1219. Interpleader suit—Non-appearance of claimants—Procedure. 53 I.C. 365=21 Bom.L.R. 948.

O. 35, R. 5.—A Railway Company by accepting goods for carriage does not become the agent of the consignor within the meaning of the rule. The company may file an interpleader suit. 28 I.C. 948=17 Bom. L.R. 339. A tenant has no right to bring

a suit to determine whics of the two defendants, both of whom claim rent from him is his landlord. 48 I.C. 733; 13 I.C. 40=15 C.L.J. 653. The objecet of O. 35, R. 5 is to prevent a tenant from compelling his landlord to have his title determined as against a stranger, and an interpleader suit is maintainable if the landlord, subsequent to the letting, does anything whereby his right to recover the rent is entangled. I.L.R. (1939) Bom. 383=41 Bom.L.R. 460=A.I.R. 1939 Bom. 249. S. 116 of the Evidence Act prevents a tenant from denying the title of his landlord at the commencement of his tenancy, and the tenant cannot therefore bring a suit in which a claim inconsistent with his landlord's title at that time is to be limited. In order therefore that a tenant may maintain an interpleader suit, the claim of the party other than the landlord must be consistent with the title of the landlord at the commencement of the tenancy in question. I.L.R. (1940) Bom. 842=42 Bom. L.R. 881=A.I.R. 1940 Bom. 414.

O. 36, R. 1.—Where a special case is

Power to state case for of fact or law may enter into an agreement in writing Court's opinion. stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,—

(a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them ; or

(b) some property, movable or immovable, specified in the agreement, shall be delivered by one of the parties to the other of them ; or

(c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and specify such documents as may be necessary to enable the Court to decide the question raised thereby.

2. Where the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement.

Where value of subject-matter must be stated.

3. (1) The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement.

Agreement to be filed and registered as suit.

(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them as defendant or defendants ; and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented.

Parties to be subject to Court's jurisdiction.

4. Where the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein.

Hearing and disposal of case. 5. (1) The case shall be set down for hearing as a suit instituted in the ordinary manner, and the provisions of this Code shall apply to such suits so far as the same are applicable.

(2) Where the Court is satisfied after examination of the parties, or after taking such evidence as it thinks fit,—

(a) that the agreement was duly executed by them,

(b) that they have a *bona fide* interest in the question stated therein, and

(c) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so pronounced a decree shall follow.

ORDER XXXVII.

Summary Procedure on Negotiable Instruments.

Application of Order.

1. This Order shall apply only to—

(a) the High Courts of Judicature at Fort William, Madras and Bombay ;

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stated by consent it can only be re-opened by mutual consent. 43 B. 281=20 Bom.L.R. 839.

O. 36, Rr. 2 and 3.—Where the case referred began by saying that the parties had concurred in stating the question of law arising therein in accordance with the Code for the opinion of the Court and ended by setting out the question but it did not contain an agreement by the parties to pay money

or deliver property consequent on the finding by the Court, *held*, that the provisions of S. 90 and O. 36, R. 2 of the Code were not satisfied. Under these sections the filing of a proper agreement is a necessary condition. 32 Bom.L.R. 416=1930 B. 232. Special case submitted for opinion and declaration—Other efficacious remedy open to parties under Special Act—Case whether one "fit to be decided". 1930 B. 232.

O. 37, R. 1.—Other conditions being ful-

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(c) the Court of the Judicial Commissioner of Sind ; and
(d) any other Court to which sections 532 to 537 of the Code of Civil Procedure, 1882, have been already applied.

LOC. AMS.—[ALLAHABAD.] Add cl. "(e) any Court in the Province of Agra exercising the powers of a Small Cause Court."

[BOMBAY.] Substitute in the heading of O. 37, the words "summary procedure" for the words "summary procedure on negotiable instruments."

[CALCUTTA.] In r. 1 of O. 37 :—

(a) in cl. (c) the word "and" shall be omitted.

(b) after cl. (c) the following clause shall be inserted namely :—

"(cc) all Civil Courts (except Courts of Small Causes) in the districts of Chittagong, Dacca, Pabna, and 24 Parganas ; and"

[LAHORE.] R. 1.—Add the words "and" and the following as Cl. (e):—

"(e) The Courts of the District Judge and the Subordinate Judges of the First Class of the Delhi Province and the Courts of the District Judges and Subordinate Judges of the first class in the civil districts of Lahore and Amritsar in the Province of the Punjab."

[MADRAS.] Rule 1.—Insert the following as cl. (b) :—

"(b) The Madras City Civil Court."

2. (1) All suits upon bills of exchange, hundies or promissory notes may, in case the plaintiff desires to proceed hereunder, be

Institution of summary suits upon bills of exchange, etc. instituted by presenting a plaint in the form prescribed; but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.

LEG. REF.

¹ Entry relating to the Chief Court of Lower Burma was omitted by A.O., 1937

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filled a suit on a Shah Jog hundi will lie under O. 37. 98 I.C. 78=1927 S. 90. Suit on hundi or in the alternative for compensation is maintainable under O. 37. 1928 S. 86=107 I.C. 218. A suit on a negotiable instrument provided for under O. 37, falls under the category of suits of the nature referred to in S. 128 (2) (f) and Art. 5 of Limitation Act applies to such cases. 1927 S. 90=98 I.C. 78. O. 37 refers only to the mode of trial in suits and does not confer any jurisdiction. 13 I.C. 244=5 S.L.R. 155. In a suit on promissory note oral agreement as to payment of interest cannot be set up to obtain a decree thereon. 49 C. 716=1922 C. 513. Where in a suit on a pro-note under O. 37, defendant applies for leave to appear and defend the suit, and Court doubts the sincerity of the defence, it should grant leave on condition that he should pay into Court the amount claimed. 60 I.C. 639=12 L.W. 712. In summary suits under O. 37, it is impossible to go into partnership accounts and so the plea that it is part of partnership account cannot be raised. 9 I.C. 299. Cl. (e) to R. 1, added by Lahore High Court, is not *ultra vires*. 8 L. 156=9 Lah. L.J. 57=1927 L. 174. Subordinate Judge invested with Small Cause powers has not, when exercising those powers, authority to act under R. 1. 51 M. 491=55 M.L.J. 114=1928 M. 517.

O. 37, R. 2.—The effect of R. 2 is that if Judge refuses leave to defend or gives leave on terms which defendant is not able to comply with, the plaint is taken to be admit-

ted and plaintiff becomes automatically entitled to a decree. So such an order is a 'judgment' within the meaning of cl. 15 of the Letters Patent and an appeal lies therefrom. 34 Bom.L.R. 252=1932 B. 163. The acceptor, drawer and endorser may be sued in one suit. 16 C. 804. The operation of S. 80 of the Negotiable Instruments Act is not excluded by this rule. On the other hand, it makes S. 79 or 80 of the Negotiable Instruments Act, as the case may be, specifically applicable to a case filed under O. 37 of the Code. Where a person claimed in the plaint 33½ per cent. interest on instruments of debt which contained no agreement as to the exact rate of interest, *held*, interest should be awarded at the rate of 6 per cent. from the date of hundies to the date of decree and subsequent interest also at the same rate thereafter. 56 M. 398=1933 M. 299=64 M.L.J. 117. Interest cannot be recovered unless specified in the note and no evidence regarding any agreement to pay can be given. 30 C. 446. O. 37 contains provision for summary procedure, which is antagonistic to an investigation of claims to a set-off, unless of the clearest description. 49 I.C. 193=12 S.L.R. 70. An affidavit in support of an application for leave to defend as required must disclose facts sufficient to support the application. 49 I.C. 193. Firm being sued—Partner entering appearance should obtain leave to defend. 50 B. 666=1926 B. 585. If a defendant who has obtained no leave to defend a summary suit can ask the Court to make the decretal amount payable by instalments. 50 B. 262=1926 B. 250=94 I. C. 9. Suit under—Plaintiff's right to costs—Suits cognisable by Small Cause Court—Need for certificate of Judge—Presidency

(2) In any case in which the plaintiff and summons are in such forms, respectively the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaintiff shall be deemed to be admitted, and the plaintiff shall be entitled to a decree—

¹[(a) for the principal sum due on the instrument and for interest calculated in accordance with the provisions of sec. 79 or sec. 80, as the case may be, of the Negotiable Instruments Act, 1881, up to the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less, and for interest up to the date of the decree at the same rate or at such other rate as the Court thinks fit; and

(b) for such subsequent interest, if any, as the Court may order under section 34 of this Code; and

(c) for such sum for costs as may be prescribed:

Provided that, if the plaintiff claims more than such fixed sum for costs, the costs shall be ascertained in the ordinary way.

(3) A decree passed under this rule may be executed forthwith.]

LOC. AM.—[BOMBAY.] The following shall be substituted for sub-rr. (1) and (2) of r. 2:—

"2. (1) All suits upon bills of exchange, hundis or promissory notes and all suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest, arising on contract express or implied or on an enactment where the sums ought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty, or on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only, or in suits in which the landlord seeks to recover possession of immovable property, with or without a claim for rent or mesne profits against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent or against persons claiming under such tenant may, in case the plaintiff desires to proceed hereunder be instituted by presenting a plaint in the form prescribed, but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.

(2) In any case in which the plaintiff and summons are in such forms respectively, the defendant shall not defend the suit unless he enters an appearance and obtains leave from a Judge as hereinafter provided so to defend, and in default of his entering an appearance and of his obtaining such leave to defend, the allegations in the plaintiff shall be deemed to be admitted, and the plaintiff shall be entitled to a decree for possession and/or as the case may be for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) to the date of the decree, and such sum for costs as may be prescribed, unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be executed forthwith."

[RANGOON.] In O. 37, r. 2, sub-r. (2) the following shall be inserted after the words "pursuance thereof":—

"Or of his applying for such leave within ten days from the service of the summons on him and on proof that the summons was duly served on him more than ten days before."

3. (1) The Court shall, upon application by the defendant, give leave to Defendant showing defence appear and to defend the suit, upon affidavits which on merits to have leave to disclose such facts as would make it incumbent on the appear. holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

LEG. REF.

¹ These words were substituted by Act XXX of 1926.

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Small Cause Courts Act, S. 22. 56 C. 484 = 33 C.W.N. 95 = 1929 C. 560. In a suit on a promissory note the plaintiff referred to the pledges in respect of the jewellery for payment of money due in respect of the promissory note but asked leave under O. 2, R. 2 to reserve his right as such pledgee. The defendant applied for leave to defend on the ground that since the execution of the promissory note various amounts had been paid in satisfaction and that upon proper account being taken it would be found that

the amount claimed was in excess of the amount due. *Held*, that leave to defend be granted on the defendant giving security for costs only. 1936 C. 476.

INSTALMENT ORDER—JURISDICTION TO HEAR DEFENDANT.—At the time of passing a decree under R. 2, Court has jurisdiction to hear defendant on the question whether or not the amount held to be due from him should be made payable by instalments. The effect of R. 2 is not to abrogate the jurisdiction of Court which it otherwise possesses in respect of it. 11 R. 424 = 1933 R. 245.

O. 37, R. 3: LEAVE TO DEFEND—GRANT OF —TEST.—The question to be considered on an application under R. 3 is whether or not

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit.

LOC. AMS.—[BOMBAY.] The following shall be substituted for r. 3 :—

"3. (1) The plaintiff shall together with the writ of summons under r. 2 serve on the defendant a copy of the plaint and exhibits thereto, and the defendant may at any time within ten days of such service enter appearance. The defendant may enter an appearance either in person or by an attorney. In either case an address for service shall be given in the memorandum of appearance, and unless otherwise ordered all summons, notices, or other judicial process required to be served on the defendant shall be deemed to have been duly served on him if left at his address for service. On the day of entering appearance, notice of the appearance shall be given to the plaintiff's attorney (or if the plaintiff sues in person to the plaintiff himself) either by notice delivered, at or sent by prepaid letter directed to, the address of the plaintiff's attorney or of the plaintiff as the case may be.

(2) If the defendant enters an appearance the plaintiff shall thereafter serve on the defendant a summons for judgment returnable not less than ten clear days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

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a triable issue is disclosed by defendants on affidavit or otherwise; a triable issue meaning a plea which is at least plausible. Once Court comes to the conclusion that there is a triable issue in the case, it must grant leave to defend without requiring defendant either to pay the amount claimed into Court or to furnish security therefor; such a condition must be imposed only in exceptional cases where, for instance, there appears to be so grave suspicion that Court comes to the conclusion that the defence is put in only in order to obtain further time. *Held*, on facts, that leave to defend must be granted but that as there was a strong suspicion in the mind of Judge with regard to a part of the defence raised, he was asked to furnish security to the extent of half of plaintiff's claim. 1934 S. 191. Where, in a suit on hundies, defendant himself showed that the hundies were not without consideration, *held*, that he could not be granted leave to defend the suit. 145 I.C. 725=1933 L. 440. Where the Court is not satisfied with the *bona fides* of the defendant, and vague and indefinite assertions have been made by him to gain time, it is open to the Court to grant leave to defend only conditionally, i.e., on the defendant paying into Court the amount claimed. 165 I.C. 166=1936 L. 584. See also 60 I.C. 639=12 L.W. 712.

LEAVE TO DEFEND—WHEN TO BE UNCONDITIONAL—TRIALE ISSUE—MEANING OF.—If a defendant in a summary suit sets up a defence in his affidavit in support of his application for leave to defend, which, if he should succeed in proving, would entitle him to succeed in the suit, the Master or the Court hearing the application has no discretion in the matter, and unconditional leave to defend must be granted. A triable issue in such a case has been raised, and it is not open to the Master or anybody else other than trial Judge to go into the merits and find out whether the case of the defendant is true. 58 M. 116=68 M.L.J. 16. In a summary suit, if the defendant raises a triable issue, he must be given an opportunity to have his case tried, but at the same time the plaintiff should not suffer by any concession

shown to the defendant. 41 L.W. 573=1935 M. 302=68 M.L.J. 407.

REVISION.—It will not be right to crystallise into rules of law the circumstance under which the Court, in the exercise of the discretion vested in it by R. 3 (2), can demand security. If in any particular case High Court is satisfied that the discretion has been arbitrarily or perversely exercised, it will interfere in revision. 43 L.W. 298=1936 M. 246=70 M.L.J. 241.

O. 37, Rr. 3 and 4.—*Ex parte* decree in summary suit—Remedy of defendant not obtaining leave to defend. 11 I. C. 433. High Court has power to extend time within which a defendant can come in and obtain leave to defend. 3 C. 539; 18 B. 717; 6 Beng.L.R. App. 64. Where defendant shows a defence apparently real, leave to appear and defend will be granted. 6 Beng. L.R. App. 64. Application under R. 3—Question to be decided is whether there is triable issue between the parties and where it exists leave should be granted without requiring deposit or security from defendant. 98 I.C. 72=1927 S. 60. Summary suit on a bill of exchange—Counter-claim for damages. 120 I.C. 528. Where money is deposited by a defendant as a condition precedent to the setting aside of a decree under the rule, the decretal amount is a charge on the deposit if final judgment is passed against the defendant. Court is not competent to enquire into the ownership of the money deposited. 38 I.C. 481=32 M.L.J. 503. An order charging the property of an insolvent-debtor for the re-payment of plaintiff's claim on condition of granting permission to defend his suit is a permanent charge till re-payment of claim. 58 I.C. 10=24 C.W.N. 401. Summary suit—Leave to defend granted on condition of furnishing security—Condition not fulfilled—*Ex parte* decree—Same if appealable—Propriety of interlocutory order whether can be challenged. 32 Bom.L.R. 660=125 I.C. 438=1930 B. 364.

APPEAL.—An appeal lies from an order refusing to set aside an *ex parte* decree. 2 B. 644. See 42 C. 735.

(3) The defendant may at any time within ten days from the service of such summons for judgment by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend the suit. Leave to defend may be granted to him unconditionally or upon such terms as to the Judge appear just.

(4) At the hearing of such summons for judgment if (a) the defendant has not applied for leave to defend or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith, or if (b) the defendant be permitted to defend as to the whole or any part of the claim the Judge shall direct that on failure to complete the security (if any) or to carry out such other directions as the Judge may have given within the time limited in the order, the plaintiff shall be entitled to the judgment forthwith."

[LAHORE.] In r. 3 the following sub-rule (3) shall be inserted:—

"(3) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

4. After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

5. In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

6. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note.

7. Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner.

ORDER XXXVIII.

ARREST AND ATTACHMENT BEFORE JUDGMENT.

Arrest before Judgment.

1. Where at any stage of a suit, other than a suit of the nature referred to in section 16, clauses (a) to (d), the Court is satisfied, by affidavit or otherwise,—

Where defendant may be called upon to furnish security for appearance.

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O. 37, R. 4.—An order rejecting an application under this rule is not appealable. An appeal is competent from the decree passed under O. 37 and the rejection of an application under R. 4 could also form a ground of appeal preferred against the decree passed. 39 P.L.R.J. & K. 11. See also 42 Cal. 735. Each partner has a right to apply for leave to defend where a suit is brought against a firm under O. 37. There is, of course, a period of limitation for such application but in a case where it is shown that a partner was deprived of an opportunity for applying for leave to defend, the Court ought to exercise its power under O. 37, R. 4, by setting aside the decree, restoring the suit and allowing leave to defend. 42 C.W.N. 820.

O. 38, R. 1.—An application in writing to enforce an award under Sch. II, para. 20,

becomes a suit for the purposes of O. 38 dealing with attachment before judgment. 1927 B. 259=29 Bom.L.R. 342=101 I.C. 430. Arrest before judgment—Security for appearance—Order when to be passed—Principles guiding in passing orders. See 50 M. 27=1926 M. 584=50 M.L.J. 348.

SCOPE AND OBJECT OF.—The object of the surety bond under this rule is to secure the rights of judgment-creditor. Government is not interested in the proceedings in any way. 28 I.C. 92=8 S.L.R. 270. Small Cause Court cannot attach immovable property. 28 C.W.N. 16=1924 C. 193. Rulings to the contrary are not now good law. See now Act I of 1926. Mere fact that an appeal is pending against a decree is no reason for not enforcing execution by arrest when the execution has not been stayed. 1924 L. 360.

MORTGAGEE, RIGHT OF.—A mortgagee cannot obtain an order for attachment before

(a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,—

(i) has absconded or left the local limits of the jurisdiction of the Court, or

(ii) is about to abscond or leave the local limits of the jurisdiction of the Court, or

(iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof, or

(b) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance.

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court.

2. (1) Where the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or

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judgment of the mortgagor's other properties, simply on the ground that mortgagor had suffered his other properties to be sold in execution of other decrees for payment of Government Revenue. He must show that mortgagor had been deliberately and fraudulently effecting sales or mortgages of his other properties with a view to defeat mortgagee's right to personal decree. 36 C.W. N. 746=1932 C. 790. See also 33 Bom.L. R. 514=1931 B. 329; 3 P. 966; 46 C. 245; 16 A. 186.

ILLUSTRATIVE CASES.—Where the master of a vessel is sued for repairs done to the vessel, and he is about to leave the jurisdiction of Court with the vessel, he can be arrested under this rule. 14 C. 695. An officer proceeding from Burma to England on leave, and who resides for a few days at Madras can also be arrested. 8 M. 205. Minor defendant without guardian—Conditional order of attachment of property is valid. 106 I.C. 142=1928 M. 1.

SUIT FOR DAMAGES FOR MALICIOUS ATTACHMENT.—Where an application to vacate order for attachment before judgment was not prosecuted to its conclusion, no suit for malicious attachment is maintainable as long as the original order of attachment had not been set aside. 59 C. 1073=36 C. W. N. 447=1932 C. 821. Injunction restraining alienation of properties—Prejudice to business capacity and loss of faith in credit not grounds for award of damages. 59 C. 1082=36 C.W.N. 323=1932 C. 695.

O. 38, R. 2.—Where a warrant of arrest is ordered under R. 1 and the person proceeded against offers to furnish security, the security should be limited to the amount

claimed. 56 C. 700=1929 C. 732. The return of a plaint in suit on the ground that the Court has no jurisdiction terminates the litigation and the re-presentation of the plaint in a different Court in effect starts a fresh litigation on the same cause of action. Where a surety executes a bond undertaking to be responsible for the appearance of the defendant in an application for arrest of the defendant before judgment in a suit, and the plaint is subsequently returned for presentation to another Court having jurisdiction, the bond cannot be taken to cover the subsequent suit started by the re-presentation of the plaint to the Court having jurisdiction. It makes no difference that the plaint returned by the small cause side of a Court is re-presented to the original side of the same Court. Since there has been a change in proceedings, that change on the principle of S. 133 of the Contract Act discharges the surety. 50 L. W. 426=A.I.R. 1939 Mad. 933=(1939) 2 M.L.J. 816. Where a surety under R. 2 gave a bond to produce defendant when called upon to produce him and plaintiff decreeholder having made his application against the surety the latter produced defendant in Court but it appeared that defendant had previously applied for being adjudicated an insolvent and had obtained exemption from arrest, *held*, that the surety satisfied the condition of his bond when he produced defendant in Court and he was under no legal liability to see that he was in an attachable condition. 38 L.W. 832=65 M.L.J. 793=1934 M. 24. A surety bond which provides that the liability of the surety extends to paying the amount claimed in the suit in the event of a decree being passed is not illegal. 115 I.C. 244 (1). Money paid into Court

make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule.

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

3. (1) A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance.

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

4. Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit or, where a decree is passed against the defendant, until the decree has been satisfied :

Procedure where defendant fails to furnish security or find fresh security.

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees :

Provided also that no person shall be detained in prison under this rule after he has complied with such order.

Attachment before Judgment.

5. (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

Where defendant may be called upon to furnish security for production of property.

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by a defendant arrested before judgment sufficient to answer the plaintiff's claim, is ear-marked for the suit and is subject to the lien of the plaintiff for his decree amount in case he succeeds. 41 M. 1053=36 M.L.J. 355. His lien subsists even when the claim of decree-holder is disallowed but subsequently upheld in appeal. 97 I.C. 1020=51 M. L.J. 436=1926 M. 1104. Insolvency of defendant before decree does not vest the money in Official Receiver. 51 M.L.J. 436. The case is different if security is given for the appearance of defendant. (39 M. 903; 29 B. 405, Dist.) 51 M.L.J. 436, O. 21, R. 63 requires a claimant whose objection to an attachment before judgment has been disallowed to bring a suit on his title within the period prescribed by Art. 11. (41 M. 23, overruled.) 41 M. 849=35 M.L.J. 231 (F.B.).

O. 38, R. 3.—Section 135 of the Contract Act has no application to the case of a surety under this rule and his obligation continues even though the parties to the suit entered into a compromise on the strength of which a decree was passed by the Court. 37 M.L.J. 435=43 M. 272. Order discharging surety but directing judgment-deb-

tor not to leave the Court—Legality. 1929 L. 163. Surety's application for discharge—Production of judgment-debtor—Withdrawal of application of discharge—Subsequent insolvency of judgment-debtor—Surety not discharged from his obligations. 6 R. 241=1928 R. 184=111 I.C. 15.

O. 38, R. 4.—Imprisonment under this rule becomes after decree, imprisonment in execution of a decree. 7 B. 431. Where in execution of a money decree, the share of a Hindu co-parcener in the family property was attached during his lifetime and brought to sale after his death his interest passes to the auction-purchaser and precludes the title arising from survivorship. [4 M. 302, (Foll.); 5 C. 48 (P.C.); 25 C. 179 (P.C.) Ref.] 24 I.C. 667=1914 M.W.N. 733.

O. 38, R. 5: SCOPE OF RULE.—Application to restrain person temporarily from withdrawing amount at his credit and Court's order thereon are really for attachment before judgment. 16 I.C. 473; 1929 R. 94. It is essential that plaintiff must make out a *prima facie* case before any attachment before judgment or an injunction can be granted. Court must be satisfied that interference is necessary to prevent injury which is

(a) is about to dispose of the whole or any part of his property, or

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irreparable, and that the mischief or inconvenience likely to arise in consequence of refusal will be greater than that from granting it. Neither an attachment nor an injunction should be lightly granted. It is only where it is essential that property should be kept in its existing condition pending the suit that the Court should interfere under O. 38, R. 5 (1) or under O. 39, R. 1. 61 C. 814=38 C.W.N. 771=1934 C. 694. O. 38, R. 5 sets out the conditions necessary to be fulfilled before an attachment before judgment can issue. The Court must be satisfied that a defendant is about to transfer his property in order to defeat or delay the interests of the creditor, who seeks to obtain a decree against the debtor concerned. Where a debtor had transferred more than 80 per cent. of his property including his residential house and had also changed the name of his firm, it was held that the circumstances justified an order under O. 38, R. 5. 1941 A.M.L.J. 30. Before the power under O. 38, R. 5 is exercised, the Court must be satisfied that transfers are going to be made by the defendant after the suit has been filed and that such transfers are made with the object of frustrating the plaintiff, if he wins the suit, in executing the decree. Mere allegations to that effect are of no avail, the facts have to be positively proved by satisfactory evidence. Though for the purpose of finding out the intention with which transfers are going to be effected by the defendant, previous transactions may be referred to, they must be transactions subsequent to the filing of the suit. The applicant for attachment must adduce evidence to show what properties are going to be transferred, to whom they are going to be transferred, and under what circumstances. 17 Pat. 89=19 Pat.L.T. 492=1938 Pat. 161. See also I.L.R. (1941) Kar. 362=1941 Sind 178. Attachment before judgment confers no right on the party who obtains the order of attachment. 37 A. 578=13 A.L.J. 732; 151 I.C. 317=59 C.L.J. 18=1934 C. 426. Nor does it give any interest in the attached property. 30 I.C. 38=21 C.L.J. 614. A person gets no rights through his attachment before judgment, if the defendant is adjudicated insolvent after the attachment but before the decree and the property vests in Official Receiver. 117 I. 145=1930 S. 127. Where during pendency of a suit defendant agreed and paid a certain amount into the hands of plaintiff's pleader in part satisfaction of the money to which plaintiff may become entitled and plaintiff subsequently obtained a decree but meanwhile another creditor filed an application in insolvency and defendant was adjudged insolvent after the decree in the earlier suit had been made. *Held*, that the money deposited with plaintiff's pleader in the earlier suit did not form part of the assets of the insolvent and

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original plaintiff was entitled to appropriate the same towards his decree. 145 I.C. 826=37 C.W.N. 475=1933 C. 625. The property may be movable or immovable and it is immaterial whether it is in the actual possession of defendant or of some other person on his behalf. 17 A. 82; 9 Bom.L.R. 540. A conditional order of attachment that simply prevents the property from alienation by the minors pending the disposal of the application for appointment of a guardian is not invalid merely because the guardian proposed appears in Court and says he is unwilling to act. 106 I.C. 142=1928 M. 1.

ORDER FOR ATTACHMENT UNDER—GROUNDS FOR—PROOF OF PRESENT INTENTION.—In an application for an attachment before judgment under R. 5 (1), plaintiff must thoroughly satisfy Court that defendant intends to obstruct or delay the execution of any decree that might be passed against him or with such intent is about to dispose of his property. Mere vague allegations are not sufficient; nor would the mere fact that defendant has in the past mortgaged or disposed of his property be a sufficient ground for levying attachment. There must be a present intention. Where the affidavit in support of application for attachment is sworn not by plaintiff himself, but by an employee of his, who states that defendant is trying to or is about to dispose of his properties with intent to obstruct and delay the execution of the decree, and that the statements are based partly on information and partly on belief—without stating which are based on belief, and which on information *held*, that the affidavit was defective and inadequate, and that the attachment was rightly refused. Under R. 5 (1), the Court may be satisfied "otherwise", *i.e.*, from admissions in the objections filed by the defendant, if there are such admissions. 61 C. 814=38 C.W.N. 771=1934 C. 694=38 P. L.R. 772=1936 L. 33. It is doubtful if circumstances would ever arise which would justify Court in allowing an order of attachment in respect of property under the control of the Court of Wards. 150 I.C. 1142=1934 N. 169 (2). Where it was alleged that *defendant company* were realising their assets to prevent satisfaction of plaintiff's claim, *held*, that it was a fit case to order attachment before judgment. 148 I.C. 719=1934 L. 594. An order of attachment before judgment can only be made after defendant fails to show cause to the contrary or to furnish security. 23 I.C. 107; 1936 A.L.J. 314=163 I.C. 336=1936 A. 408. The power should be exercised only on clear proof of the existence of the mischief aimed at. 5 Pat.L.T. 124=1924 P. 312. If Court accepts the view that defendant has no intention of alienating the property, there is no power to order attachment. (*Ibid.*) Intent to obstruct or to de-

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lay the execution within the terms of the rule must be clearly proved. Vague allegations will not suffice. 23 Bom.L.R. 1228=46 B. 431; 1928 P. 172; 44 I.C. 240. *See also* 41 I.C. 89. Trustee failing to produce accounts. Defendant attempting to dispose of property during pendency of suit is not enough. 45 B. 1256=23 Bom.L.R. 550. Allegation that defendant is running into debts is not sufficient. 1927 C. 354=101 I.C. 9=31 C.W.N. 432. *See also* 94 I.C. 880=1926 C. 855. Court ought to withdraw attachment before judgment on the dismissal of a suit. Attachment is not however revived by reversal of the dismissal on appeal. 9 I.C. 918=13 C.L.J. 243. An attachment applied for before judgment but actually effected after decree has still the force of the attachment before judgment. 42 M. 1=35 M.L.J. 387. Dismissal of the subsequent execution application will not put an end to the attachment. (*Ibid.*) An attachment before judgment ceases to be operative on the dismissal of the first application for execution. (17 N. L. R. 121, Foll.) 1922 N. 81. *See also* 1937 A. L.J. 348=1937 All. 424. Where property is attached before judgment a decree in plaintiff's favour does not determine the attachment which continues in force. 1919 Pat. H.C.C. 465=53 I.C. 20. An attachment followed by decree prevents the accrual of title by survivorship where judgment-debtor dies after attachment of decree but before the order for sale. 24 I.C. 320=26 M.L.J. 517. An attachment before judgment becomes one in execution on an application for execution, and R. 57 of O. 21 will apply to it equally with the other rules of O. 21. 63 I.C. 712=17 N.L.R. 121; 31 Bom.L.R. 1101=1929 B. 455. *See also* 1937 All. 424. Civil Court has no power to issue a warrant of attachment before judgment on property situated without its jurisdiction. 25 I.C. 771. *See also* 8 M. 20; 5 B.H.C.R. 570; 24 C.L.J. 533=22 C.W.N. 160. But *see* 1926 L. 330=93 I.C. 361; 1928 L. 376. Property outside the jurisdiction of High Court—Mode of attachment. *See* 94 I.C. 116=1926 B. 278=28 Bom.L.R. 380. *See* O. 38, R. 13 newly added by Act I of 1926, which was passed to set at rest the conflict of rulings between the different High Courts regarding the power of a Court of Small Causes to order attachment before judgment of immovable property. As to the conflict of rulings before Act I of 1926, *see* 1923 C. 176; 49 C. 994; 1925 C. 1; 52 C. 275; 82 I.C. 109=40 C.L.J. 119; 28 C.W.N. 1056; 48 M. 488=1925 M. 589; 43 I.C. 717; 53 I.C. 814; 46 C. 717=31 C.L.J. 179. There is no suit before Court until the application to sue *in forma pauperis* has been granted. Consequently Court has no jurisdiction to attach defendant's property before judgment before application is filed as a suit. 25 C.L.J. 159=21 C.W.

N. 870. A mortgagee may, after preliminary decree, attach other properties of the mortgagor, if the hypothecation is insufficient and mortgagor intends to dispose of his other properties fraudulently. 46 C. 245; 37 A. 423=13 A.L.J. 565; 1929 L. 402. Mortgagee decree-holder selling portion of mortgaged property and realising substantial amount—Reminder not sold—Application by him to attach non-mortgaged properties—Maintainability. 1936 A. L. J. 314=1936 A. 408. Attachment before judgment—Money deposited by sureties for release of attachment—Assets held by Court—Rateable distribution. 26 C. W. N. 169=1922 C. 19. A surety's liability ceases as soon as the first Court dismisses the suit. His liability is not revived by appellate Court subsequently decreeing plaintiff's claim. 29 I.C. 271=147 P.L.R. 1915; 47 M.L.J. 523; 12 B. 71; 5 R. 492. *See also* 12 Bur.L.T. 89=52 I.C. 930. But if trial Court decrees the suit, and appellate Court dismisses it and second appellate Court restores the decision of trial Court, the liability of surety is also restored. 14 Rang. 361=1936 Rang. 342. Surety entering into agreement before trial Court is bound by decree passed in appeal. 51 B. 31=1927 B. 84=99 I.C. 820. But *see* 5 R. 492. Where a surety bond has been given for the property attached before judgment the decree in the suit can be executed against the surety also. 45 I.C. 429=11 S.L.R. 122. Surety under—Bond—Amount of—Bond providing for liability of surety for decretal amount and not value of property to be attached—If illegal. 1936 C. 143. The liability of the surety is the same whether the judgment has been arrived at by the Courts after a regular trial or on an award passed by the arbitrator appointed in the suit. Arbitration is an ordinary incident of the suit. 1936 C. 143. An order of discharge of surety without notice to the parties is rescindable at the instance of any party. 37 I.C. 919.

NOTICE TO PARTY—FORM OF NOTICE.—Issue of notice to defendant is absolutely necessary before an order is passed. Where no notice is issued, no foundation is laid for an action under R. 5 (3). Before passing the order of attachment before judgment, the Court must faithfully and strictly carry out the stringent procedure as laid down in R. 5 and no short cuts are permissible. 38 P.L.R. 772=1936 L. 33. An order granting application for attachment before judgment without issuing notice to defendant under O. 38, R. 5 (1) can be deemed to have been one under O. 38, R. 6 and is therefore appealable under O. 43, R. 1 (q). 1936 L. 33. Even if there is no appeal against the order, the Court may treat the memorandum of appeal as an application for revision, and can interfere on the ground that the order of the Court below is unjust and unfair and was passed in the defiance of

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the legal procedure prescribed by the Code. 1936 L. 33. Notice to the party under R. 5 should be sent on Form No. 5, Appendix F. Issuing notice on the general form merely directing the defendant to appear on the date fixed and show cause against the application and informing that if he did not appear and show cause the application would be disposed of in his absence amounts to an irregularity and is objectionable though not necessarily wholly *ultra vires* or void *ab initio*. 148 I.C. 509=1934 A. 456. The wording of O. 38, R. 5 and of Form No. 5 in Appendix F to the Code, shows that the legislature intended that the notice to the defendant to furnish security or to show cause against it and the order for the conditional attachment of his property should be issued simultaneously and in one and the same form. Where, therefore, the notice issued under that rule only directed defendant to show cause why the application for attachment before judgment should not be allowed and it did not appear that any notice was to be (or in fact), issued to him about the furnishing of security, *held*, that the warrant was illegal, the resistance whereto was no offence under S. 186 of the Penal Code. *Held, further*, that even if a notice relating to security was in fact issued to defendant, as it was not consolidated with the order of attachment, the requirements of law were not fulfilled. 146 I.C. 183=1933 A.L.J. 932=1933 A. 759. Appendix F, Form 6—Surety bond under—Parties entering into compromise—Surety is discharged. 54 B. 118=1930 B. 122. Attachment before judgment—Security—Attaching creditor whether acquires charge on money deposited. 32 I.C. 190=39 M. 903. A proclamation by beat of drum and affixing on the property a copy of the order in Form No. 5 of Appendix F under O. 38, R. 5 does not constitute an attachment under the Code. If there is no publication of attachment in the form laid down under O. 21, R. 54, namely in Form No. 24 of Appendix E, there is no valid attachment. 65 C.L.J. 329=A.I.R. 1937 Cal. 375.

ORDER CONDITIONAL under R. 5 (3) cannot be made without accompanying order under R. 5 (1) to furnish security or to show cause why it should not be furnished. 57 I.C. 907. Where a conditional order for attachment before judgment has already been issued it is not necessary to issue or serve a fresh order of attachment before judgment after the conditional order is made absolute. 37 C. W. N. 1164. Conditional order of attachment before judgment—No order absolute—Validity of attachment. 66 C. L. J. 222. Security and attachment whether can be ordered at the same time. 1927 C. 354=101 I.C. 9=31 C.W. N. 432. What is not a conditional order. 33 I.C. 689=23 C.L.J. 392. Rule 5 contemplates attachment of property which the de-

fendant is about to dispose of and not of the property already disposed of. 1928 L. 772.

PROCEDURE under R. 5. *See* 106 I.C. 808.

MEANING OF WORDS.—The words "to produce and place at the disposal of the Court" refer only to such property as is capable of being produced in Court. 17 A. 82. "Is satisfied", meaning of. 13 C.L.R. 356; 16 A. at 188.

MORTGAGE SUIT.—In a mortgage suit, plaintiffs, sometime after applying for final decree, and before final decree was in fact passed, applied for attachment before judgment of the defendant's properties on the ground that he was about to dispose of his other properties in order to defeat the personal decree that may be passed against him under R. 6. *Held*, that the application was maintainable at that stage. 1933 A.L.J. 37=1933 A. 191. As to power of Court to order attachment before judgment of mortgagor's other properties, *see* 33 Bom. L.R. 514=1931 B. 329. (3 P. 966; 46 C. 245; 16 A. 186, Foll.) *See also* 140 I.C. 457=36 C.W.N. 746=1932 C. 790. Where a plaintiff in a mortgage suit has no right in a personal decree he cannot apply for enforcement of personal remedies. His remedy is limited to bringing the mortgaged property to sale and he can only obtain a remedy from the date of the auction sale. Until that auction sale he has no right to take possession of the property or any income of the property. Under those circumstances Court has no jurisdiction to appoint a receiver under O. 40 or pass an order of attachment before judgment under O. 38, R. 5 or a temporary injunction under O. 39. 150 I.C. 1035=1934 A.L.J. 561=1934 A. 772. *See also* 146 I.C. 338=1933 A.L.J. 1269=1933 A. 557. But the rulings of the other High Courts are otherwise. *See* 1938 Mad. 325=(1938) 1 M.L.J. 249; (1940) 1 M.L.J. 429; 1934 Bom. 54=40 Bom.L.R. 1226; 42 C.W.N. 266=1938 Cal. 93; 40 P.L.R. 541 and notes to O. 40, R. 1, under heading "In mortgage suit", *infra*.

PROPERTY OUTSIDE JURISDICTION can be the subject-matter of an order of attachment before judgment. 9 R. 561=1932 R. 279. The word "property" in O. 38, R. 5 means property already in existence, belonging to and at the disposal of the defendant. A salary which has not yet been earned or paid, cannot be 'disposed' of until it has at least become payable. It is, therefore, clearly illegal to attach before judgment a moiety of the salary of a public servant or of any employee until it has accrued. 1937 Rang. L.R. 108=A.I.R. 1937 Rang. 292.

FOREIGN STATE PROPERTY in Civil Court constituted under Order in Council under Foreign Jurisdiction Act is not competent to attach before judgment movable property of a defendant British subject which is in a foreign State. 134 I.C. 822=1931 L. 723.

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

6. (1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

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APPEAL.—Order rejecting application for attachment—Absence of conditional order—Appeal from order rejecting—Maintainability. See 14 Pat. 1. The Code does not contemplate appeal from order directing the defendant to furnish security. 50 C. 215=1923 C. 639. Appeal lies from order of attachment made under O. 6. 50 C. 215. Where application for attachment before judgment is dismissed by the Court of first instance after hearing the defendants no appeal lies against that order. 33 I.C. 689=23 C.L.J. 392; 146 I.C. 838=1933 A.L.J. 1269=1933 A. 557. See also 14 P. 1. Appeal from order is not limited to the grounds mentioned in Rr. 5 and 6. Order under R. 5 that certain properties are not attachable is maintainable. Such an appeal does not become infructuous by the subsequent passing of a decree. 53 C.L.J. 289=37 C.W.N. 978=1933 C. 757. Where the trial Judge issues a notice to the defendant to show cause why the application of the plaintiff for attachment before judgment of the property of the defendant be not granted and at the same time orders attachment of the same and the defendant objects to the attachment but voluntarily offers security pending disposal of the plaintiff's application for attachment before judgment, the appellate Court cannot cancel security merely because it thinks that the attachment is illegal. A. I.R. 1937 Lah. 780. Where Court directed defendant to give security for satisfaction of any decree that may be passed in favour of plaintiff and noted that on failure of security being furnished further action under R. 6 would be taken and defendant failed to furnish security, *held*, that appeal against the order was maintainable though no formal order of attachment had been made. 148 I.C. 719=1934 L. 594.

REVISION.—No revision lies from order of dismissal of application for attachment before judgment. See 146 I.C. 338=1933 A.L.J. 1269=1933 A. 557.

COMPENSATION FOR WRONGFUL ATTACHMENT.—Compensation under S. 95 can be awarded even in respect of *conditional attachments* before judgment. 35 C.W.N. 546. Where the only ground put forward in application was that unless the attachment was made plaintiff in the event of success would have difficulty in realising the decretal amount, an order of attachment would be entirely unjustified. Where such application was granted the case is clearly one in which defendant is entitled to reasonable compensation against plaintiff under S. 95. 151 I.C. 283=11 O.W.N. 1135=1934 O. 429 (2).

O. 38, Rr. 5 and 6.—There is no justification for the view that in order that Rr. 5 and 6 of O. 38 should apply there must be a transaction subsequent to the institution of the suit. There is nothing in the plain words of the rules which would make a transaction subsequent to the institution of the suit a condition precedent to the application of Rr. 5 and 6. R. 5 refers not to the past but to the future. It refers to a defendant who with a particular intent is about to dispose of the whole or part of his property. The fact that he has done so after the institution of the suit may be strong evidence of the future intention provided he has any property left. But transfers before the institution of the suit may, as evidence of conduct be evidence of intention after the institution of the suit. 1941 Sind 178=I.L.R. (1941) Kar. 362.

O. 38, R. 5 and S. 64.—Though the order of attachment before judgment should comply with the provisions of O. 38, R. 5, that is, the order should be a conditional order accompanied by a notice to the defendant, yet non-compliance with this procedure and failure to give the defendant an opportunity to furnish security does not make the *ex parte* order of attachment a nullity but simply renders it irregular liable to be set aside only at the instance of the defendant. But a third party cannot ignore the attachment and enforce his mortgage against the decree-holder's

(2) Where the defendant shows such cause or furnishes the required security and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

7. Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

8. Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money.

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claims under attachment. 18 Lah. 756=40 P.L.R. 280=1938 Lah. 49.

O. 38, R. 6.—As to scope of R. 6, see 107 I.C. 276 (1). Order conditional under R. 6 cannot be passed unless the defendant has failed to furnish security, or fails to show cause. 57 I.C. 907. See also 1927 C. 354=101 I.C. 9. O. 38, R. 6 might apply to an objection by the defendant but not to an objection by a third person. A. I.R. 1938 Nag. 321=I.L.R. (1940) Nag. 509. Scope of enquiry—Procedure prescribed by O. 21, Rr. 58 and 59—Applicability—Person not having interest in property whether can apply. 48 C.L.J. 594=115 I. C. 268=1929 C. 162; 1928 L. 445 (1). Court attaching a debt either before judgment or in execution has no power to enquire into the truth or existence of the alleged debt. 34 L.W. 906=61 M.L.J. 863. Application for attachment—Court ordering petition closed on respondent undertaking not to alienate properties—Appeal lies against order. 1928 M.W.N. 125. (50 C. 215, Ref.) See also 140 I.C. 95=1932 A.L.J. 228=1932 A. 269. In a suit on promissory note, plaintiff obtained attachment before judgment and thereupon a third person stood surety and executed a bond which recited: "If the suit is to be decreed in favour of the plaintiff in accordance with the plaint he can recover the decree amount from me personally and from my properties and if the suit is to be dismissed the security bond should get cancelled. On this condition this bond is executed." Subsequently the suit was dismissed for default but was afterwards restored to file, and a decree was passed in favour of the plaintiff. Held, that the security bond had reference to the ultimate issue of the suit in trial Court and that the restoration of the suit dismissed for default also restored the bond and that the surety could therefore be proceeded against and made liable. 58 M. 721=41 L.W. 479=68 M.L.J. 444 (F.B.).

O. 38, R. 7.—The mode of executing attachment before judgment is the same as that provided for attachment after decree is passed. In the case of immovable property the procedure prescribed by O. 21, R. 54 should be adopted. 37 C.W.N. 1164=1934 C. 251; 182 I.C. 748=1939 Pat. 81.

The meaning of the saving clause in R. 7 is that attachment before judgment in order to be effective *must comply with the provisions of Rr. 5 and 6*. Order of attachment before judgment can only be made after defendant had failed to show cause to the contrary or to furnish the security required. Where defendant has not been served with notice under R. 5 to furnish security or to show cause, the attachment is illegal and *ultra vires*. 1933 A.L.J. 1501=1934 A. 165. When there is an attachment before attachment, time for consideration of the question *whether the attached debt is due to judgment-debtor* can be decided when the garnishee order is going to be enforced. 146 I.C. 457=1933 A. 481. Order of attachment before judgment of movables found at a certain place does not authorize the *nazir* to take away the things from that place. 59 C. L.J. 389=1934 C. 780. No property can be declared to be attached unless first the order of attachment has been issued and secondly in execution of that order the other things prescribed by the rules in the Code have been done. Where however there was no positive evidence that the attachment was not effected in accordance with law and no such contention was raised in the lower Court, held, that Court should give effect to the presumption regarding the regularity of official acts and proceed on the view that there was a valid attachment duly effected. 58 C. 598=134 I.C. 561=1931 C. 763. The question whether a particular property has been attached has to be determined with reference to the writ of attachment. Even if the property is mentioned in the application for attachment before judgment and the order for attachment is made in terms of that application, but if the writ of attachment served by the Civil Court peon does not mention the property, the property cannot be said to be under attachment and the judgment-debtor is not prohibited from transferring it. 182 I.C. 748=A.I.R. 1939 Pat. 81.

O. 38, R. 8.—This rule which prescribes the manner of investigation, is silent as to the result. O. 21, R. 60 does not apply to claims to property attached before judgment. 20 B. at 407. See also 41 M. 23=39 I.C. 863. The effect of O. 38, R. 8 is to make O. 21, R. 63 applicable to orders passed on

9. Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed.

Removal of attachment when security furnished or suit dismissed.

10. Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

Attachment before judgment not to affect rights of strangers, nor bar decree-holder from applying for sale.

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objections to attachment before judgment. 9 R. 561=1931 R. 279. Enquiry under—Scope of—Power of Court to decide question of title. 119 I.C. 555=1929 P. 747. See also 146 I.C. 457=1933 A. 481; 1933 A. 953=147 I.C. 482. It is not necessary for any person who has a claim to property attached before judgment to prefer a claim, though he may do so if he wishes under the provisions of R. 8. His failure to do so, however, cannot amount to any negligence or justify his subsequent claim being dismissed under the proviso to O. 21, R. 58 (1). 31 N.L.R. 426=1935 N. 222. See also 168 I.C. 364=1937 P. 245; 1937 A. 635.

O. 38, R. 9.—On dismissal of a suit, attachment before judgment *ipso facto* comes to an end and does not revive when an appeal is lodged: 45 C. 780=22 C.W.N. 927; 113 I.C. 63=1928 M. 976; even though Court did not pass an order withdrawing it. 53 M. 334=1930 M. 514=58 M.L.J. 675 (F.B.) (Overruling 56 M.L.J. 70). Even dismissal of a suit for default puts an end to attachment. It is not revived on the subsequent restoration of suit. 9 R. 472=134 I.C. 748=1931 R. 281; 48 L.W. 763=(1938) 2 M.L.J. 1053. [But see 58 M. 721 (F.B.) (noted *supra* under O. 38, R. 6).] The last words of R. 9 are merely directory. They do not mean that in the absence of an order removing the attachment on the dismissal of a suit, the attachment before judgment is rendered a perpetual attachment. (*Ibid.*) When a suit is dismissed attachment before judgment terminates without any order of Court and if the judgment is reversed on appeal or annulled on review the judgment does not revive it so as to affect alienations made before the date of such reversal. Even where plaintiff on the reversal of the decree of first Court dismissing his suit and on appeal gets a decree in his favour and re-attaches the property in suit his claim is not one enforceable under the original attachment. 1933 A.L.J. 1501=1934 A. 165. But see 1937 Sind 272. A surety who binds himself as such to be liable until the defendant fully satisfies the decree that might be passed against him is not discharged from liability on the dismissal of the suit by the trial Court. O. 38, R. 9 does not say that the surety shall be relieved from his liability on the dismissal of the

suit. If an appeal is preferred against the dismissal of the suit and a decree is passed in appeal, the surety is bound by the appellate decree and remains liable for the decree amount. 31 S.L.R. 165=A.I.R. 1937 Sind 272. On the abatement of the suit the attachment before judgment also abates, but does not revive when the abatement is set aside. 47 C.L.J. 282=1928 C. 234=109 I.C. 164. Suit in O. 38, R. 9 does not include proceedings in appeal. 5 R. 492=105 I.C. 540=1927 R. 310. But see 51 B. 31. Surety for removal of attachment—Liability ceases on dismissal of suit. 5 R. 492=105 I.C. 540=1927 R. 310; 1929 R. 94. But see 51 B. 31.

O. 38, R. 10.—O. 38, R. 10 is not limited to rights *in rem*. 23 C.L.J. 115=21 C.W.N. 158. Attachment before judgment only prevents alienation of property by judgment-debtor and does not confer any priority of title on attaching creditor. It is no bar to attachment by another decree-holder. 151 I.C. 317=59 C.L.J. 18=1934 C. 426. See also 151 I.C. 683=1934 P. 413. Where between the dates of attachment before judgment and the decree in a suit, another decree-holder against the same judgment-debtor attaches in the interval the same property of the judgment-debtor, the attachment before judgment though earlier in point of time does not confer any priority over the later attachment. 15 Luck. 287=A.I.R. 1940 Oudh 80. Agreement by attaching creditor consenting to sale of attached property does not require registration as attachment confers no right or interest in him. 151 I.C. 683=1934 P. 413. Attachment has no effect against the Official Assignee. 26 M. 673; see 21 B. 273; 17 M. 144; 31 Bom.L.R. 320. See also S. 53. When adjudication is made, insolvent's property vests in the Receiver and the Receiver's rights are not affected by prior attachment, whether attachment is before judgment or after decree. Attachment by itself does not give the attaching creditor any charge or lien on the property, nor does it give him any priority in respect of the property attached as against the Official Assignee or Receiver. 145 I.C. 695=29 N.L.R. 303=1933 N. 229. The effect of an attachment before or after judgment is the same provided that in the former case a decree is made for the plaintiff at whose instance the attachment takes place. 26 C.

11. Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

Property attached before judgment not to be re-attached in execution of decree.

12. Nothing in this Order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce.

Agricultural produce not attachable before judgment.

¹[13. Nothing in this Order shall be deemed to empower any Court of Small Causes to make an order for the attachment of immovable property.]

Small Cause Court not to attach immovable property.

LEG. REF.

¹ Added by Act I of 1926.

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531; 33 C.W.N. 805. When a person attaches property he also attaches the profits thereof. 12 W.R. 391. A re-attachment of property after decree does not imply an abandonment of an attachment obtained before decree. 6 C. 129 (P.C.); 16 I.C. 384; 56 C. 416. Where the attached decree is sold in execution of another decree the attachment ceases, and no further proceedings can be taken against the property on the basis of that attachment. 2 P.L.T. 240 = 61 I.C. 922. Attachment before judgment—Property sold—Decree—Proceeds recovered by previous decree-holder—Suit to recover share. 45 B. 360 = 22 Bom.L.R. 1407. Attachment before judgment—Money decree-holder—Right to proceed against property—Priorities. 91 I.C. 93 (2) = 1926 R. 85. An agreement for sale entered into before an attachment before judgment is perfectly valid and can be enforced. 106 I.C. 356 = 1928 P. 199 = 9 P.L.T. 5. See also 41 Bom.L.R. 943; 43 Bom.L.R. 206. So also subsequent sale in pursuance of contract of sale prior to attachment is not void. 1936 N. 163. See also 41 Bom.L.R. 943; 43 Bom.L.R. 206. Sale deed—Execution—Subsequent attachment of property sold—Deed registered subsequently—Effect—Sale not affected by attachment before judgment. See A.I.R. 1937 Nag. 143.

O. 38, R. 11.—Where there is order in execution for sale of a property attached before judgment under Art. 11, Limitation Act, the period of limitation is one year to set aside the order. 44 M. 902 = 41 M.L.J. 252. But see also 41 M. 23. This rule gives the same effect to an attachment before judgment after a decree is passed as an attachment after judgment. 2 P.L.T. 719 = 6 P.L.J. 332. O. 38, R. 9 refers to what takes place while suit is pending. R. 11 provides for what is to happen when suit is disposed of. After decree is passed

attachment becomes one in execution and ceases to be one before judgment. 53 B. 543 = 31 Bom.L.R. 652 = 119 I.C. 769 = 1929 B. 321; 1938 Rang.L.R. 565. Attachment before judgment—Application for execution—Dismissal for default does not terminate attachment. See 18 Pat.L.T. 585 = 1937 Pat. 626 = 16 Pat. 589. Attachment before judgment—Decree passed in favour of attaching creditor—Subsequent attachment and sale of the same by a third party—Sale not confirmed—Original attachment is revived. 99 I.C. 895 = 44 C.L.J. 553 = 1927 C. 240. Attachment actually made after judgment cannot be deemed in law to be made before judgment, simply because it happens that the application for such attachment was made before the judgment was actually passed. The legal effect of the attachment comes into being only when the attachment is actually made, and its nature is defined also by the time when it is made and not when it is ordered. 1937 M. 84. There must be some unmistakable declaration of the decree-holder's intention to execute the decree, before the attachment before judgment can become an attachment in execution of the decree. (*Ibid.*) In ordinary cases such an election or declaration of intention would be made by presenting an execution application, but in every case it is not necessary that it should be done in this manner and in no other. If intention to execute can be inferred by other circumstances it is sufficient. (*Ibid.*)

ATTACHMENT BEFORE JUDGMENT OF JOINT FAMILY PROPERTY—SURVIVORSHIP.—An attachment before judgment of a coparcener's interest, when not followed by a decree during the said coparcener's lifetime does not operate to defeat the right of survivorship. 1931 M.W.N. 1015.

O. 38 R. 12.—The word "agriculturist" in O. 38, R. 12 must be interpreted in the same sense as in Ss. 60 and 61, C.P. Code and not differently. An "agriculturist" is a tiller of the soil who is unable to maintain himself otherwise. 48 L.W. 380 = 1938 Mad. 922 = (1938) 2 M.L.J. 487.

ORDER XXXIX.

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

Temporary Injunctions.

Cases in which temporary injunction may be granted.

1. Where in any suit it is proved by affidavit or otherwise—

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O. 39: APPLICABILITY.—O. 39 is applicable to proceedings in liquidation of company. 1926 L. 525=98 I.C. 10.

SCOPE.—Court's powers under this order—Application for attachment before judgment—Undertaking by defendant—Acceptance by Court and dismissal of application—Defendant subsequently acting in breach of undertaking—Jurisdiction to punish. 44 L. W. 714=1936 Mad. 651. Apart altogether from O. 39, C.P. Code, the Court has ample jurisdiction to pass an order providing for the protection and security of the property which is the subject-matter of the litigation. Where an applicant for leave to sue *in forma pauperis* also applied for an injunction to restrain the opposite party from dealing with the subject-matter of the litigation, it was held that the Court had jurisdiction to grant the necessary relief, though the question of pauperism had not been decided and the proceedings had not been numbered as suit. I.L.R. (1940) All. 201=187 I.C. 813.

O. 39, R. 1: PRINCIPLE OF TEMPORARY INJUNCTION.—The granting of temporary injunction is a matter of discretion. 26 M. 168 (174); 1933 L. 203=14 L. 330; 1933 N. 153=146 I.C. 727. As to inherent power to issue temporary injunction, see 1934 S. 179; 140 I.C. 843=1933 L. 73. There is no general rule to guide the discretion of Courts. 29 I.C. 855=21 C.L.J. 469. If the Court finds that there is a substantial question to be investigated and that matters should be preserved in *status quo* till final disposal of that question it is sufficient ground for granting injunction. 29 I.C. 855; 103 I.C. 167=1928 S. 82; 110 I.C. 621. See also 1934 L. 26 (2)=154 I.C. 421. It has sometimes been held that O. 39, Rr. 1 and 2 are not exhaustive of the Court's power to grant a temporary injunction. But they do not seem to have given due weight to the words 'if it is so prescribed' occurring in the opening para. of S. 94 of C.P. Code—'Prescribed' in that section clearly means prescribed by the rules. 1938 M. 190=(1937) 2 M.L.J. 888. Issue of temporary injunction is governed by the same principles as the grant of a permanent injunction at the trial of a case. That the suit would become infructuous if it did not issue is by itself no ground in law if there was no *prima facie* case made out in support of it. 14 L. 330=1933 L. 203. The real point is not how the question should be decided at the hearing of the case, but whether there is a substantial question to be investigated. 1922 L. 356. Court must first see that there is a *bona fide* contention between the parties and then on which side in the event of

success the balance of inconvenience will lie if the injunction does not issue. 1922 L. 356; 1923 L. 227; 1926 C. 837=95 I.C. 667=43 C.L.J. 405; 1926 P. 318=96 I.C. 623; 1929 S. 182; 1930 S. 287; 1939 Mad. 750. In granting temporary injunction Court has to see balance of convenience and inconvenience of both sides. 66 I.C. 599; 46 C. 1001=23 C.W.N. 677; 146 I.C. 67; 1933 L. 621; 151 I.C. 862=1934 S. 136. When mortgagee or attaching creditor is proceeding to sell the right, title and interest of his debtor, the balance of convenience is in favour of the creditor, that no injunction should issue in such cases, and all that Court might do *ex majeure cautela* is to require the creditor to give an undertaking that at the time of the sale, whether it be through Court or otherwise, the intending purchasers should be informed of the pendency of the suit. 1929 S. 182. There must be a probability of the plaintiff succeeding. 18 I.C. 394=17 C.W.N. 964; 24 L.W. 839=1927 M. 188=99 I.C. 383. When a decree has been passed against a party who is himself seeking the injunction, the Court has no jurisdiction whatever to grant the injunction, merely because an appeal is pending in another suit, on the ground that the property is in danger of being wrongfully sold in execution. 43 I.W. 383=1936 M. 276=59 M. 744=70 M.L.J. 257. The Court will have to be satisfied that the applicant has a *prima facie* case and further that the protection of his interest requires that an injunction should issue temporarily. 17 I.C. 219=23 M.L.J. 316; 1927 M. 188=99 I.C. 383; 29 P.L.R. 50; 1939 M.W.N. 621=1939 Mad. 750; 103 I.C. 372; 110 I.C. 118=1928 L. 235; 156 I.C. 698=1935 S. 128. The applicant must also show an actual or threatened violation of that right, productive of irreparable or at least serious damage; his conduct must be such as not to disentitle him to assistance; it should be fair and honest, and in particular there must be no acquiescence or delay. There must be a greater convenience in granting than in refusing the injunction; and equally efficacious relief must not be obtainable by any other usual mode of proceedings, except in case of breach of trust. 160 I.C. 569=1936 Pesh. 11. That the defendant would not be worse off if injunction is granted is no proper ground for its grant. 15 P. 404=17 P.L. T. 109=1936 P. 226. Where a plaintiff out of possession claims possession, the Court will not grant an injunction against a defendant in possession under a claim of right unless the threatened injury would be irreparable. 46 C. 1001=23 C.W.N. 677; 146 I.C. 67=1933 L. 621; 1933 L. 282. The word "injury" means an act which is con-

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders.

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trary to law. 55 I.C. 403=2 L.L.J. 283. By the term "irreparable injury" is meant injury which is substantial and could never be remedied or adequately remedied or atoned for by damages. 1937 N. 137. Plaintiff as owner sold certain land, divided into building plots and approved by Municipality. Municipal Committee gave notice calling upon him to construct certain external and internal roads and informed that if he failed to do so, the committee would construct the roads and recover the cost of doing so from the plaintiff. The latter brought a suit and applied for a temporary injunction to restrain the committee from acting in that way. *Held*, that the inconvenience caused to the plaintiff by refusing to issue an injunction would not be irreparable and could be obviously remedied by damages. Therefore he was not entitled to the injunction claimed by him. 1937 N. 137. Party to prove irreparable loss would accrue if injunction is not granted. 93 I.C. 848=1926 L. 435. In a suit for permanent injunction a temporary injunction ought not to be refused where the refusal would defeat the object of the suit. 43 I.C. 24. As regards proper course when applications for mandatory injunctions are made, see 16 Bom.L.R. 288=38 B. 381. Under colour of temporary injunction a plaintiff cannot seek a relief, which forms the cause of action in the suit. 27 I.C. 617; 29 I.C. 855=21 C.L.J. 469; 18 I.C. 394=17 C.W.N. 964. See also 56 B. 254=137 I.C. 379=34 Bom.L.R. 231=1932 B. 166; 1933 S. 118. Suit for declaration only—Another suit necessary to seek relief—Injury which is sought to be prevented by injunction—Temporary injunction cannot be granted. 96 I.C. 439=1926 L. 504. But see 92 I.C. 723=1926 L. 523. A plaintiff making a considerable delay is not to be assisted at the expense of the defendant. 29 I.C. 855=21 C.L.J. 469. In granting temporary injunction Court should exercise wise discretion and see that the machinery of Court is not abused for fraudulent purposes. 9 I.C. 277. The order must not create totally new state of things. 67 I.C. 742; 66 I.C. 599. Defendant residing outside jurisdiction—Acts within jurisdiction—Interference with acts of religion. 4 P.L.T. 48. The onus is upon the petitioner to show that his inconvenience exceeds that of the other side. 70 I.C. 864=15 S.L.R. 5. Court has no jurisdiction to grant injunction under its

inherent powers. 1927 M. 687=102 I.C. 700=26 L.W. 899. See also 140 I.C. 843. Court has no jurisdiction to issue temporary injunction against a person not party to suit. 96 I.C. 540=1927 L. 284. Issue of temporary injunction against a co-sharer in possession. 1928 C. 293. In granting or refusing injunction Court should have regard to balance of convenience. 144 I.C. 54 (1)=1933 S. 118. (1929 S. 182, Foll.)

PRINCIPLES.—The object of an interim injunction is to preserve *status quo*. When an application is made the Judge should ask himself the question whether the plaintiff is likely to suffer any damage or any irreparable damage and if he comes to the conclusion that the plaintiff would not suffer any serious damage, injunction should be refused. 152 I.C. 563=1934 Cal. 713. In doubtful cases where the question as to the legal right is one on which Court is not prepared to pass an opinion, or the legal right being admitted, the fact of its violation is denied, the course of Court is either to grant the injunction or to order the motion to stand over pending the trial of the legal right. In determining which of these alternatives is to be adopted, Court is governed by considerations as to the comparative mischief or inconvenience to the parties which may arise from granting or withholding the injunction. 28 S.L.R. 161=1934 Sind 180. The power of a Court is very wide with respect to the issue of a temporary injunction and the injunction can be issued in any suit if it is proved to the satisfaction of the Court that the property in dispute in the suit is being wrongfully sold in the execution of a decree. There is no restriction in O. 39, R. 1 that the suit should be for the issue of a perpetual injunction if a temporary injunction is to be granted. 177 I.C. 917=1938 Pesh. 67. Courts have an inherent jurisdiction to issue an injunction in a proper case to prevent an abuse of the process of Court. Where the circumstances require it, the Courts have power to act *ex debito justitiae* in order to do real and substantial justice. Where the parties agreed that disputes between them should be agitated in a particular Court, and one of them in flagrant violation of the agreement filed a suit in another Court, it was held that an injunction could issue to prevent its prosecution in that Court. I.L.R. (1940) All. 232=1940 A.L.J. 188=1940 All. 241. The basic principle on which injunctions should be issued is that the plaintiff must show that an injunction is

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necessary to protect him from irreparable injury and that mere inconvenience is not enough; by the term "irreparable injury" is meant injury which is substantial and could never be remedied or adequately remedied or atoned for by damages. 1937 Nag. 137=I.L.R. 1937 Nag. 313.

GRANT OF INJUNCTION AND ATTACHMENT BEFORE JUDGMENT—CONDITIONS.—It is essential that the plaintiff must make out a *prima facie* case before an injunction or an attachment before judgment can be granted. Court must be satisfied that interference is necessary to prevent injury which is irreparable, and that the mischief or inconvenience which is likely to arise in consequence of refusal will be greater than that from granting it. An attachment or an injunction should not be lightly granted. It is only where it is essential that property should be kept in its existing condition pending the suit that the Court should interfere under O. 39, R. 1 or under O. 38, R. 5 (1). 61 C. 814=38 C.W.N. 771=1934 C. 694. "Injunction pending disposal of the suit" period for which it is in force. 43 A. 383=19 A.L.J. 174. Injunction granted *pendente lite* ends with suit. 1930 A. 387 (2). The offending of religious prejudices is no ground for granting an injunction. 1 C.W.N. 429. "Suit" in O. 39 includes proceedings. 1926 L. 525=26 Punj.L.R. 803.

DELAY.—The essence of an application for an interlocutory injunction is that it should be made with promptness. Improper delay although it does not amount to acquiescence may deprive a plaintiff of his right to such a remedy. Injunction refused on account of delay in a case of infringement of trade-mark. 139 I.C. 490. When the suit was delayed till the last day and the temporary injunction was applied for on the very day that the suit was instituted and the men were going to be discharged although it was known long before, that they were going to be discharged, *held*, that this in itself was a sufficient reason for refusing to issue the temporary injunction. 1933 L. 203=14 L. 330.

TEMPORARY AND PERPETUAL INJUNCTIONS.—The rule refers only to temporary injunctions leaving perpetual injunctions to be governed by the provisions of the Specific Relief Act. 6 B. 266 (279). The issue of temporary injunction is not governed by the same principles as the granting of a permanent injunction. 26 M. 168 (174). R. 1 does not authorise Court to grant a temporary mandatory injunction. 24 L.W. 839=1927 M. 188=99 I.C. 383. But see 94 I.C. 840=1926 S. 201.

WITHDRAWAL OF RELIEF FOR PERMANENT INJUNCTION.—Ordinarily if a plaintiff makes no prayer for a permanent injunction in a plaint, a temporary or interim injunction of a like nature should not be issued. But there may be cases in which a relief in the shape of a permanent injunction may not be

necessary the other reliefs granted by the decree being sufficient. Consequently the withdrawal of the relief for permanent injunction cannot preclude plaintiff from asking for a temporary injunction. 137 I.C. 519=36 C.W.N. 291=1932 C. 353.

INJUNCTION OR RECEIVER.—Distinction between a case in which a temporary injunction may be granted, and a case in which a receiver may be appointed. See 22 C. 459 (465); 1 A.L.J. 527. Proof of waste is a ground for appointing a receiver. 53 I.C. 760=10 L.W. 551; 105 I.C. 131. The digging of a well is not waste. W.R. (1864) 275.

NOTICE OF APPLICATION.—Notice, however short should, if possible, be given before an injunction is granted. 27 B. at 451. See R. 3. The other side must be given an opportunity to show cause. 7 A. 550; and when no *ex parte* order is made liberty to have it varied or set aside must be implied. 9 A. 36 (42).

EX PARTE ORDER.—Interlocutory injunctions can be very readily granted on the side that is asking for them undertaking to pay the person damnified by the granting of the injunction any damage that that person may sustain. Where no such undertaking is forthcoming, injunction should not be granted *ex parte* except in very rare circumstances. 184 I.C. 570=1940 Nag. 45=1939 N.L.J. 483.

JURISDICTION.—High Court can grant an injunction under its general equity jurisdiction independently of Code. 34 C. 97; 34 C. 101. See also 1939 Cal. 642. High Court, as appellate or revisional authority, has no jurisdiction to issue an injunction apart from and except in accordance with the provisions of O. 39. (35 L.W. 168, Diss. from.) 56 M. 563=141 I.C. 607=1933 M. 500 (2)=64 M.L.J. 112. The injunction should be issued to the party and not the Court. 2 A.L.J. 601. Only Court in which the suit is filed, and not Court to which a decree is sent for execution can grant an injunction. 12 C. 515. An inferior Court can issue an injunction to stop a sale in execution of a decree by a superior Court. 23 C. 341. But see 31 C. 480 (486). District Court cannot issue an injunction to stay waste in respect of property in dispute in a suit pending in a subordinate Court. In case it wants to do so it should withdraw the case to its own file. 2 Bom.H.C.R. 103. The mere fact that a person resides outside the jurisdiction of Court is not *per se* sufficient to prevent the Court from granting an injunction. 2 C.W.N. 521. Application to restrain a suit in a Small Cause Court does not come within the provision of this rule. 27 B. 357. As to power of subordinate Court to stay foreign suit, see 27 L.W. 418. See also 1940 A.L.J. 820 (Power of Special Judge under U.P. Encumbered Estates Act S. 54 to grant injunction under this rule). High Court in its original jurisdiction has power to make an order of injunction and

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also to order the arrest of a person disobeying it, though he be resident beyond the limits of its ordinary original jurisdiction, and to transfer the same for execution to the District Judge within whose jurisdiction such person resides. Such orders are not *ultra vires* or without jurisdiction. And the District Judge acts in the lawful exercise of his powers in arresting the party in execution of the writ sent to him. 61 C. 971=38 C.W.N. 799=1934 C. 818. An application under O. 39, R. 1 (a), can be made on behalf of a defendant who is entitled to come to the Court if any such act as is referred to in the rule is committed by the plaintiff. 49 L.W. 441=1939 Mad. 495= (1939) 1 M.L.J. 519.

PRACTICE.—Before granting temporary injunction it is usual to put the applicant upon terms to abide by such order as Court shall think fit to make by way of damages resulting from passing of the order. 1 A.L.J. 527. An application for an injunction restraining the defendant in a pending suit from prosecuting on action in a foreign Court must be made at a very early stage of the proceedings. 59 I.C. 218=24 C.W.N. 735. A party is presumed to have knowledge of a prohibitory order "not to alienate his property" when it is made in the open Court, in the presence of the parties appearing before the Court. 42 A. 98=17 A.L.J. 1127. An interlocutory injunction in a suit for perpetual injunction is dissolved *ipso facto* by the decree granting a perpetual injunction. 42 C. 550=18 C.W.N. 1189.

HIGH COURT, POWERS OF.—The powers of High Court in the matter of issuing injunction are not confined to the provisions of O. 39, Rr. 1 and 2. Any order may be made which justice and expediency require. 137 I.C. 519=36 C.W.N. 291=1932 C. 353. See also 136 I.C. 346=1932 M. 180; 1939 Cal. 642. High Court, as appellate or revisional authority, has no jurisdiction to issue an injunction apart from and except in accordance with the provisions of O. 39. 64 M.L.J. 112=1933 M. 500 (2)=56 M. 563.

APPEAL.—An order of injunction is purely discretionary and a party appealing against it should prove that the Court acted wrongly in the exercise of its jurisdiction. 22 I.C. 710=19 C.L.J. 305. See also 12 M. 186; 1930 Sind 287; 146 I.C. 727=1933 N. 153; 1933 L. 282. Order refusing grant of a temporary injunction is appealable. 18 C. L.J. 39=17 C.W.N. 996; 152 I.C. 563=1934 C. 713; but see 150 I.C. 15=36 P. L.R. 142=1934 L. 79 (2). Appellate Court should be very reluctant in interfering with the discretion exercised by lower Court in granting temporary injunction. 160 I.C. 569=1936 Pesh. 11. An order granting temporary injunction cannot be the subject of an appeal but is subject to the revisional jurisdiction of High Court. 1927 M. 687=102 I.C. 700=26 L.W. 899. A security bond furnished in pursuance of an order of the trial Court under this rule becomes in-

effectual as soon as the disposal of the suit by it, and it does not enure to the benefit of the decree-holder so as to enable him to enforce the decree of the appellate Court against the surety. 37 P.L.R. 489=1935 L. 718.

REVISION.—An applicant for a temporary injunction must show that he has a *prima facie* case. Where the Court grants such an injunction in the absence of a *prima facie* case, its order is vitiated by material irregularity justifying interference by the High Court in revision. 1939 M.W.N. 621=1939 Mad. 750.

ILLUSTRATIVE CASES: (1) ACCOUNT SUIT.—In a suit for recovery of money due on settled accounts application was filed for appointing a receiver and for order directing defendant to produce certain books of account not connected with the suit in order that the plaintiff, if he gets a decree, may be in a better position to realise his decree-debt. Court ordered the production but defendant refused, whereupon the Court passed an order compelling him to produce them failing which a complaint was to be laid for disobedience of the Court's order. Held, that O. 39, R. 1 (b) had no application and that even if it did apply it was overridden by O. 21, R. 41 and that the order should be set aside. 57 M. 635=148 I.C. 79=1934 M. 199=66 M.L.J. 498.

(1-a) ADMINISTRATION SUIT.—Before an application for injunction can be granted under O. 39, R. 1, the applicant must show that the property with respect to which an injunction is prayed for is property in dispute in a suit. In a proceeding for the grant of letters of administration, it cannot be said that there is any property in dispute. No question regarding title to property can be decided in an application for probate or letters of administration. Hence, an application in such proceeding for an order restraining certain authorities from making payments of money lying with them which are alleged to appertain to the estate of deceased and restraining certain person from withdrawing or receiving payments of the aforesaid money is not one which can be brought within the scope of O. 39, R. 1. 1939 Cal. 642.

(2) ARBITRATION PROCEEDINGS.—An interlocutory injunction should not be granted upon novel considerations interfering with arbitrators. 31 C.L.J. 167=24 C.W.N. 612=47 C. 611. Principles governing grant of temporary injunction restraining arbitration. 54 I.C. 546.

(3) ALIENATION.—An alienation pending a temporary injunction is not void. 253 P.L.R. 1914=25 I.C. 180; 108 I.C. 395. A temporary injunction restraining alienation of a house pending decision of a suit for recovery of money does not render a sale void as against a *bona fide* purchaser for valuable consideration without notice of any fraud or collusion, on the part of the vendor even though it might have been made in defence of the restraining order. 1930 L.

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858=128 I.C. 304. *See also* 1930 A. 387 (2)=127 I.C. 577.

(4) COPYRIGHT.—Where the legal right of plaintiff, namely his copyright in a particular book was admitted and only its violation by the threatened publication of an alleged similar book was not denied, and it further appeared that if the injunction was not issued irreparable injury or inconvenience might result to plaintiff, it is a proper case in which a temporary injunction should be issued. 132 I.C. 585=1931 L. 624. *See also* 34 P.L.R. 249. In suit for a perpetual injunction against defendants, who, it was alleged, had infringed plaintiffs' copyright by copying a large number of judgment from plaintiffs' journal 'Lahore Law Times' and compiling and publishing a book called "Consolidated Revenue Rulings", it appeared that the allegation referred to the rulings portion only of the 'Law Times' and that of past years; secondly, defendants' publication consisted not merely of Lahore Rulings but those of other places as well; thirdly, the plaintiffs had, by bringing out a similar book at a cheaper price, substantially reduced the chance of a loss to themselves; lastly, trial Court had, by directing defendants to keep a separate account of their sales, amply safeguarded their interests. *Held*, in the circumstances, a temporary injunction was not necessary. 34 P.L.R. 249=1933 L. 448.

(5) CO-SHARERS.—One co-sharer can restrain another from building on the land. 41 C. 436=18 C.W.N. 176.

(6) DECLARATION OF TITLE.—In a suit for declaration of title, plaintiff applied for an injunction to restrain defendants from alienating the properties; the affidavit in support of the application was inadequate and defective and merely alleged that defendants were trying to dispose of the properties and stated that the allegation was based partly on information which the plaintiff believed to be true and partly on belief, but did not state which part was based on information and which part on belief; nor did he state the grounds of belief. There was no overt act suggested in the application towards the alienation of the properties, such as negotiations or offers of sale, and there was no proof of the property being in danger of alienation. Lower Court refused the injunction. *Held*, that the injunction was properly refused and for reasons which were sound and unanswerable under R. 1. *Held, further*, that in a suit for declaration, an injunction should not be granted where the plaintiff is out of possession and does not ask for consequential relief or for a permanent injunction. 61 C. 814=38 C.W.N. 771=1934 C. 694. *See also* 20 Pat.L.T. 855 (suit by reversioner to declare alienation by Hindu widow invalid.) 1939 Sind 256.

(7) ELECTION PETITION.—Per *Pollock, A. J. C.*—In deciding whether an injunction should issue to restrain elected members from

performing their duties, Civil Court should be guided by the balance of justice and convenience; the occasions must be few on which it will be more just and convenient to hold up elections or the administration of newly elected bodies more or less indefinitely whilst one or more individual persons sue for a declaration that the elections have been or are going to be invalidly conducted. 143 I. C. 514=29 N. L. R. 278=1933 N. 193 (F.B.). Where the effect of granting a temporary injunction will be to deprive finally and for ever the defendants of the right which they claim (which in this case was to hold the election without delay) and would be tantamount to granting the plaintiff the relief sought in his suit and might deprive the defendants of a right to which they are really entitled, the temporary injunction shall not be granted, for it would be a grave injustice to the defendants for which they could not be adequately compensated afterwards. Moreover, a Court cannot be asked to give the relief which forms the cause of action in the suit under colour of a temporary injunction. 151 I.C. 862=1934 S. 136. Where plaintiffs filed a suit for a declaration that they were the only elected members and that the defendants were not the members, and applied for an interim injunction restraining them from attending the meetings. *Held*, that the likelihood of injury and inconvenience was much greater if the defendants were not allowed to function as members and that the injunction should not be granted. 151 I.C. 679=60 C.L.J. 1=1934 C. 621. Though a candidate for election to a Local Board like any one else has a right to pursue his legal remedies whatever they may be, save in exceptional circumstances it is an abuse for a candidate, who for some reason is shut out to make his pursuits of his remedies in the Civil Court, a weapon for dislocating electoral machinery and stopping an election. Unless in very extreme cases the Court cannot grant an injunction restraining the holding of an election at the instance of a candidate whose nomination has been rejected. 140 I.C. 441. Where the holding of an election would result in no irreparable harm, damage or waste, no injunction is to be granted. 97 I.C. 172=1926 M. 1147.

(8) CORPORATIONS AND COMPANY.—The plaintiffs sued for a declaration that they were the directors of a company and not defendants and alleged that they were unlawfully excluded by defendants from participation in management of the company. *Held*, that there was a continuing invasion of plaintiff's rights and the case was a fit one in which Court should grant a temporary injunction to prevent the injury to plaintiff's rights. 55 A. 399=1933 A.L.J. 290=1933 A. 344.

(9) EXECUTION PROCEEDINGS AND SALE.—A plaintiff, who after being defeated under O. 21, R. 99, brings a suit under R. 103 of the same order, is not entitled to get a tem-

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porary injunction restraining the defendant from taking possession of the property. 27 I.C. 56=16 Bom.L.R. 676. A prohibitory order by way of injunction can be issued so long as property in dispute is in danger of being wrongfully sold in execution of a decree, but once it is sold, no such order can be passed. 54 I.C. 928. Property sold in execution of decree on dismissal of objector's suit under O. 21, R. 63, but possession not delivered—Objector appealing—Injunction preventing delivery of possession may be issued. 1930 L. 850. In a suit filed by an unsuccessful claimant under O. 21, R. 63 the Court has power to grant a temporary injunction under O. 39, R. 1, restraining the decree-holder from selling the property, which is the subject-matter of the suit, in execution of his decree. The principle underlying O. 39, R. 1 is to prevent multiplicity of judicial proceedings, and in each case the Court will have to consider whether there is a danger of the property being wrongfully sold in execution of the decree. The mere fact that the plaintiff lost the claim case is not enough to indicate that the suit is a frivolous one or that it is an abuse of the process of the Court. 42 C.W.N. 409=1938 Cal. 371. See also 1938 Pat. 606; 16 Pat. 738. A sale held in ignorance of an order by way of an injunction staying the sale is an irregularity, but the sale will not be set aside unless judgment-debtor has sustained substantial injury by reason of such irregularity. 54 I.C. 928. Where it is fairly established that there is a danger of a wrongful sale in execution, an injunction can properly be granted. 25 I.C. 9; 1930 L. 108 (2). But see also 75 I.C. 381. A Court has jurisdiction to issue an injunction upon a person residing outside its territorial limits if he has property within the jurisdiction. 75 I.C. 381. See also 130 I.C. 252=1931 C. 279. In a case in which the defendants have submitted to jurisdiction of a Court by entering appearance, Court has jurisdiction to grant an injunction restraining the defendants from executing in another Court a decree which they had obtained against plaintiff. (Case-law referred to.) 1 P. 356=4 Pat.L.T. 10. A Court has no power to issue a temporary injunction to restrain the defendant from executing a decree lawfully obtained by him. 23 L.W. 85=1926 M. 258=92 I.C. 615. The taking of delivery implied in the passing of the delivery receipt, is not punishable as an act of disobedience of an order of injunction under O. 39, R. 1. The terms of O. 39, R. 1 would not include the mere act of taking possession in execution of a decree. 1937 M.W.N. 1229=(1937) 2 M.L.J. 888. It is impossible to contend that a person who has got a decree, and is entitled to execute it, can be said to be wrongfully selling in execution because some other person has brought an action through which he hopes to succeed in

getting possession of the property which is being sold; in injunction to restrain such a sale cannot be granted. 1938 P.W.N. 220=1938 Pat. 606; 16 Pat. 738; see also 42 C.W.N. 409=1938 Cal. 371; 1938 Rang. 21=174 I.C. 503.

(9-a) HIGH COURT—POWERS OF.—Although an application cannot be brought within the scope of O. 39, R. 1, a chartered High Court is not powerless to grant an injunction otherwise than in accordance with the provisions of O. 39, R. 1 if a proper case is made out. It has an inherent jurisdiction to grant injunctions operating in *personam* under circumstances and conditions other than those set out in the Code of Civil Procedure where the ends of justice so require. 1939 Cal. 642.

(10) LEGISLATIVE PROCEEDINGS, RESTRAINT OF.—See 56 B. 254=34 Bom.L.R. 231=1932 B. 166. Cited under O. 39, R. 2.

(11) PARTY WALL.—In order to entitle the plaintiff to a temporary injunction, it is necessary for him to make out a strong *prima facie* case. Where the demolition of the party wall is likely to seriously endanger plaintiff's buildings and the lives of its inmates and property, Court ought to grant a temporary injunction under R. 1. 1933 S. 244 (Case-law reviewed.)

(12) GUARDIANSHIP PROCEEDINGS.—Whether a proceeding for the appointment of a guardian can be treated as a suit or a proceeding to restrain the other party from committing a "breach of contract" or "other injury" within the meaning of R. 2, see 137 I.C. 425=1932 C. 719. Powers exercisable under O. 39 and those under Ss. 12 and 43, Guardian and Wards Act—Distinction. See 1940 N.L.J. 157.

(13) MARRIAGE.—Temporary injunction to restrain marriage, when not to be granted. 17 A.L.J. 1138=42 A. 134; when to be granted. 28 N.L.R. 332.

(14) MINORS.—A suit was brought on behalf of minors. It was found that the minors had no strong *prima facie* case and that it was a collusive one. Further it was found that defendants were maintaining proper and accurate accounts. Held, no interim temporary injunction should be granted. 146 I.C. 67=1933 L. 621.

(15) MORTGAGE SUIT.—Where a plaintiff in a mortgage suit has no right in a personal decree he cannot apply for enforcement of personal remedies. His remedy is limited to bring the mortgaged property to sale and he can only obtain a remedy from the date of the auction sale. Until that auction sale, he has no right to take possession of the property or any income of the property; under those circumstances Court has no jurisdiction to appoint a receiver under O. 40 or pass an order of attachment before judgment under O. 38, R. 5 or a temporary injunction under O. 39. 150 I.C. 1035=1934 A.L.J. 561=1934 A. 772. See also 144 I.C. 54=1933 S. 118. (See also under O. 40, R. 1, *infra* under heading "In mortgage suits.")

LOC. AMS.—[ALLAHABAD.]—R. 1.—In cl. (a) *delete* the words “or wrongfully sold in execution of a decree” and *delete* the word “sale” after the words “damaging alienation” in cl. (b).

[CALCUTTA AND SIND.] *Re-number* r. 1, O. 39, as r. 1 (1) and *add* the following as sub-rules (2) and (3):—

“(2) In case of disobedience, or of breach of the terms of such temporary injunction or order, the Court granting the injunction or making such order may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months unless in the meantime the Court directs his release.”

“(3) The property attached under sub-rule (2) may, when the Court considers it fit so to direct, be sold and, out of the proceeds, the Court may award such compensation to the injured party as it finds proper and shall pay the balance, if any, to the party entitled thereto.”

[NAGPUR AND OUDH.] In r. 1, *delete* the words “or wrongfully sold in execution of a decree” in cl. (a) and *delete* the word “sale” after the words “damaging alienation” and *insert* the following as proviso to the rule:—

“Provided that, if it appears to the Court that the property in suit is in danger of being wrongfully sold in execution of a decree, the Court may also by order grant a temporary injunction restraining the Court executing the decree from confirming the sale held in execution of the decree until the disposal of the suit or until further orders.”

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(16) MUHAMMADAN ENDOWMENT.—Appointment of co-mutwalli by the first mutwalli, grantor of waqf, does not invite the application of the rule unless there is danger of waste of property. 35 I.C. 718=14 A.L.J. 554.

(16-a) MUNICIPALITY.—Plaintiff as owner sold certain land, divided into building plots. The lay-out was approved by the Municipality. The Municipal Committee gave notice calling upon him to construct certain external and internal roads and informed that if he failed to do so, the committee would construct the roads and recover the cost of doing so from the plaintiff. The latter brought a suit and applied for a temporary injunction to restrain the committee from acting in that way. *Held*, that the inconvenience caused to the plaintiff by refusing to issue an injunction would not be irreparable and could be obviously remedied by damages. Therefore he was not entitled to the injunction claimed by him. I. L. R. (1937) Nag. 313=1937 Nag. 137.

(17) RIGHT OF WORSHIP.—Injunction to restrain plaintiff from preventing defendants entering and worshipping in certain temple not proper. 1 P.L.J. 560. As to grant of temporary injunction in a suit to declare that a certain article of a temple is sacred and for injunction to restrain sale thereof. See 70 M.L.J. 315.

(18) SALE IN EXECUTION OF MORTGAGE DECREE.—The language of O. 39, R. 1 is wide enough to cover the case of a sale in execution of a mortgage decree. In the case where the property of A is going to be sold at the instance of B who had obtained a mortgage of the same property from C and had instituted a suit to obtain a declaration that the mortgaged property was really his and not of C he is entitled to a temporary injunction. 35 C.W.N. 910. (11 C. 146, Ref.) Where in execution of a good and valid mortgage decree, the decree-holder proceeds to sell the property mortgaged as the property of his judgment-debtor, and another person having been defeated in a

claim case institutes a suit to declare that the property is his. O. 39, R. 1 cannot be applied to the case so as to entitle the latter to apply for a temporary injunction to prevent the sale. The property cannot, at the moment of his application to the Court, be said to be in danger of being wrongfully sold in execution of a decree. Neither on the ground of balance of convenience nor in law can an injunction be granted in such a case. 1938 Pat. 228.

Manohar Lal, J. (Obiter.)—It may be that the Court will invoke its inherent powers to stay the execution of the decree if the circumstances are coercive that the balance of convenience is in favour of the applicant or that the stay is necessary to prevent an abuse of the process of the Court. 16 Pat. 738=19 Pat.L.T. 256=1938 Pat. 228. See also 42 C.W.N. 409=1938 Cal. 371; 1938 Pat. 606. In a suit by the sons for partition and declaration that the debts incurred by the father were illegal and immoral and so not binding, the sons applied for a temporary injunction to stop the sale, threatened by some of the creditors. Apart from considerations of balance of convenience, the chief ground for granting or refusing an injunction in such a case is whether plaintiffs have or have not a *bona fide* claim, and to a certain extent, it is inevitable that the Court should prejudge the merits of the case in deciding the question if the plaintiffs have or have not a *bona fide* claim. 127 I.C. 345=1931 N. 106.

SECOND APPLICATION.—Although a Court has refused to issue a temporary injunction on a previous application, it can, if new circumstances arise, go behind that order and make another order which the exigencies of the case require. 41 P.L.R. 823=1940 Lah. 39.

(19) SECURITY AND ACCOUNTS.—An order directing the furnishing of security and submission of accounts passed on an application for the issue of interim injunction is not an order under R. 1. 17 I.C. 361=17 C.W.N. 318. An order to defendants to prepare an inventory and to keep accounts is not an order under the inherent powers of Court but

[PATNA.] R. 1.—Substitute the word "the" for the word "a" in line 1 of cl. (a) of r. 1 and add the following provisos after r. 1 :—

"Provided that no such temporary injunction shall be granted if it would contravene the provisions of S. 56 of the Specific Relief Act.

Provided further that an injunction to restrain a sale, or confirmation of a sale, or to restrain delivery of possession, shall not be granted except in a case where the applicant cannot lawfully prefer, and could not lawfully have preferred, a claim to the property, or objection to the sale, or to the attachment preceding it, before the Court executing the decree."

[RANGOON.] R. 1.—In Cl. (a) the words "or wrongfully sold in execution of a decree" shall be *deleted* and in the last sentence the word "sale" occurring between the words "alienation" and "removal" shall be *deleted*.

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff

Injunction to restrain repetition or continuance of breach.

may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

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one under R. 1. 1923 L. 48=72 I.C. 569. In a case falling under R. 1, it is not necessary that Court should order the petitioner to furnish security to compensate the decree-holder for any loss that may be caused by a temporary injunction against him being granted. 1934 L. 26 (2).

(20) SECURITY FOR MESNE PROFITS.—Stay of confirmation of sale—Order not communicated—Decree-holder-purchaser given possession on condition of giving security for mesne profits. 133 I.C. 128=1931 L. 289.

(21) SPECIFIC PERFORMANCE.—A temporary injunction will be granted to a plaintiff restraining defendants from selling property to a third person during the pendency of a suit for specific performance of contract for sale. 57 I.C. 847. See also 1938 P.W.N. 220=1938 Pat. 606. See also in the case of contract for lease. 16 I.C. 359=17 C.L.J. 427.

(22) STRANGER TO SUIT.—A Court has no jurisdiction to issue an injunction upon a person who is not a party before it. 3 P. L.J. 456=46 I.C. 224; 51 I.C. 108=46 P. L.R. 1919.

(23) STAY OF PROCEEDINGS IN REVENUE COURT.—Where an application was made to the High Court for stay of a partition proceeding in a Revenue Court which was not subordinate to High Court, *held*, that the stay could not be granted as High Court had no power and that an injunction also could not be issued for that purpose. 53 A. 180=132 I.C. 42=1931 A. 57 (2).

(24) SUIT FOR POSSESSION.—Restraining execution of decree for possession—Receiver—Appointment of. 24 Bom.L.R. 378=1922 B. 385. In a suit for possession, an injunction restraining defendant from committing waste may be granted. 38 C. 791=13 C.L.J. 394.

(25) TRADE MARK.—See 21 I.C. 258=40 C. 570; 139 I.C. 490=1932 Sind 127. Where on an application for interim injunction pending a suit to restrain defendant from passing off goods bearing mark and figure

similar to those used by plaintiff, Court finds that defendant's article is comparatively new, it would be a greater inconvenience to allow him to flood the market with his goods and possibly infringe plaintiffs' rights than to restrain defendant for a short time and compensate him, if so entitled, for the loss sustained by him in consequence. 1934 M. 226=38 L.W. 771=65 M.L.J. 617. In a suit the plaintiff charged the defendant with imitating his trade-mark and applied for an injunction against defendant under O. 39, Rr. 1 and 2, a comparison of the get up of the parcels containing the products of plaintiff and defendant respectively displayed a remarkable similarity which could scarcely be said to be accidental. Plaintiff took immediate action by way of criminal prosecution as soon as he became aware of the alleged infringement. And it also appeared that if an injunction did not issue the balance of inconvenience would be against the plaintiff, *held*, on these considerations that the plaintiff was entitled to an injunction against defendant under Rr. 1 and 2. 1934 S. 194=153 I.C. 324. Where in a suit for injunction and other reliefs for infringement of trade-mark by the defendants, plaintiff prays for a temporary injunction Court has to see on which side the balance of convenience lies assuming that the infringement exists. Where the loss to defendants by the grant of injunction cannot be remedied if plaintiff fails, but plaintiff's interests can be otherwise safeguarded, the injunction should be refused. 1933 L. 1046.

(26) TRADE NAME.—Where the defendant firm has adopted a name so similar to that of the plaintiff firm as is likely to cause confusion in the mind of the intending purchasers, the harm thus caused to the plaintiff firm is *prima facie* such as no compensation would be enough to counter-balance it, and the Court would, therefore, be justified in granting a temporary injunction. 1940 Lah. 39=41 P.L.R. 823.

O. 39, R. 1 (Rangoon Amendment).—The result of the amendment of O. 39, R. 1,

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise as the Court thinks fit.

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prima facie, is that the Court in which a suit under O. 21, R. 63 is pending or the Court in which an appeal from such a suit is pending does not enjoy the power of granting a temporary injunction to prevent the sale of the property under attachment in the execution case which led to the suit and then to the appeal. The reason for the present rule is this. The claimant in a proceeding under O. 21, R. 58, who files a suit under O. 21, R. 63, is not the judgment-debtor against whom execution is taken; and by sale of the attached property attached in the execution case his right, title or interest in the property cannot be impaired, for it is only the right, title and interest of the judgment-debtor which is conveyed to the purchaser at the sale. If his suit or his appeal succeeds, then the interest which are declared in his favour are to be deemed not to have been disposed of by the sale. There is obviously no good ground for thinking that a sale made in the execution case during the pendency of a suit under O. 21, R. 63, or an appeal from such a suit will be injurious to the right, title and interest, if any, of the claimant in the property sold. Hence an application for stay of the sale and also of other steps taken or in contemplation in aid of execution, cannot be granted; nor can it be granted under S. 151, C.P. Code, as the order sought for is not necessary for the ends of justice or to prevent abuse of the process of the Court. 174 I.C. 503=1938 Rang. 21.

O. 39, Rr. 1 and 2.—An injunction to restrain the execution of decree for possession cannot be granted either under O. 39, R. 1 or R. 2 pending suit for declaration of title. 1941 A.M.L.J. 23.

O. 39, R. 2.—[See also NOTES UNDER R. 1—GENERAL.] The words "of any kind" have been inserted to supersede the rule in 22 A. 449. Sub-rule (3) has been remodelled to give effect to the decision in 19 B. at 155. As to whether a Court can of its own motion punish for disobedience, see 26 M. 494. The Code is not exhaustive and Court has inherent jurisdiction to act *ex debito justitiæ* in order to do that real and substantial justice for the administration of which alone it exists. (23 C. 351, Foll.) 1923 L. 144 (2)=73 I.C. 909. See also 140 I.C. 843=34 P.L.R. 51=1933 L. 73. Injunction can be granted only against defendant—Principles governing the same. 79 I.C. 233=1923 L. 47; 96 I.C. 286=1926 L. 589.

PRINCIPLES GOVERNING GRANT OF INJUNCTION.—Relief by way of temporary injunction is in the discretion of the Court, but that discretion is not unfettered and it must be exercised in accordance with the principles generally recognised. One of these principles is that the Court will not grant an

interlocutory injunction, except in cases where there is some pecuniary or proprietary right of the plaintiff which requires protection. 41 C. W. N. 755=I.L.R. (1937) 1 Cal. 382. In a suit for a perpetual injunction a temporary injunction is to be granted or refused on a consideration of the following points: (1) Has the plaintiff made out a good *prima facie* case? (2) On which side lies the balance of convenience? 1939 S. 17=179 I.C. 626. It is not open to a Court frivolously and vexatiously to issue a temporary injunction without proper cause and due consideration. 14 L. 330=34 P.L.R. 975=1933 L. 203. See also I. L.R. (1937) 1 C. 382; 1939 Sind 17; 1939 Sind 256. Where the relief asked for by way of an injunction on an interlocutory application is in effect the whole relief that is asked for in the plaint in the suit, the effect of granting the injunction will be to decide the whole suit. It is not a rule, and it is not the usual practice of the Court to grant such an injunction on motion, especially when there is no statement of pleading as to the injury likely to be caused by not getting the injunction or as to the urgency of the matter. 40 C.W.N. 1201. The issue of a temporary injunction is governed by the same principles as the grant of a permanent injunction at the trial of a case. That the suit would become infructuous if it did not issue is by itself no ground in law, if there was no *prima facie* case made out in support of it. 14 L. 330=34 P.L.R. 974=1933 L. 203. See also 151 I.C. 862=1933 S. 136. The issue of a temporary injunction staying further proceedings in another Court in the exercise of equitable jurisdiction was refused as the petitioner could easily raise his plea of want of jurisdiction in the other Court. 1933 L. 592. When a suit is pending in a Civil Court, the Court has jurisdiction under this rule to issue a temporary injunction if it is satisfied that injury is likely to be caused to the plaintiff. The fact that the Court ultimately discovers that the suit does not lie or that it should fail on some other ground does not oust its jurisdiction under that rule. 1935 A.L.J. 139=1935 A. 106. If the relief which the plaintiff seeks cannot be granted, no temporary injunction can be issued by the Court. 152 I.C. 98=1934 A. 876. Under sub-R. (1), Court may grant an injunction restraining a person living outside its own jurisdiction from instituting certain proceedings. 130 I.C. 252=57 C. 1280=1931 C. 279. The lawful exercise of a right vested in a person cannot be legally restrained by the Court under O. 39, R. 1. 1939 A.L.J. 688=I.L.R. (1939) All. 825=1939 All. 643. Civil Court has no jurisdiction to restrain a party by an injunction from pursuing her remedy, under

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S. 488, Cr.P. Code, in a Criminal Court. 1930 Cr.C. 1153=1930 C. 763. Single Judge of High Court has jurisdiction to pass the order of stay, subject to certain conditions. 17 A.L.J. 1127=42 A. 98. In a suit before High Court on the original side, Judge can restrain defendant by an injunction from proceeding with a suit instituted by him in a mofussil Court. 44 B. 283=21 Bom.L.R. 963. Where pending the disposal of an appeal by High Court the party had filed a suit in the lower Court and thereupon an application was made to High Court for injunction restraining the party from proceeding with the suit till the disposal of the appeal, *held*, that the injunction could be granted if the balance of convenience was in favour of such a course. 31 P.L.R. 550 (1). Courts in India have power to issue temporary injunctions in a mandatory form. (38 B. 381, Diss.) 41 M. 208=33 M.L.J. 448; 24 L.W. 854=1927 M. 210=99 I.C. 566. On an interlocutory application, Court has power to pass a mandatory injunction before the suit is heard. 28 I.C. 121=16 Bom.L.R. 566. It is doubtful whether mofussil Courts have power to grant mandatory injunction on interlocutory applications. 38 B. 381=16 Bom.L.R. 288. Under O. 39, R. 2 (1) Court may grant an injunction restraining a person living within the jurisdiction of another Court from instituting certain proceedings. 57 C. 1280. Court has no jurisdiction to issue an injunction against a person not a party to the suit or to summon before it any person not a party to the injunction. 44 I.C. 496; 96 I.C. 540. District Court can demand security from the guardian of the person of a female infant ward to prevent his giving her in marriage without the consent of her "proper male relations." 20 P.L.R. 1914=23 I.C. 351. High Court has power under this rule to interfere and restrain a party from proceeding with a suit pending in another Court. 24 L.W. 421=97 I.C. 938=1926 M. 1126. Suit to contest election—Injunction *pendente lite*. 20 I.C. 676=41 C. 384.

DELAY.—When suit was delayed till the last day and temporary injunction was applied for on the very day that the suit was instituted and the men were going to be discharged although it was known long before that they were going to be discharged, *Held*, that this in itself was a sufficient reason for refusing to issue the temporary injunction. 14 Lah. 330=34 P.L.R. 975=1933 Lah. 203.

TRADE NAME.—Infringement—Temporary injunction, grant of. *See* 21 I.C. 258=40 C. 570. *See also* 439 I.C. 490=1932 S. 127. (*See cases under Trade Mark in R. 1 supra.*)

RESTRAINING INTRODUCTION OF BILL IN LEGISLATIVE ASSEMBLY.—An interlocutory injunction can only be granted if the Court is satisfied that in all probability the declaration which is the foundation for the

permanent injunction claimed will be made when the suit comes to be tried. The Court cannot make a declaration that a Bill in the form in which it was at that moment sought to be introduced in the Legislative Assembly is *ultra vires*, because a Bill as such has no legal effect and if the declaration refers to a future Act which may be passed, the Court is then invited to deal with a future and hypothetical question which may never arise. In a suit for such a declaration, it follows no interlocutory injunction can be granted. 56 B. 254=34 Bom.L.R. 231=1932 B. 166.

DISOBEDIENCE OF INJUNCTION—CONSEQUENCES.—A temporary injunction under the provisions of R. 1, O. 39 is not a stay order issued by a Court competent to stay execution proceedings under any provision of the Code, authorizing such an order. The effect of non-compliance with an injunction issued under O. 39, R. 1 is to make the offender liable to the punishment prescribed in O. 39, R. 2 (3) and a completed sale in contravention of an injunction under O. 39 R. 1 is not a nullity as being without jurisdiction. A temporary injunction under O. 39, is not a mandatory direction to a Court, as is a stay order of the kind provided for by the Procedure Code, but is an order directed against a particular person which can be issued only in the circumstances described in R. 1. 40 P.L.R. 518=1938 Lah. 220. When there is an injunction against Government in respect of certain quarry, persons who with knowledge of the injunction and with permission of Government work at the quarry are guilty of contempt. It is immaterial that they were not themselves parties to the suit and whether they were or were not bound by the injunction. 16 Pat. 159=18 Pat.L.T. 95=1937 Pat. 65 (S.B.). *See also* 43 P.L.R. 447. Where the true owner of a pension is prevented by injunction from getting his pension from Government he should be committed for contempt if he disobeys the Court's injunction and gets the pension from the Government. 20 C.W.N. 457=35 I.C. 378 (P.C.). Provisions of R. 2 (3), O. 39 were intended to be applied to breach of injunction under R. 1 also but as Cl. (3) is included under R. 2, it would follow that the provisions of that clause will not apply to R. 1. 1930 A. 387 (2). Injunction restraining defendant company from disposing of the goods—Assistant of the firm cannot be punished for disobedience. 42 C. 1169=21 C.L.J. 578. Sub-Judge could issue a temporary injunction staying the execution of a decree proceeding in a Munsiff's Court. 1923 L. 144 (2)=73 I.C. 909; 15 I.C. 614=18 C.W.N. 92. Decree of Revenue Court—Injunction—Extent of operation—Disobedience—Government's liability. 20 C.W.N. 457=35 I.C. 378 (P.C.). An injunction which is discharged subsequently must be obeyed during its subsistence. 20 C.W.N. 457. Disobedience of injunction issued by Court—Suit transferred to another Court—Jurisdiction of second Court to

(3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(4) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

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punish disobedience. 22 I.C. 499=18 C. W.N. 470; 46 M. 83=43 M.L.J. 71. O. 39, R. 2 (3) applies not only to disobedience of an order issued under Cls. (1) and (2) of that rule and applies equally to disobedience of all injunctions issued under S. 94 of the Code. High Court in its appellate side has jurisdiction over the whole of the Presidency. 1926 M. 574=50 M.L.J. 401=95 I.C. 196 (2). Unless Court has jurisdiction over the subject-matter of the controversy, disobedience of its injunction is not punishable. An injunction in matter beyond the jurisdiction of a Court is void. 15 C.L.J. 147=16 C.W.N. 447. Injunction—Breach of—Karnavan restrained from contracting loans—Validity of loans contracted thereafter. 47 I.C. 778=35 M.L.J. 96. The provision as to punishment for disobedience to orders of Court is not confined to suits of the nature contemplated by R. 2. 44 I.C. 56=7 L.W. 328. Marriage of ward in disobedience of guardian's undertaking given to Court—Offence—Penalty—Persons assisting guardian not liable for contempt. 31 Bom.L.R. 1120. Where a temporary injunction was obtained against a person directing him not to get the girl who had gone to his house married and when the person was not responsible in promoting or bringing about the marriage but did not do all that he could do to prevent it, it cannot be said that he actually disobeyed the order as it was passed and so an order for his detention in prison is incompetent. 118 I.C. 675=1929 N. 273. O. 39 has to be read along with S. 94. 7 L.W. 328. R. 2 applies to case of disobedience to an order to do or abstain from doing a single act. Provisions of sub-rule apply equally to disobedience of injunctions whether under Cl. (1) and (2) of the rule or under S. 94 of the Code. 50 M.L.J. 401=1926 M. 574; 1929 M. 273; 7 L.W. 328. Court is not bound under R. 2 (3) in the first instance to attach property and then only order imprisonment. The matter is one for the discretion of Court. 39 M. 907=30 M.L.J. 523; 26 M.L.J. 37=22 I.C. 404. Attachment of property is not a suitable form of remedy except where a person is ordered to do something and he does not do it. 31 C. W.N. 814=1927 C. 598=105 I.C. 348. An order for attachment of property or imprisonment of the person guilty of disobedience of an injunction is not an enforcement of the order of injunction but is a punishment for

past disobedience. 31 C.W.N. 814. Abettors of contempt of Court cannot be punished. 1927 C. 598=105 I.C. 348=31 C.W.N. 814.

HIGH COURT—POWERS OF.—The powers of High Court to issue injunctions in appropriate cases are not confined to the provisions of O. 39. Any orders may be made which the ends of justice or expediency may require. 136 I.C. 346=1932 M. 180; 137 I.C. 519=36 C.W.N. 291=1932 C. 353.

APPEAL.—An order refusing to attach property of a person who had disobeyed an injunction is appealable. 26 M.L.J. 37=22 I.C. 404. *See also* 1922 L. 347; 118 I.C. 675=1929 N. 273.

O. 39, R. 2 (3).—Cl. (3) of this rule applies to disobedience generally to an injunction granted by the Court. The words "in case of disobedience," in that clause are wide enough to cover breaches of an injunction issued under R. 1 of O. 39, for which no penalty is provided elsewhere. 16 Pat. L.T. 309=1935 Pat. 274; 15 Pat. 320=17 Pat.L.T. 61=1936 Pat. 23. An application under O. 39, R. 2 (3), for disobedience of an injunction, should not be granted where the applicant has not at heart the honour of the Court whose authority he says has been condemned but is actuated by personal motives. 43 P.L.R. 447. Sub-R. (3) of R. 2 of O. 39 does not apply to injunctions issued under R. 1 of O. 39, but applies only to injunctions issued under R. 2 of that order. The enforcement of injunctions issued under O. 39, R. 1 is to be under the provisions of S. 36 and O. 21, R. 32. The proceedings for the enforcement of an injunction under O. 39, R. 1, are transferable under S. 24. On the analogy of S. 37, C.P. Code, a Court which has passed an interim order which requires execution, ceases to have jurisdiction in the matter of enforcing the order, when it ceases to have jurisdiction to deal with the suit and consequently the power of enforcing the order lies in the Court which would deal with the interim proceedings, if it began at that time. 1941 A.L.J. 46=1941 O.W.N. 48. *See also* 61 C.L.J. 543. "Court granting the injunction"—Meaning of—Grant of injunction by one Court—Allocation of suit for trial to another Court of same jurisdiction—Jurisdiction to punish for breach of injunction. 61 C.L.J. 543. *See also* 1941 A.L.J. 46=1941 O.W.N. 48; 1937 Pat. 65 (S.B.) (Power to punish persons not parties to suit). Where a party disobeys an injunction

LOC. AM.—[ALLAHABAD.] *Delete* sub-rules (3) and (4) of r. 2, O. 39, and *add* the following as r. 2-A :—

"2-A. (1) In the case of disobedience to an injunction issued under r. 1 or r. 2 sub-rule (2), or of breach of any terms of any such injunction, the Court in which the suit is proceeding may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(2) No attachment under this rule shall remain in force for more than one year at the end of which time, if the disobedience or breach continues the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto."

[High Court Notification dated 15—9—1941.]

3. The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.

Before granting injunction, Court to direct notice to opposite party.

Order for injunction may be discharged, varied or set aside.

4. Any order for an injunction may be discharged or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

Injunction to corporation binding on its officers.

5. An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

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order restraining alienation of certain properties, Court can punish the party in contempt under O. 39, R. 2 (3). 131 I.C. 343=1931 L. 201. Before a Court commits a party to prison for alleged disobedience to an order for injunction in a case where the party contends that he received no notice of the order, the party should be given an opportunity of establishing his contention. 137 I.C. 425=1932 C. 719.

O. 39, R. 3.—If the object is likely to be defeated by delay, Court may grant an *ex parte* injunction without notice to opposite party. 64 I.C. 534=13 Bur.L.T. 227. Appellate Court can order stay of an interim injunction *ex parte* provided it thinks that a fit case has been made out. Where the interim order, so far as the relief claimed in the suit is concerned, really decides the action, appellate Court is justified in ordering a stay so that as far as that issue is concerned it might remain open until it has heard the appeal. An order in appeal does not confirm the interlocutory order. A totally different order, based on the merits, is passed which dissolves the injunction. The stay order merely operates to prevent for the time being the injunction taking effect. When the injunction itself is dissolved, the stay order is completely vacated. 136 I.C. 822=1932 A. 223.

O. 39, R. 4.—When injunction is granted *ex parte*, liberty to apply to Judge to vary or set aside his order must be implied. 9 A. 36 (42). Appeal. See O. 43, R. 1, Cl. (r) and 15 A. 8. O. 39, R. 4 is intended to cover two classes of cases: (1) when an urgent order *ex parte* has been passed under R. 3, R. 4 will allow the party against whom it has been passed to apply to have it dis-

charged or varied or set aside; and (2) when an injunction order already in force has, owing to fresh circumstances, become unduly harsh or unnecessary or unworkable, it would be open to either party to apply under R. 4 to the Court to discharge, vary, or set it aside. R. 4 is not intended to set at naught the ordinary *cursus curiae* that, once a Court has decided a matter after giving each side an opportunity of being heard, its order is final and binding on itself as much as on the parties, and cannot be re-opened except on the presentation of some new matter not available when the original order was passed. 1929 M. 803=120 I.C. 862. Where an order for an injunction has been passed and an application for its discharge is made, the order if it allows the application is clearly appealable because it results in an order being discharged. Also if the application is dismissed still the order is made under O. 39, R. 4 which attracts O. 43, R. 1 (r) which makes the order appealable. 1940 Nag. 45=1939 N.L.J. 483. Whatever be the scope of this rule it cannot be that a party can appeal against a mere reiteration of the original order of injunction when he has failed to appeal against the original order. 1929 M. 803=120 I.C. 862.

O. 39, R. 5.—The rule applies only to Corporations strictly so called, i.e., to bodies authorised by law to act as a person in law and not unregistered or unincorporated bodies or associations. 38 I.C. 572=9 Bur.L.T. 247. On this rule, see also 55 A. 399=1933 A. 344. Equity acts *in personam* and an injunction must be addressed to the defendant personally. The Secretary of State as a corporation sole would be an individual, but neither 'the N. W.Ry. Administration, Lahore' nor the

Interlocutory Orders.

6. The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any movable property, being the subject-matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once.

Power to order interim sale.
Detention, preservation, inspection, etc., of subject-matter of suit.

7. (1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit,—

(a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein ;

(b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit ; and

(c) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply *mutatis mutandis*, to persons authorized to enter under this rule.

Application for such orders to be after notice.

8. (1) An application by the plaintiff for an order under rule 6 or rule 7 may be made after notice to the defendant at any time after institution of the suit.

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance.

9. Where land paying revenue to Government, or a tenure liable to sale, is

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Agent of the Railway an individual. That would amount only to a suit against the office of Agent and not against the person or official himself. 14 L. 330=1933 L. 203.

O. 39, R. 6.—The power of Court to order sale of movable property is independent *inter alia* on the said property being the subject-matter of the suit or having been attached before judgment. If either of these conditions do not exist, then Court cannot exercise the power conferred by R. 6. 134 I.C. 118=1932 L. 51. As to whether application under this rule is one in execution, see 40 C.W.N. 1317.

O. 39, Rr. 6 and 7.—Where property attached before judgment is released on security which comprised some items of attached property, the plaintiff is preferentially entitled to execute his decree against the property given as security. 11 L.W. 6=56 I.C. 267. In a suit for damages alleged to have been caused by the erection by the defendant of an adjoining house, the defendant is entitled to an order to enter into the house of the plaintiff and to inspect the same. 24 C. 117. See also 16 B. 511. Power of Court to order inventory—Jurisdiction of probate Court to pass such order. 49 C.L.J. 484=1929 C. 498. R. 6 merely gives power to a Court to sell a perishable article and certainly does not authorize it to send a commissioner to sell any crop. 1930 M. 224=126 I.C. 284.

O. 39, R. 7.—Where what was required

was a decision on the question as to whether what was asserted by one of the parties, namely, that certain structures standing on the land were recent and not old structures was a true assertion or not and Court issued a commission for local investigation, *Held*, that the appropriate procedure was under R. 7 and not under R. 4 or 9 of O. 26. 37 C.W.N. 143=1933 C. 475. An order by a Court, in reference to certain constructions over a site which is in dispute directing that the situation then existing should not be altered pending disposal of a suit is an order which the Court is competent to pass under this rule. 1935 A.M.L.J. 117. An application for leave to institute a suit in *forma pauperis* is a suit for purposes of O. 39, R. 7, and the parties in a contemplated pauper suit who have petitioned to have their suit admitted under O. 33, C.P. Code, are therefore entitled to the relief of appointment of a commissioner or receiver for the purpose of taking an inventory of properties. (1939) 1 M.L.J. 96=1939 M. 80=I.L.R. 1938 M. 1060.

O. 39, R. 8.—The term "may" must be read with the words "at any time". 7 M. 241. When an interlocutory order is refused by one Judge the proper course is to apply for a review or to appeal from it. 16 B. 511.

O. 39, R. 9.—Possession given under O. 39 R. 9—Nature and effect of—If conclusive in proceedings in Criminal Court. See 1938 P.W.N. 526=1939 Pat. 151.

When party may be put in immediate possession of land the subject-matter of suit.

the subject-matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is conse-

quently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure :

and the Court in its decree may award against the defaulter the amount so paid with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

10. Where the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds

Deposit of money, etc., in Court.

such money or other thing as a trustee for another party, or that it belongs or is due to another party

the Court may order the same to be deposited in Court or delivered to such last-named party with or without security, subject to the further direction of the Court.

ORDER XL.

Appointment of Receivers.

Appointment of receivers.

1. (1) Where it appears to the Court to be just and convenient, the Court may by order—

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O. 39, R. 10.—In case the defendant refuses to deposit the money in Court, he is liable to pay interest from the date of the order. 16 W.R. 297. The rule does not cover a case where the money is held by another Court to credit of another suit. 27 M. 168. Admission which is insufficient under O. 12, R. 6 is also so under O. 39, R. 10. 1927 S. 25=97 I.C. 623.

O. 40, R. 1: SCOPE OF RULE.—The rule intends to give power of appointing Receiver only to the Court in which the suit is brought or by which the property has been attached. 23 C. 517 (519). See also 24 B. 38 (42). O. 40 if applies to mortgage decrees. 100 I.C. 735 (1)=1927 A. 419. Receiver can be appointed even after a decree is passed. 8 M. 229 (233). Court can order that the Receiver should continue permanently after decree when such continuance is necessary. 19 M. 120 (P.C.). Receiver can be appointed in respect of immovable property notwithstanding the fact that a Magistrate has passed an order under S. 145 of the Cr.P. Code. 22 A. 214. Jurisdiction of Special Judge acting under U.P. Encumbered Estates Act, see 1937 A.W.R. 1125. Discretion given by this rule is one that should be used with greater care and caution. 5 A. 556; 133 I.C. 433; 134 I.C. 799=1931 L. 688; 15 C. 818 (822); 23 C. L.J. 567; 16 C.W.N. 997; 28 C.W.N. 86=1924 C. 456; 134 I.C. 799=1931 L. 688; 1932 L. 82=133 I.C. 433. Remedy is derived from English practice and is an exceptional remedy. 100 I.C. 735 (1)=1927 A. 419. As to power of Court to appoint receiver in suit wrongly valued or wrongly framed, see 1936 L. 102. Pendency of proceedings is a condition precedent for appointment of receiver. Where on an

appeal against preliminary decree, the High Court stayed further proceedings, the original Court has no power to appoint receiver. 1937 M. 163=(1937) 1 M.L.J. 605. Execution of decree—Properties outside jurisdiction—Receiver—Power of Court to appoint. 40 C.W.N. 1056.

GROUND FOR APPOINTMENT—AND WHO CAN BE APPOINTED.—Grounds for appointment of a Receiver, see 11 I.C. 703; 1926 S. 83; 106 I.C. 167; 134 I.C. 799=1931 L. 688. An appointment of Receiver can be made only on proof of strong grounds of necessity. 11 I.C. 403. The first essential condition is that the applicant must have "an interest" in the property to be affected by the order. 61 I.C. 849=6 P.L.J. 366. Receiver should not be appointed where no risk of loss is shown. 12 I.C. 198=4 Bur.L.T. 241. See also 1933 S. 231. Where during the course of trial a receiver was appointed and a decision is given by that Court as to the rights of parties, the property can no longer be said to be *in medio* and as such there is no justification for the appointment of a receiver pending appeal. 1939 O.W.N. 59=1939 Oudh 94. When there has been a decision on the merits deciding the rights of the parties in the respective properties concerned, the property cannot be said to be any longer '*in medio*'. A receiver cannot be appointed where it would have the result of depriving the possession of the defendant who had possession up to the decision of the suit by the lower Court and who has continued to be in possession since, after a recognition of his title by one Court. 1939 O.W.N. 615=1939 Oudh 229. The power conferred by O. 40, R. 1 should be exercised cautiously and only in cases where the applicant for the appointment of a

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receiver has made out a *prima facie* title to the property. Where the defendant has been in possession for about fifteen years, without any objection from any body, and the plaintiff seeking to oust him from possession does not even allege that the property is in danger of being wasted by the defendant, no case is made out for the appointment of a receiver to take possession of the property. 1939 O. 61=1938 O.W.N. 1153. Where there are rival claimants to the property in dispute and the property has never been in the possession of any of the parties to the suit since the death of the deceased owner and the situation is fraught with the possibility of waste and mismanagement, it would eminently be a case for the appointment of receiver. 1941 O.W.N. 272. Public nature of the matter has got to be taken into account in the appointment of Receiver. 96 I.C. 30=1926 C. 1092. It would be very improper to take property out of the hands of ladies of culture and well capable of managing the property and of examining accounts. 11 I.C. 703. On application for appointment of a receiver, plaintiff must show that *prima facie* defendant has no title to the property and that he (the plaintiff) has the title. 161 I.C. 838=1936 O.W.N. 466. The burden of proof is on the applicant to show that it is just and convenient that a receiver should be appointed, and it is not for the opposite party to show cause why no receiver should be appointed. 1937 O.W.N. 243=1937 O. 232. Mere existence of apprehension in the mind of the plaintiff that the defendant would wrongfully dispose of his property is not alone sufficient to justify an order for receivership without further inquiry as to the basis of these apprehensions and existence of such apprehensions. 1936 L. 102. As to what is meant by "just and convenient". 28 C.W.N. 86=1924 C. 456; 34 C.W.N. 440=1930 C. 610. "Just and convenient" means just and convenient in view of the equities in favour of both the parties. 1932 C. 189=59 C. 205=35 C.W.N. 1066. See also 132 I.C. 349=1931 O. 307; 34 C.W.N. 440=1930 C. 610; 177 I.C. 612=1938 Lah. 12; 1938 All. 3; 1940 A.M.L.J. 34. The words do not mean just or convenient to one party or the other but just or convenient according to judicial notions of what is right and just. 159 I.C. 93=1935 M. 875. Appointment of Receiver is just and convenient if the main object is to preserve the property. 1923 L. 239 (2). Receiver should be an impartial person and wholly disinterested in the subject-matter of the suit. 18 I.C. 398=17 C.W.N. 581; 28 C.W.N. 86=1924 C. 456. But it is competent to Court upon the consent of parties and in a proper case, without such consent to appoint a person mixed up in the subject-matter of the litigation, if it will be beneficial to the estate. 28 C.W.N. 86=1924 C. 456. Order on an application under O. 40, R. 1 should not express an opi-

nion on the merits of the case. (*Ibid.*) Appointment of an interim Receiver pending the final appointment of a common manager can be made only on evidence of necessity for such appointment. 34 I.C. 83. O. 40, R. 1 does not lay down notice to the opposite party. (22 C. 459; 21 M.L.J. 821; 107 P.R. 1908; 36 P.R. 1910, Dist.) 1923 L. 239 (2). See also 42 P.L.R. 475. Where there are a large number of outstandings due to the estate of the deceased person, some of which are liable to be lost owing to the efflux of time, and the heir of the deceased is a lady and there is a *bona fide* dispute between the parties, Court is justified in appointing a Receiver to recover the outstandings and to bring the proceeds into Court. 1923 L. 239 (2)=71 I.C. 743. Mahant—Disputes regarding title—Convenience. 69 I.C. 361. Court may make an order appointing a Receiver *suo motu*. 1922 L. 444=67 I.C. 383. Such appointment is one made under this rule, and is appealable under O. 43, R. 1. 1936 O.W.N. 1134=1936 Oudh 337. Court has jurisdiction to appoint a receiver to maintain the *status quo ante* pending a suit or appeal. (*Ibid.*) Appointment of Receiver in suit in which possession cannot be decreed to plaintiff. 92 I.C. 599=1926 M. 155. Court has got power to appoint a Receiver in a declaratory suit and appellate Court should not interfere with the discretion exercised by the lower Court. 94 I.C. 39=27 Punj.L.R. 138; 45 L.W. 519=1937 Mad. 163=(1937) 1 M.L.J. 605. Where defendant has been put in possession of the properties in dispute by the Revenue Courts after contest on the ground of his having a *prima facie* title to them, it would not be just and convenient for the Court to deprive him of that possession and to appoint a receiver in his place to manage the properties. 166 I.C. 983=1937 O.W.N. 197. Poverty of the defendant trustee is no ground for appointment of a Receiver unless there be in addition some danger to the estate. 29 M.L.J. 209=29 I.C. 485; 1933 Sind 231. The late production of accounts and documents by manager is not sufficient to warrant the appointment of a Receiver. 17 I.C. 261=1912 M.W.N. 904. Mere fact that a Muhammadan widow is entitled to a lien for dower on her husband's estate is no ground for refusing the appointment of a receiver summarily without enquiry. 1923 N. 21. That receiver has not been appointed at a prior stage of the suit is no ground for refusing the application at a later stage, when fresh grounds are made out. 1923 N. 21. Court has no jurisdiction to appoint a receiver at the instance of a simple money-creditor unless he establishes a special equity in his favour. 61 I.C. 849=6 P.L.J. 366; 34 C.W.N. 440=1930 C. 610. As, for example, in the case of a creditor who has a right against a specific fund or estate. 1936 Lah. 102. (1922 Pat. 318 *Rel. on.*) In a fit and proper case receiver may be appointed in

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respect of defendant's properties (not the subject-matter of suit), even in a suit for recovery of amount due on a promissory note. 1935 Rang. 398. A prior incumbrancer desiring to take possession is entitled to have the Receiver obtained by a puisne incumbrancer discharged, and a Receiver of his own substituted. 61 I.C. 849=6 P.L.J. 366. The insolvency of an administrator is a good reason for appointing a Receiver. 48 I.C. 152=11 Bur.L.T. 127. It is obviously undesirable that receiver should be appointed by two Courts of concurrent jurisdiction, so that orders may be given possibly by one Court which may conflict with the orders that are given in the other Court. Where there is a receiver already appointed, the proper procedure for protection of one's interest is not to apply to another Court of concurrent jurisdiction for the appointment of another receiver, but to apply to the Court which has already appointed a receiver for adequate protection. 42 C.W.N. 33. O. 41, R. 1 (2) is an enactment for the benefit of third parties and means that the wide words of sub-R. (1) of O. 41, R. 1 are not to be construed to justify the Court in removing from possession or custody of property a third party who has got a good title to such possession or custody as against the parties to the suit. The words "whom any party to the suit has not a present right so to remove" merely mean whom no party to the suit has a right so to remove. The provision is *ex abundanti cautela*. I.L.R. (1939) Bom. 82=40 Bom.L.R. 1266=1939 Bom. 54. The appointment of a Receiver, unless perfected by his taking possession of the property has no effect on the right of an attaching creditor. Accordingly an attachment of property made after the appointment of a Receiver but before he takes possession of the property would be a valid attachment which would have priority over the claims of the Receiver. This would be so not only when the property is immovable property but also when it is a debt. I.L.R. (1937) 2 Cal. 440=41 C.W.N. 1074. See also 45 C.W.N. 1104. The property in respect of which a receiver was appointed was a contingent one. The receiver gave notice to the debtor and the latter admitted his claim. *Held*, that the admission plus the notice already given immediately perfected the title of the receiver. 1941 Cal. 579.

SELECTION OF RECEIVER.—Ordinarily a party to a litigation should not be appointed a Receiver unless very exceptional circumstances are established to justify such an appointment. 18 C.L.J. 638=18 C.W.N. 533. See also 1929 Lah. 780. One of the parties to suit will not be appointed without the consent of the other. 19 I.C. 873=17 C.W.N. 974; 25 I.C. 602. Where the right to succeed to the estate of a deceased person is in dispute, a person to whom the deceased had be-

queathed by her will the bulk of her property and who has been granted letters of administration may be appointed interim receiver on his furnishing sufficient security to safeguard the interests of whoever is ultimately found to be the rightful heir to the estate. 42 P.L.R. 475. See also 1941 Sind 112. Per *Stone, C.J.*—An application for the appointment of a receiver should not merely ask for the appointment of a receiver but should name out the person whom the applicant wants to be appointed as a receiver. If the application does not name out a receiver the Court should adjourn the matter for the naming of a receiver and not make an order granting the application and still leaving the matter at large as to who the receiver ought to be. There should not be two distinct orders, one stating that it is just and convenient to appoint a receiver and then a later order appointing a particular person as a receiver. I.L.R. 1938 Nag. 174=1938 Nag. 540. When a non-resident is appointed Receiver there must be adequate guarantee that he will be subject to the effective control of the Court. 19 I.C. 873=17 C.W.N. 974. That the Receiver resides at a great distance from the property to be managed, is not an absolute disqualification, but is an important circumstance to be taken into consideration. 19 I.C. 873=17 C.W.N. 974. A person who is guardian of an incapacitated defendant in a suit is not always disqualified to be Receiver. 35 I.C. 939=4 L.W. 285. While appointing a Receiver, the wishes of the creditors are entitled to a great weight, as they have virtually the right of nomination. 115 I.C. 881=1929 P. 114.

PRIMA FACIE CASE.—In an application praying for the appointment of a receiver, the burden of proof is on the applicant to show that it is just and convenient that a receiver should be appointed, and it is not for the opposite party to show cause why no receiver should be appointed. 1937 O. W.N. 243=1937 Oudh 232; 21 M. L.J. 821=11 I.C. 170; 3 Pat.L.T. 466; 43 I.C. 550; 1928 M. 813. Alienation by Hindu widow—Suit by reversioner to set aside—Appointment of receiver not proper. 32 Bom.L.R. 1013.

PUBLIC OFFICER.—Receiver is public officer. 58 C. 850=35 C.W.N. 161=1932 C. 503.

REMUNERATION.—Court has a discretion if it thinks fit to allow him remuneration at a fixed rate. 1923 C. 516=76 I.C. 583. Receiver's remuneration must come out of the estate of the insolvent and the legal representatives of the insolvent cannot be made personally liable for the same. (*Ibid.*) The appointment should be made for the protection of property or the prevention of injury according to legal principles. The rule does not confer an arbitrary and non-regulated discretion on Court. 34 I.C. 693=23 C.L.J. 567; 9 I.C. 985=13 C.L.J. 495; 5 Lah.L.J. 583=1923 L. 623; 55 C. 720=32 C.W.

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N. 681=54 M.L.J. 423=1928 P.C. 49 (P.C.). As to remuneration of Receiver, *see also* 131 I.C. 655=1931 M. 500=60 M.L.J. 332. Discretion of Court in declaratory suit in respect of agricultural lands. 1923 L. 623.

WASTE, WHAT IS.—A mere intention to transfer by a life tenant does not constitute waste but may constitute danger to the reversionary interests and to protect them Court may appoint a Receiver. 44 B. 727=57 I.C. 553. Where it is clearly proved that an estate is so grossly mismanaged that the whole estate will be jeopardised, it is a clear case for the appointment of Receiver. 25 I.C. 406=18 C.W.N. 537; 21 M.L.J. 821=11 I.C. 870. *See also* 134 I.C. 799=1931 L. 688; 1933 A. 138 (waste by widow); I.L.R. (1940) Kar. 208.

EFFECT OF APPOINTMENT.—Property in the possession of Receiver is in the custody of the law and cannot be seized under a writ of attachment or execution. 47 M. 47=43 M.L.J. 211. Where Receiver is appointed, property vests in him only when the orders under O. 40, R. 1 (b), (c) and (d) are made. 1923 N. 6. Appointment of receiver for collecting amount due under decree—Effect of—Creditor getting such receiver appointed—Right to priority over attaching creditor. A step of that kind is no more than getting the property attached or issuing an injunction against the defendant not to alienate his property, and it does not amount to a charge and therefore does not confer priority over others who had obtained order of attachment. 153 I.C. 259 (2)=1935 M. 146. Effect of appointment does not bar execution. 6 Pat.L.J. 208=62 I.C. 469. Where Agent of owner is appointed Receiver, whether it terminates the agency. 1936 M. 980. Appointment of Receiver—Effect of—If involves transference of ownership—Duty to report to Collector under U.P. Land Revenue Act. 1936 R.D. 238. *See also* 1938 A. 80.

CONFLICT OF JURISDICTION—SECOND RECEIVER BY ANOTHER COURT.—Where a receiver is appointed, his possession is that of the Court which appointed him and it cannot be disturbed without its leave. If any one, whoever he may be, disturbs the possession of the receiver, he will be guilty of contempt of Court. It follows from this that when a receiver is appointed by one Court to take charge of any properties, another receiver cannot as a rule be appointed by a different Court to take possession of or exercise any control over the same properties without the leave of the former Court. To make any such appointment would be obviously inconsistent with the first appointment and result in a conflict of jurisdictions. 146 I.C. 966=1933 L. 671.

RIGHTS OF THIRD PARTIES.—A Court cannot appoint a receiver to take charge of pro-

perty which is in the possession of third party and when that party claims to be in possession thereof in his own right. 1935 Rang. 398. Though O. 40 governs the appointment of receivers in execution, R. 1 (2) of O. 40 bars the appointment of a receiver to take possession of, and to realise the income from, the occupancy and expropriatory tenancies of a judgment-debtor. To so appoint is contrary to the Tenancy Act and is tantamount to an ejectment of the tenant. 1937 A.L.J. 267=1937 All. 389. *See* 17 L.W. 64=1923 M. 304. The rule that the possession of Receiver may not be disturbed without leave, does not apply, so far as third persons are concerned until a Receiver has been actually appointed, and is in possession. 23 C.W.N. 952=29 C.L.J. 424. Receiver—Possession of—Legality of—Right of third parties to question—Order appointing Receiver not challenged—Effect. 56 M.L.J. 95.

CONTEMPT BY RECEIVER.—22 C. 648; *see also* 30 C. 696.

CONTEMPT OF COURT.—Where a receiver is appointed to take possession of property the person in possession of property cannot interfere with the Receiver, but should apply to the Court for redress. 18 C.W.N. 289=22 I.C. 417.

DISCHARGE OF RECEIVER.—23 C.L.J. 217=20 C.W.N. 789. Court which has the power of appointing the Receiver is also invested with the power of dismissal. 1931 A.L.J. 13=1931 A. 72. A Receiver appointed in a suit for proceedings by consent of parties, may be discharged, even before the termination of the suit or proceeding. 13 L.W. 367=61 I.C. 562. Neither the termination of the suit in decree nor the pendency of the appeal against that decree will put an end to the authority of the Receiver appointed to collect rents. 33 I.C. 69; 5 Pat.L.J. 513=1 Pat.L.T. 643. A Receiver who has once been appointed should be discharged only for proved incapacity. 115 I.C. 881=1929 P. 114.

HIGH COURT, POWERS OF.—High Court has no jurisdiction to examine the accounts in order to ascertain the liability of a Receiver appointed by a Subordinate Court, he not being an officer of High Court. 4 P.L.J. 636=54 I.C. 207. High Court has power to appoint a Receiver in a testamentary suit, 17 B. 388.

SUIT AGAINST RECEIVER.—Where the Receiver dies, further proceedings can be continued against his successor and no one else. 61 I.C. 888. Permission to conduct a suit implies permission to institute a suit. 63 I.C. 843. A permission granted by a Court to sue a Receiver relates back to the time of the institution of the suit. (*Ibid.*) A Receiver if an officer of Court—Suit against. 62 I.C. 768=26 C.W.N. 992. The necessity to obtain sanction before institution of a suit against the Receiver is imposed by the Common Law, merely to enforce due respect towards Courts of Justice, and omission

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to do so does not affect the jurisdiction of Courts. Per *Sadasiva Aiyar, J.*, in 70 I.C. 759=42 M.L.J. 339; 43 M. 793=59 I.C. 568. It is illegality which can be cured by obtaining it during the course of litigation. 43 M. 793=59 I.C. 568; 61 I.C. 888; 63 I.C. 843. It is clear law that as a Receiver is an officer of Court he cannot be sued for acts done in his official capacity by a third party except with the leave of Court. 1 R. 138=1923 R. 208; 102 I.C. 797=1927 P. 297=8 P.L.T. 629.

LEAVE OF COURT.—Proceedings cannot be instituted against a Receiver without the permission of Court and if so instituted they constitute a contempt of Court. 19 C.L.J. 191=18 C.W.N. 546. See also 130 I.C. 836=1931 P. 204 (Permission of Court is necessary before attaching properties in the hands of the Receiver). Where an estate is in the possession of a receiver appointed by Court, a suit for possession of the estate from that receiver can only be brought with the leave of Court. It is necessary for the plaintiff to apply to the Court which has appointed the receiver for sanction for the purpose of bringing the action for possession of the estate. Where property is in possession of an officer of the Court, if there are legal or equitable rights in that property which are not vested in the parties to the action or the persons before the Court, and which are not the subject of the administration then going, then the person who claims to enforce those rights must apply for leave to enforce them. Whether such right be a right to take possession, or a right to bring an action, or a right to do various other things, the Court requires an application to be made to it for leave to enforce the same. If no such sanction is obtained, the action commenced without the sanction must fail. 19 Pat.L.T. 35=1938 Pat. 487. See also 186 I.C. 854=1940 Rang. 59. To charge a Receiver for the breach of the ordinary criminal law of the country sanction is not necessary. 15 I.C. 491=13 Cr.L.J. 491. It is not a general rule of law that sanction of Court appointing a Receiver is not necessary in the case of criminal proceedings against him arising out of his office. 15 I.C. 489=13 Cr.L.J. 489. Leave of Court is necessary both for execution of a decree against Receiver of the property of judgment-debtor as well as for prosecuting an application for rateable distribution against Receiver. 14 C.L.J. 55=15 C.W.N. 925. An application for rateable distribution of the proceeds of sale in the hands of a Receiver does not require leave of Court. 34 Bom.L.R. 1405=1932 B. 622. Receiver appointed by appellate Court—Proper Court to grant sanction for attachment of properties in his possession. 1929 I. 147. Such leave may be obtained at a subsequent stage of the proceedings. 14 C.L.J. 55=15 C.W.N. 925. A prohibitory order against the Receiver is not equivalent to the

grant of leave to execute the decree. (*Ibid.*) Receiver appointed by one Court—Subsequently sued in another Court with leave of the appointing Court. Such leave does not render him amenable to the other Court's jurisdiction and an injunction against him is illegal. 7 P. 684=1928 P. 321.

LEAVE OF COURT NOT NECESSARY FOR EXERCISE OF STATUTORY RIGHT.—The rule forbidding the bringing of a suit against a Receiver is a mere procedure of Court not resting on any statutory authority, whereas the right to bring a suit under O. 21, R. 63 was statutory; and a statutory right to sue cannot be defeated by any rule of practice. 37 L.W. 346=147 I.C. 526=1933 M. 340.

LEAVE TO SUE.—A Receiver appointed under the Code merely holds the estate on behalf of the Court. The estate does not vest in him, nor does he in any way represent it. Leave of Court is necessary in order that by impleading him the estate may be bound. A Receiver under the Insolvency Act holds a different capacity altogether. He is more than a mere officer of Court; the insolvent's estate vests in him. He alone, and no one else, represents the estate. No leave is accordingly necessary for suing him. 21 A.L.J. 737=46 A. 16. But where a party to a suit is appointed Receiver, leave is not pre-requisite to his filing suit in respect of the property. He may sue as party. By being appointed Receiver, he does not lose his privilege as a party. The strictness of the rule as to the necessity of the leave applies more appositely to the case of the appointment of a person who is not a party to the suit or who is not interested in it. 55 C. 1216. Grant of subsequent leave will cure the defect. 46 C. 352=23 C.W.N. 496; 56 I.C. 424=22 Bom.L.R. 319. A suit against a Receiver without leave of Court should be dismissed and not remanded to lower Court for obtaining the necessary leave. 24 I.C. 622. In every case a Receiver as such need not be sued but remedy can be obtained by party, by application to Court. 10 I.C. 673=9 M.L.T. 300. There is no statutory provision which requires a party to obtain leave of Court to sue a Receiver. The rule is based on public policy. 4 P.L.J. 20=47 I.C. 719; 51 I.C. 706. A Court should not refuse leave to sue ordinarily. 4 P.L.J. 20. A decree against a Receiver without permission must be set aside. 17 I.C. 916=3 Bur.L.T. 163.

POWERS OF RECEIVER.—A Receiver appointed by Court is not ordinarily the representative or the agent of either party in the administration of the trust. But his appointment is for the benefit of all parties and he holds the property of those ultimately found to be true owners. 1930 M. 4; 1928 C. 402. A Receiver is not a judicial officer. He is merely a custodian of properties by order of the Court. In that capacity it may be his duty to institute suits on behalf of the estate in the Court of the Judge. It is

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unthinkable that any such officer should also be the Judge in the Court in which the suits are instituted. Where Court authorises Receiver to hold an enquiry as to heirs in a contested succession proceedings, *held*, that the order was invalid in law. 121 I.C. 433=31 Bom.L.R. 1081=1929 B. 478. A receiver appointed by the Court under O. 40, R. 1 has a legal position different from that of the Official Trustee or the Administrator-General. Unlike the Receiver these Officers have an estate in the properties which they hold by virtue of their office and consequently a suit in respect of the properties they hold would be a suit against them in the legal sense. The same reasoning does not apply to a Receiver. 44 C.W.N. 74=1940 Cal. 1. Receivers appointed by the Court are officers of the Court, and are not the legal representatives or assigns of the parties to the suit; nor is it the practice of the Court to bring Receivers on the record in a suit and subject them to liability as to costs. Where an estate of which a Receiver has been appointed includes a decree to be executed, the proper procedure is for the Receiver to apply in the suit in which he was appointed (unless it already has the power) for liberty either to file a fresh darkhast in his own name for execution or to continue the existing darkhast (when one has been filed and is pending) in the name of the darkhastdar on giving him a proper indemnity as to costs. 40 Bom. L. R. 932=1938 Bom. 458. Where Receiver was given power to collect outstandings and do all things necessary for the realisation and preservation of the assets of firm, *held*, Receiver had no authority to mortgage the property of the firm. 44 M.L.J. 602=50 C. 338=1 R. 66=50 I.A. 77 (P.C.). A Receiver in possession of the estate is entitled to require payment of rent. 58 I.C. 301. A Receiver appointed by Court under O. 40, R. 1 has no power to bind the estate by a lease. The proper remedy of the lessee for breach of contract of lease entered into by Receiver is only against the Receiver personally and the lessee has no right of suit against the owner of the estate. The Receiver can claim to be indemnified from the estate if it is found that his action in leasing the property was correct. 1938 Rang.L.R. 611. In a partition suit in which a Receiver is authorised to sell properties there can be no difficulty in directing him to convey the properties. 43 C. 124=19 C.W.N. 817. Court may confer on a Receiver all such powers for the realisation of properties and the execution of the documents as the owner has. 43 C. 124. See also 45 C.W.N. 68 (Power to mortgage property subject of partition suit). Also all such powers as to bringing and defending suits. 27 I.C. 459=19 C.W.N. 45. If a joint Hindu family can sue to recover possession of family property, there is no reason why a Receiver of the joint family estate cannot likewise sue. 39

Bom.L.R. 224. Plaintiff appointed Receiver by Court cannot appropriate partnership moneys to his own use. 1925 P.C. 257=92 I.C. 274=23 L.W. 628 (P.C.). On appointment of a Receiver the estate vests in him and thereafter the Receiver is the only person competent to prosecute suits and obtain decrees. 11 I.C. 102=15 C.L.J. 339. The general powers of Receiver who can sue and defend a suit with the express permission of Court do not necessarily contain a power to sue and liability to be sued. 66 P.R. 1913=17 I.C. 751. A Receiver appointed in execution can prosecute a cause of action outside the jurisdiction of the Court by which he was appointed Receiver. 1921 M.W.N. 106=61 I.C. 753. A Receiver appointed to collect outstandings can file suits in that behalf even though the suit in which he was appointed has terminated in a decree or an appeal is pending from that decree. 33 I.C. 69. Termination of litigation in which Receiver was appointed—Absence of order of discharge—Appointing Court closed—Competency of Receiver to prefer appeal against adverse orders. 30 L.W. 713=57 M.L.J. 668. Receiver's powers are entirely conditioned by terms of his appointment, subject to any subsequent change by the Court under which he holds the appointment. 32 I.C. 207=30 M.L.J. 456. Suit by Receiver to cover property sold prior to his appointment. 35 M. 578. A Receiver appointed by a Court can oust a mortgagee decree-holder put in possession of the lands subsequent to his mortgage decree. 6 P.L.J. 37=61 I.C. 67. R. 1 does not permit of the appointment of a Receiver in respect of properties not comprised in suit. 17 I.C. 16. Receiver can collect only such assets as become due to the estate after his appointment. Rents falling due prior to his appointment are not such assets. 42 I.C. 785=1917 P.H.C.C. 311. Generally speaking a person who is appointed by Court as the manager of the property in dispute has no power to pledge the credit of an individual party. While in law it is more usual to have that doctrine applied to a Receiver and manager, the doctrine is equally applicable to any person appointed by the Court as an officer of the Court. 1929 C. 659. Lease of debutter property—Need for sanction of Court—Application for leave containing misrepresentations—Effect—Term not mentioned in application—Whether can be included in lease. 50 C.L.J. 333=1929 C. 828. Receiver—Appointment in execution of mortgage decree—Purchase of properties without leave of Court—Legality—Sale if liable to be set aside. See 68 M.L.J. 597.

DUTIES OF RECEIVER.—19 B. 660. Delegation of powers to receiver. See 65 I.C. 837=34 C.L.J. 123.

COSTS DUE TO RECEIVER.—19 B. 660; 134 I.C. 272=1931 N. 143; 30 C. 696.

LIABILITY OF RECEIVER.—Receiver would be personally liable for breach of contract for

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which sanction of Court has not been obtained. 58 C. 174=134 I.C. 1266=1931 C. 491. (See the same case as to rights of third parties and right of Receiver to be indemnified.) Where the applicant establishes a *bona fide* claim either against the former Receiver or against the estate as represented by his successor or against both, permission to sue the Receiver should be granted and refusal amounts to illegal exercise of jurisdiction. The court has no jurisdiction to consider the issues of law between the applicant and the Receiver on the petition for leave to sue and should leave them to be decided in the regular suit. 186 I. C. 854=1940 Rang. 59. As to personal liability of Receiver to pay costs, see 134 I.C. 272=1931 N. 143. Where Receiver is guilty of wilful default or gross negligence, the only provision for taking action against him, apart from proceeding against the security, is that his property can be attached. The fact that the rule provides for the enforcement of such an order by attachment implies that it is the only way to be enforced and that arrest and imprisonment are not to be the methods of enforcement. 1931 M. 760=62 M.L.J. 199.

REMEDY AGAINST RECEIVER.—26 M. 492. As to personal liability of Receiver, see 1925 P. 602; 58 C. 174=134 I.C. 1266=1931 C. 491.

REMOVAL OF RECEIVER.—19 W.R. 66; 13 M. 300. Court that appoints a Receiver has also power to remove him. 134 I.C. 454=1931 A. 72. The Court may remove a receiver who has failed to file his accounts in spite of its order and who considers his own personal interests to the exclusion of the interests of the parties. 1941 Cal. 144=I.L.R. (1940) 2 Cal. 102. Where two sets of defendants are joined in a suit on a mortgage and the mortgagee gets a receiver appointed to take charge of certain land covered by the mortgage, but subsequently one set of defendants are struck off the record as being not necessary parties to the suit, and the defendants so discharged apply that the receiver should be discharged and that the land under his possession should be released to them, they are entitled to the order prayed for, if it is found that they were in possession of the land at the time the receiver was appointed and if none of the other parties had the right to remove them from possession. 1938 Rang. L. R. 586=1938 Rang. 387. Where a receiver appointed under this rule is replaced by another Receiver, the new Receiver should be made a party to the proceedings. 28 M. 157. An order removing a Receiver is one falling under R. 1 (a) as the power of appointment includes also the power of removal and is appealable. 92 I.C. 940=53 C. 319=1926 C. 593. But see also 60 C. 162. Court may in the exercise of its discretion make any order discharging or removing a Receiver for the proper care and management of the property in its custody and Receiver has no right of

appeal against the order of removal passed by the Court appointing him. 60 C. 162=1933 C. 52=57 C.L.J. 408.

APPEAL.—A decision that it is just and convenient to appoint a receiver does not amount to an order appointing a receiver and no appeal lies against such order until a receiver is actually appointed because it is possible that the final order appointing a receiver may never be made. 148 I.C. 184=1934 N. 64. See also I.L.R. (1938) Nag. 174=1938 Nag. 540. If the order appointing a receiver is made against a party to the suit, then he would have a right to appeal under O. 40, R. 1 (a) read with O. 43, R. 1 (s); if the Court orders the removal of a person from possession he would have a right of appealing against that order under O. 40, R. 1 (b) read with O. 43, R. 1 (s). But where an order is made against a person not a party to the suit, refusing to direct the receiver to release the property there is no appeal against it by the third party. His remedy is by suit. 1941 Rang.L.R. 300. In an appeal against an order on an application under O. 40, R. 1, it is dangerous for the appellate Court to express any opinion at all as to the merits of the suit or to indicate even briefly whether there appear grounds for supposing that one side or the other has a stronger *prima facie* case. 1940 A.M.L.J. 34. See also I.L.R. (1941) Lah. 590. An order merely declaring that a Receiver should be appointed is appealable even though nobody is named as Receiver. 13 Pat.L.T. 525=1932 P. 360 (following 40 M. 18 and 1 P. 625.) An order refusing to appoint a Receiver is open to appeal. 30 I.C. 545=17 Bom.L.R. 680. See also 17 C. 680; 10 M. 179 (F.B.); 1938 Lah. 10 (appointed receiver refusing to act—If appeal lies from order of appointment); 1937 Sind 161. In such an appeal it is inexpedient to go into the merits of the case pending in the lower Court. 32 C. 741. An order refusing an application for removal of a Receiver cannot be appealed from. 23 C.L.J. 217=20 C.W.N. 789; 24 I.C. 862. See also 40 C. 862. A Civil Court cannot appoint a Receiver in respect of properties for which a Criminal Court has already appointed a Receiver under S. 136, Cr.P. Code, unless the Magistrate withdraws the attachment. 40 C. 862=17 C.W.N. 1070. A Court of appeal will not, except in an extreme case, disturb an order for the appointment of Receiver by a Court below. 1923 L. 623; 1927 L. 65. See also 1937 O. W.N. 197=1937 Oudh 280; 42 P.L.R. 421=1940 Lah. 325; I.L.R. (1941) Lah. 590. If appointment of Receiver is not made on sound judicial lines, appellate Court should interfere. 96 I.C. 30=1926 C. 1092; 55 C. 720=32 C.W.N. 681=55 M.L.J. 423=1928 P.C. 49 (P.C.). The pronouncement by a Court that a Receiver should be appointed without naming a specific person is appealable. 40 M. 18=32 C.L.J. 304; 1 P. 625; 1922 P. 250; 5 P.L.T. 210. See also 1938

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Rang. L.R. 586=1938 Rang. 387 (Order dismissing application for removal of receiver is appealable). An order dismissing an objection to the appointment of a Receiver of property of which the objector is in possession is appealable. 48 I.C. 133=3 Pat. L.J. 573. The appointment of a receiver is a matter entirely within the discretion of the trial Judge and unless it can be shown by the appellant that the trial judge has not exercised a judicial discretion in the matter, he cannot succeed in his appeal against an order rejecting his application for the appointment of a receiver. 166 I.C. 983=1937 O.W.N. 197. No second appeal lies against an order appointing a Receiver in execution. 114 I.C. 839=1929 M. 20. Proceedings under S. 12, Guardians and Wards Act—Order appointing Receiver—Appeal lies. 1929 N. 119. An order giving directions to a Receiver for the restoration of property does not fall under O. 40, R. 1 (d) and is not appealable. 1933 L. 216=145 I.C. 200. O. 40, R. 4 gives the Court a judicial discretion to take action against the receiver or not, and when the Court has exercised its discretion by not taking such action, the appellate Court will not entertain an appeal against such exercise of discretion. 150 I.C. 750 (1)=1934 A. 907. Neither R. 1 nor R. 4 of O. 40 has any application to accounts from a third party relating to the period of a receiver's administration and the non-rendition of accounts by third party during that period is not appealable under any of these provisions of law. 1938 Lah. 328.

APPEAL TO PRIVY COUNCIL.—R. 13 of O. 45 applies where an application for appointing a Receiver is made after leave to appeal to Privy Council is granted, but the principle for appointing a Receiver shall be the same as laid down in R. 1. 12 I.C. 198=4 Bur. L.T. 241.

REVIEW.—An *ex parte* order passed under this rule is capable of being reviewed. 21 B. 328. Order appointing Receiver is discretionary with the trial Court—Court of review is free to exercise its own discretion. 27 L.W. 333=1928 P.C. 49 (P.C.).

COLLUSIVE SUIT—RECEIVER IN.—Even if a suit is collusive, the appointment of a receiver by a Court in that suit cannot be ignored so long as it stands. It is not competent for any person to interfere with the possession of a receiver on the ground that his appointment should not have been made. Persons who feel aggrieved by the order of the Court may take proper course to question its validity but so long as it lasts, it must be respected. 146 I.C. 966=1933 L. 671.

ALIENATION BY HINDU WIDOW—SUIT BY REVERSIONERS.—In a suit brought by a reversioner impeaching the alienation made by the widow of a share of the estate, it is legal to appoint a Receiver but under exceptional circumstances only. Where the property is

being managed by a third person who has been trying for a long number of years to obtain the property by fair means or foul and who is expected to make as much profit out of the estate as he possibly can, thus prejudicing the rights of the reversioner and waste is proved, a Receiver may be appointed and the third party being an alienee outright of a certain share of the estate from the widow is liable to be ousted just as much as the widow. 1933 A. 138=144 I.C. 33. Where properties of deceased are in the possession of his widow and she is the executrix under the will left by the deceased, a mere claim to such property made by an alleged daughter of the deceased is no ground for appointment of receiver. 1934 R. 153.

DECLARATORY SUIT.—If there is property in dispute between parties, and the Court thinks it expedient that the property should be protected for the benefit of the party ultimately entitled to it pending the suit, the Court can properly appoint a receiver of it even in a suit which prays for no other relief than the declaration of some particular right or title. 45 L.W. 519=1937 Mad. 163=(1937) 1 M.L.J. 605.

EQUITABLE MORTGAGE.—The possession of deeds under circumstances consistent with a deposit by way of security raises a *prima facie* case for the appointment of a receiver on an interlocutory application; and in addition to proving that there is a *prima facie* mortgage it is incumbent upon the plaintiff to prove that interest is in fact in arrear. 1937 Rang. 399. In the case of *English mortgages*, a receiver can be appointed of the mortgaged property in execution in cases where sub-R. (2) of O. 40, R. 1, C.P. Code, would operate to prevent such an appointment. 42 C.W.N. 266=1938 Cal. 93.

EQUITABLE EXECUTION.—A person seeking 'equitable execution' by appointment of receiver must show that he was met by difficulties arising from the nature of the property, which prevented his obtaining relief at law. One principle to be applied is to see whether in lieu of the assets the amount due under the decree is likely to be realized within a reasonable time from the profits of the attached property. Another principle is that such an appointment should appear in the circumstances to be the best course both for the creditor and the debtor. 18 Lah. 486=39 P.L.R. 839=1937 Lah. 433.

EXECUTION PROCEEDINGS.—R. 1 is a general provision relating to appointment of receivers and receiver can be appointed in execution proceedings. 100 I.C. 298=1927 L. 190; 114 I.C. 839=1929 M. 20; I.L.R. (1941) Lah. 590; I.L.R. (1941) 2 Cal. 37; 45 C.W.N. 1104. S. 51, C. P. Code prescribes the procedure in execution and lays down that the Court may, on the application of the decree-holder, order execution of the decree by appointing a receiver. No fur-

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ther restrictions have been placed on the power of the Court in this section, nor has the nature of the property been defined of which a receiver can be appointed. This section will therefore evidently be governed by the provisions of O. 40, R. 1. 162 I.C. 861=1936 L. 239. Hence where the judgment-debtor has a theatre and a receiver is appointed in execution of a decree against the judgment-debtor to receive the earnings collected and keep accounts but not to receive money at the doors, the money so earned is property within the meaning of O. 40, R. 1 and as such the order is not *ultra vires*, but is just and convenient. (*Ibid.*) A Court has jurisdiction to appoint a receiver even in execution of a money decree. To justify such an appointment, it is not necessary that there should be difficulties arising from the nature of the property against which execution is sought and which prevent the decree-holder from obtaining relief in the ordinary manner, i.e., by attachment and sale of the judgment-debtor's property. Where the decree-holder wants to get the property sold as soon as possible but the judgment-debtor is putting obstacles in his way by raising all sorts of objections and thus delaying the proceedings and the judgment-debtor is in the meantime appropriating the rents and profits paying little or nothing to the decree-holder, an order for the appointment of a receiver only till the property is sold in execution would be "just and convenient" under O. 40, R. 1. 42 P.L.R. 421=1940 Lah. 325. A receiver appointed in execution is quite as much as a receiver appointed in a suit, an officer of the Court, and holds moneys collected by him subject to the orders of the Court. All moneys in his hands are not necessarily to be regarded as appropriated towards the satisfaction of the decree. The Court has got the power to give directions to him in respect of the disbursements of the moneys and in proper circumstances such directions may also be for the benefit of the judgment-debtor. 1935 M. 1046=42 L.W. 615=69 M.L.J. 534. An appointment of receiver by way of execution cannot be obtained where the decree-holders can execute the decree in the ordinary manner. (1931 O. 307 and 1930 C. 502, Foll.) 1933 S. 231. A person applying for appointment of receiver in execution of a decree must make out reasonable ground for the appointment. The mere fact that the judgment-debtor presses the applicant to accept a smaller amount than the sum decreed or applies to Manager, Sind Encumbered Estates, for his aid does not constitute a valid ground for appointing a receiver, more especially when there is no danger of waste or destruction of the property. (1928 P.C. 49 and 1931 L. 668, Foll.) 1933 S. 231. The appointment of a Receiver has often been described as a process of equitable and profits of non-attachable property.

execution. Though it is not always necessary that legal execution should be exhausted before the appointment of a Receiver can be obtained in India where there is no distinction between law and equity, the rule holds good that, under ordinary circumstances, equitable execution ought not to be allowed to be resorted to when there is no impediment to execution being levied in the ordinary way as provided by the Code. The person seeking equitable execution should make out a proper case for it. He must show that he was met by difficulties arising from the nature of the property which prevented his obtaining relief by the usual statutory modes of execution and that it is necessary and advantageous to appoint a Receiver. 57 C. 964. See also 35 C.W.N. 1066=1932 C. 189=59 C. 205. Some of the points to be considered by the Court are: (1) Whether in view of the assets the amount due under the decree is likely to be realized within a reasonable time from the profits of the attached property; (2) whether the ordinary remedy by sale in execution is not sufficient. 35 C.W.N. 1066. The mere fact that judgment-debtor might harass decree-holder in recovering his dues on getting into possession is no ground for receivership. 35 C. W. N. 1066. See also 134 I.C. 799=1931 L. 688. A creditor is not generally debarred from proceeding to execution by appointment of Receiver. 23 C.W. N. 952=29 C.L.J. 424. The fact that a judgment-debtor will be reduced to poverty if his properties are allowed to be sold is no ground for the appointment of a Receiver. 28 I.C. 505. Right of a person to receive allowance charged on property is attachable but a Receiver cannot be appointed to receive money month by month. 16 C.L.J. 354=17 C.W.N. 662. In execution of a decree against a Ghatwal though the Ghatwali property could not be attached whether a Receiver of the rents and profits cannot be appointed so as to apply them in satisfaction of the decree. 39 C. 1010=16 C.W.N. 802. See also I. L. R. (1937) All. 267=1937 All. 389 (case of realizing income of occupancy and ex-proprietary tenancies of judgment-debtor). Payment of Chowkidars, Sardars and Government dues in a Ghatwali estate do not belong to the Ghatwal, while the rents and profits belong to the Ghatwal. 5 P.L.T. 34=3 P. 339. If decree is to be executed against him, these can be collected by a receiver appointed therefor. (*Ibid.*) A mere right to maintenance not being liable to attachment and sale, a Court has no power to appoint a Receiver to receive such maintenance and apply it in satisfaction of the decree. 40 M. 302=30 M.L.J. 361. When appointment of a Receiver is the only way to recover the decretal amount and when the interest of both parties can be safeguarded, the appointment is neither unjust nor inconvenient. 13 I.C. 285=11 N.L.R. 113. A Receiver can be appointed to receive rents

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(*Ibid.*) Mere convenience on the part of the decree-holder would not justify the appointment of a Receiver. 21 I.C. 283=16 O.C. 238. Where the judgment-debtors are in possession of the property by virtue of their having furnished the security demanded from them by the Court as a condition of execution being stayed, the decree-holder has not a present right to remove them from possession. The appointment of a receiver over part of that property with a view to the realization of costs awarded to him is barred. 1936 O. W.N. 595=1936 Oudh 370.

EXECUTION BY COLLECTOR.—The appointment of a receiver to take charge of the judgment-debtor's property is an exceptional remedy and when there is admittedly ample property of the judgment-debtor available for satisfaction of the decree, there is no good reason to appoint a receiver. Besides, when the execution proceedings are to be transferred to the Collector a receiver cannot be appointed. 1940 Lah. 345. See also 191 I. C. 704.

EXECUTION OF MORTGAGE DECREE.—Order 34 is self-contained and meant to provide for all matters it refers to. Its provisions do not allow of the application provided by O. 40 and a receiver cannot, therefore, be appointed in execution of a mortgage decree. (100 I.C. 735, Foll.) 143 I.C. 574=34 P. L.R. 815=1933 L. 687.

EXECUTION SALE.—Where a Receiver does not obtain special leave to bid at an execution sale, the sale in his favour is void. 59 C. 956=139 I.C. 186=36 C.W.N. 125=1932 C. 672.

INSOLVENCY.—Where subsequent to the appointment of a receiver of the property of the judgment-debtor at the instance of the decree-holder, the judgment-debtor is adjudicated insolvent and the possession of the property is made over to the Official Assignee, the receiver is only entitled to the costs and expenses incurred in the execution proceedings till the date of the order of adjudication to be paid out of the estate of the insolvent. The receiver's remedy for the other charges and expenses he has incurred, *viz.*, rent due for premises of which he was in occupation and charges in respect of *durwan* and estate clerk will be against the person at whose instance he was appointed. I.L.R. (1941) 2 Cal. 37.

JOINT FAMILY PROPERTY.—A Receiver is appointed for the benefit of all the parties concerned in the litigation and is the representative of the Court and the parties interested in the litigation. If a joint Hindu family can sue to recover possession of family property, there is no reason why a receiver of the joint family estate cannot likewise sue. 39 Bom.L.R. 224=1937 Bom. 244.

LAND ACQUISITION CASES.—Under R. 1, Court has power to appoint a receiver of an estate and to direct him to accept the award

of the land acquisition collector on behalf of the claimants. But the acceptance by the receiver of the award, will not take away the right of claimant to make a reference when the appointment has been made "without prejudice to the contentions of the parties concerned" as to the inadequacy of the compensation money payable. Even apart from the special direction of the Court under the general law relating to receivers, the right of reference would not be lost, as the appointment does not affect existing contracts or rights of action between the party whose property is placed in the hands of the receiver and others. 60 C.L.J. 184=30 C.W.N. 844=1934 C. 758.

MISCELLANEOUS PROCEEDINGS.—R. 1 does not restrict the appointment of a Receiver only in the case of suits. Section 141 extends the procedure to all proceedings. 43 C. 986=20 C.W.N. 1009; 1928 C. 256.

PARTITION SUITS.—Receivers in partition suits. 36 A. 19=11 A.L.J. 973; 45 C.W. N. 68. Receiver may be appointed in a partition suit to avoid scramble among co-sharers. 139 I.C. 670=1932 M. 542. Practice as to appointment of Receiver in a partition suit relating to joint family property. 55 I.C. 827=22 Bom.L.R. 217; 1923 L. 48; 18 C.L.J. 638=22 I.C. 601=18 C.W.N. 533. In all cases where a property is in the hands of one co-sharer and the share of the profits is withheld from the other, there is sufficient reason for appointing a Receiver. 117 I.C. 375=1929 L. 497. In the absence of a finding that the karnavan has been guilty of waste or mismanagement or neglect of duty or that there is an apprehension of such waste or mismanagement or neglect, the Court will not be justified in appointing a receiver of the properties of a Malabar tarwad, merely because some members of the tarwad have filed a suit for partition. 41 L.W. 353=1935 M. 402. It is open to the Court in a suit for removal of the manager of a Malabar tarwad appointed by a karar, to appoint an *interim* receiver when the circumstances require it; but the power of appointing a receiver should be exercised only when the circumstances of the case clearly not only justify, but also require it, as being the only means of protecting the rights of the junior members of the tarwad. Mere charges of mismanagement and fraud would not be sufficient. They must be established *prima facie* before the appointment of an *interim* receiver is made. 44 L.W. 498=1936 M. 817. For such evidence he must be given an opportunity and without it, it would not be proper to dispose of a petition on the materials on record. 44 L.W. 606=1936 M. 966=71 M.L.J. 629. In a suit by a minor for partition of the family properties, it was found that he was entitled to a half-share in the properties, that the quarrels in the family and the conduct of the defendant made it impossible for the plaintiff to get his fair

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share of the harvest and it also appeared that so long as the properties remained with the defendant the plaintiff would not be able to secure his fair share of the income. The lower Court appointed a receiver to harvest the crops. *Held*, that the circumstances of the case justified the appointment of a receiver. 1938 Mad. 730=(1938) 1 M. L.J. 863. Where in a suit for partition of the movable and immovable property, it is likely that debts may be realised by the defendants without the plaintiff's knowledge or settlement of these debts may be arrived at by the defendants in a manner prejudicial to the plaintiff, it is just and convenient to appoint a receiver during such suit. 176 I.C. 919=1938 Lah. 10.

IN PARTNERSHIP SUIT.—The ordinary rule that no party is appointed as receiver except by consent has been departed from only in exceptional cases, as for instance, in a case of partnership where there are no allegations of fraud and where the carrying on the business depends on the personal credit of one of the members of the firm. 148 I.C. 459=1934 C. 444. In all cases of partnership the true rule is that a receiver is generally appointed for realising the assets of the *harbar* with a view to its winding up and for that purpose to carry on the business in so far as is necessary and incidental to such winding up. Court does not take upon itself the management of a partnership except as incidental to winding up. 148 I.C. 459=1934 C. 444. Where in a suit by a partner for dissolution of partnership a receiver is appointed of the assets of the partnership, the remedy of the creditor who had obtained a decree against the partnership firm is either to apply to the Court which appointed the receiver for leave to attach some specific property or for an order charging the assets in the hands of the receiver on giving an undertaking to deal with the charge according to the orders of the Court. There is no doubt that the application for a charging order must be made to the Court by which the receiver was appointed. But where the Court which appointed the receiver in the partnership suit and passed the decree in the creditor's suit is the same, and all the parties in both suits are present, including the receiver, there can be no objection to a charging order being made on an application made in the creditor's suit, instead of in the partnership suit, and the cause title can be formally amended. The effect of a charging order will be to give the judgment-creditors priority over creditors who have not proceeded to judgment. 45 C.W.N. 1104. The application of a Receiver to take charge of the partnership assets, does not transfer the ownership therein from the partners to the Receiver. 36 I.C. 980=91 P.R. 1917; 12 C.L.J. 368=7 I.C. 75. Where a dissolution is inevitable and the partners are on bad terms, the usual way of guarding their inter-

ests is by appointing a Receiver and ordering the good will of the business and the stock-in-trade to be sold, the partners being at liberty to bid at the sale. 8 Bur.L.T. 57=29 I.C. 684; 45 I.C. 224=11 S.L.R. 115. Guiding principles for appointment of Receiver in partnership suit. 45 I.C. 224=11 S.L.R. 115.

PARTIES BEING MINORS OR FEMALES.—Though under the Code, the Court has discretion to appoint a Receiver without security it should obviously be done only in the most exceptional circumstances. Where all the parties to the suit, except the respondent were females or minors, the Receiver should generally not be allowed, without giving adequate security, to have unfettered control of money and securities to a large amount. 59 I.A. 311=7 Luck. 382=63 M.L.J. 658 (P.C.).

RAIYATI HOLDINGS.—In the face of the clear language of O. 40, R. 1 (2), it must be held that a Court has no power to appoint a receiver of the *raiya* holdings held by a judgment-debtor in Chota Nagpur, a sale of which is prohibited by the Chota Nagpur Tenancy Act. The general power given to the Courts under O. 40, R. 1 (1) is curtailed by sub-R. (2). Both the sub-rules have to be read together as forming part and parcel of one rule. 1941 P.W.N. 580=22 Pat.L.T. 798.

MAINTENANCE SUITS.—Where under a decree for maintenance decree-holder is entitled only to proceed against a house which has been made a charge for payment of maintenance and the maintenance is allowed to fall in arrears it is highly desirable to appoint a receiver for paying off arrears as well as for ensuring punctual payment of maintenance in future. 146 I.C. 1024=1933 L. 826. Although a *Jahagir* for maintenance is inalienable and therefore unattachable in execution of the decree, a receiver can be appointed to manage the *jahagir* for the benefit of the decree-holders subject to a suitable allowance for the maintenance being made in favour of the judgment-debtor. Executing Court need not fix the suitable allowance when making the order of the appointment of a receiver. It will have to be fixed on the amount of profits which come into the hands of the receiver and not upon any estimated income of the property. 1933 N. 266.

IN MORTGAGE SUIT.—The Court is entitled to appoint a receiver under O. 40, R. 1 whenever it is deemed just and convenient to do so; for example, in a mortgage suit when interest is in arrear the Court will normally appoint a receiver at the instance of the mortgagee as of course, whether or not the property appears to be of sufficient value to cover the mortgage debt and interest, and whether or not the right of the mortgagee to obtain a personal decree against the mortgagor subsists or has been lost. 14 R. 292=1936 R. 290; 12 R. 437=1934 R. 321; 56 M. 915=1933 M. 570=65 M.L.J. 222

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(F.B.); 1938 Mad. 325=(1938) 1 M.L.J. 249; 1939 Rang.L.R. 403=1939 Rang. 321 (F.B.); (1940) 1 M.L.J. 429; 1938 A.M., L.J. 90; 16 L. 366=1935 L. 17; 23 S.L.R. 200=115 I.C. 306=1929 Sind 114, But *see contra* 1936 A.L.J. 605=1936 A. 495 (F.B.) (Overruling 1933 A.L.J. 51) that in a suit for sale on the basis of a simple mortgage, the Court is not competent to appoint a receiver of the property mortgaged pending the decision of an appeal against the mortgage decree. The Court in a suit on a simple mortgage has jurisdiction to appoint a receiver of the mortgaged property whether before or after the preliminary decree whether or not the fact that the interest is in arrear would by itself be sufficient ground for appointment of a receiver; where the rates and taxes as well as interest are in arrear, the property is in jeopardy, and in such a case it is just and equitable to appoint a receiver. I.L.R. (1939) Bom. 82=40 Bom. L. R. 1266=1939 Bom. 54. It is settled law that in the case of a simple mortgage without possession the intention of the parties is that the mortgagor shall ordinarily remain in possession of the mortgaged property till it is brought to sale in execution proceedings for the payment of the mortgage debt. Consequently a receiver will be appointed pending a suit on the basis of a simple mortgage only if there exists special circumstances in the case. 40 P.L.R. 541. The Court will not appoint a receiver in execution of mortgage decree unless the circumstances are such as to make the sale and of the properties a matter of serious difficulty. Once a receiver in execution is appointed, the mortgagee will, as a rule, have little inducement to bring the properties to sale will tend to let matters drag on indefinitely. If the properties are producing a good income, it is probable that the mortgagee will have a more profitable investment than he will be able to obtain for the sale proceeds if the properties are brought to sale. This does not however mean that if there are substantial difficulties in the way of the sale the Court will not help the mortgagee by appointing a receiver. The Court in considering this question should also take into consideration the diligence of the mortgagee. The person who applies for appointment of receiver in execution of mortgage decree should be able to point to some actual difficulty in carrying out the sale, and not merely to a delay which he foresees on general grounds. It cannot be supposed that when a substantial portion of the mortgage securities is outside the local limits of the jurisdiction of the Original Side, the mortgagee can almost as of right obtain the appointment of a receiver in execution which is a form of relief which the Courts are slow to encourage. 42 C. W. N. 266=1938 Cal. 93. In a mortgage suit after the receiver has taken possession of the mortgaged

property the mortgagor is under no duty to pay revenue in respect of the aforesaid property. It is the duty of the receiver to preserve the property by paying the public demand. 1941 Cal. 305. In a suit by a mortgagee without possession, on the application of the plaintiff, defendants who were subsequent mortgagees without possession but who obtained possession under a lease from mortgagor, were appointed receivers and they were asked to keep an account and also to keep intact the benefits accruing from the property during the pendency of the suit. *Held*, that the order was quite proper. [1925 L. 590, 1933 M. 570 (F.B.), Rel. on.] 1934 L. 717. *See also* 1940 Lah. 125. Where, pending an appeal against the preliminary decree in a mortgage suit, execution has been stayed but it was proved that the mortgagors were going beyond the ordinary course of village management in granting leases, *held*, that a receiver should be appointed to keep the property intact and that it would have a salutary effect if one of the mortgagors was himself appointed receiver with due safeguards. 16 N.L.J. 161=1933 N. 294. But *see contra* 43 I.C. 533. Whether the mortgagee is or is not entitled to possession, he may ask for a receiver, if the demands of justice require that the mortgagor should be deprived of possession. 31 C.L.J. 385=47 C. 418; 95 I.C. 632=1926 C. 1006; 52 M. 797=56 M.L.J. 115=1929 M. 138; 1929 L. 780. Mortgage — Floating charge — Appointment of receiver without going into evidence. 46 I.C. 389; 34 I.C. 405=23 C.L.J. 440; 17 I.C. 202=16 C.W.N. 997. The appointment of a receiver at the instance of a mortgagee will be made as a matter of course if interest payable under the security is in arrears. 17 I.C. 202=16 C.W.N. 997. There may be special reasons, even in such a case, that will make it *not* "just and convenient" that a receiver should be appointed, *e.g.*, when the interest has been in arrear for a very short period, or when the interest has been tendered but acceptance of it has been refused; but the fact that the property is more than sufficient to cover the mortgage debt is not a ground upon which the Court ought to refuse to appoint a receiver in such a suit. 14 R. 308=1936 R. 296 (S.B.). *See however* 1935 R. 525, where it was held that the most important criterion with regard to whether a receiver should or should not be appointed in a mortgage suit is whether the mortgagee, having originally been well secured, finds that the security is likely to be insufficient, either by reason of considerable accumulation of interest or by reason of depreciation of the value of the property itself. The considerations which apply in a suit between the mortgagee and mortgagor as regards the appointment of a receiver differ considerably from the considerations which arise where the interests affected are not of the mortgagor only, but also of the mortga-

(a) appoint a receiver of any property, whether before or after decree ;
 (b) remove any person from the possession or custody of the property ;
 (c) commit the same to the possession, custody or management of the receiver; and

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

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gor's creditors. The appointment of a receiver in the mortgagee's suit will have the effect of depriving the creditors in the insolvency proceedings of the benefit of the usufruct of mortgaged property although the mortgagee has not yet obtained a final decree in the mortgage suit. Hence the appointment of a receiver in a mortgage suit subsequent to the appointment of receiver in insolvency was set aside. 17 P.L.T. 671=1936 P. 357. Considerations for the appointment of a receiver in a suit on simple mortgage. See 13 P.L.T. 525=1932 P. 360; 34 P.L.R. 950; 16 L. 366=37 P.L.R. 529=1935 L. 17; 14 R. 308; 12 R. 437; 14 R. 292; 144 I.C. 265=1933 R. 94; in a suit on equitable mortgage, see I. R. 1932 L. 648; 35 C.W.N. 1141 (when receiver can be appointed in mortgage suit after decree). Receiver may be appointed in a suit by an equitable mortgagee. 54 M. 565=1931 M. 626=61 M.L.J. 111; 133 I.C. 433=1932 L. 82; 23 S.L.R. 200=115 I.C. 306=1929 Sind 114. Receiver can be appointed in a mortgage suit for sale, although a Receiver has been appointed in a prior partition suit. 16 C.W.N. 126=14 C.L.J. 526; 102 I.C. 353=1927 S. 230; 29 M.L.J. 457; 14 B. 431; 47 C. 418; 6 R. 261=1928 R. 176. A receiver need not be appointed if the mortgagee has obtained a decree for foreclosure, and cannot recover even the costs of the litigation from the mortgagors personally. 16 C.W.N. 126=12 I.C. 165=14 C.L.J. 526. Receiver may be appointed even after sale of the mortgaged properties. 13 C.L.J. 487=15 C.W.N. 672; 95 I.C. 632=1926 C. 1006. Mortgage suit—Lessee in possession made party—Mortgagee's application for receiver—Lessee depositing in Court annual rent—Execution sale—Mortgagee auction purchaser applying for receiver claiming crops as his on ground of lease being collusive—Appointment of receiver—Propriety, 1935 M. 875. Though ordinarily a receiver is not appointed when mortgagee is in possession, yet when he is in possession through one of the mortgagors who became insolvent, then the Court can appoint a receiver. 32 I.C. 691=1915 M.W.N. 864. A receiver can be appointed for the protection of property in respect of which a mortgage decree has been passed. 158 I.C. 586=1935 O.W.N. 1118=1935 Oudh C.C.M.—166

497. A mortgagee decree-holder prevented from executing the decree is entitled to have a receiver appointed if the security is not sufficient to discharge the debt and the interest has not been paid. Per Oldfield, J., in 26 I.C. 986=29 M.L.J. 457; 102 I.C. 353=1927 S. 230. An order appointing a Receiver in execution of a mortgage decree is not binding on a person not a party to the suit, and claiming to be in possession in his right as prior mortgagee. 45 I.C. 177. See also 9 R. 565. Where a defendant who is entitled to share in mortgaged property is impleaded in mortgage suit for sale, on the ground that mortgage was for his benefit also, and there is no reasonable probability of mortgage being binding on his share and where it is certain that if a receiver is not appointed no part of the usufruct would go towards the mortgage debt, it would be just and convenient to appoint a receiver with direction for payment of the mortgagee's share of usufruct into Court. 163 I.C. 166=1936 R. 246. Execution of mortgage decree—Receiver cannot be appointed for other properties not connected in suit. 96 I.C. 194=23 L.W. 650=1926 M. 797. When the mortgage is void *ab initio* it cannot give such mortgagee who has got only a simple money decree, right to the appointment of a Receiver. 1930 R. 271=127 I.C. 176. In a suit for a declaration that the decree for sale obtained by defendant in a mortgage suit is not binding on him, the Court has the power, on application by the plaintiff, to appoint a Receiver. 146 I.C. 451=1933 A. 227=1933 A.L.J. 51. A Receiver appointed in a mortgage suit is appointed for the benefit of the mortgagee and all the proceeds from the property realised after his appointment go to the credit of the mortgage debt. Such proceeds also include the proceeds of crops raised before, and harvested after the appointment of the Receiver. 156 I.C. 67=41 L.W. 495=1935 M. 410. The appointment of a Receiver in a mortgage suit depriving as it does the mortgagor of his right to deal with the income negatives also the right of a Court auction-purchaser in execution of a money-decree to it even though the Receiver himself was made a party to the execution proceedings and leave of Court was granted to execute the decree against him. 56 M. 546=64 M.L.J. 682=1933 M. 293.

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MORTGAGE EXECUTED BY RECEIVER UNDER COURT'S ORDER—ORDER SANCTIONING LOAN ON FIRST CHARGE—PRECEDENCE OF MORTGAGE OVER EARLIER ENCUMBRANCES.—In those cases where the order of the Court simply sanctions a loan by the Receiver on a first charge of the properties, but does not indicate the purpose for which the loan is sanctioned, the creditor who advances the money is entitled to assume that every thing was in order and so he ought to get what the Court had promised to give him, precedence over earlier encumbrances created by the parties. In such cases the Court cannot break faith with him. In cases, however, where the order itself recites the purpose of the loan, different considerations should apply. If the purpose of the loan as set out in the order is for preservation or protection of the property committed to the care of the receiver, or if the order is made in an administration suit or in a partition suit for working out the rights, liabilities and obligations of the co-sharers of the joint properties in the course of partition, the mortgagee from the receiver would have first charge in accordance with the order. The principle seems to be this. By the appointment of the receiver the Court takes upon itself the duty of protecting and preserving the subject-matter of the suit, which it discharges through its own officer, namely the receiver. It must therefore have all powers which are incidental and necessary for the discharge of that duty. It will have therefore the power to sanction loan to be raised by the receiver, and if necessary, to direct the mortgage to be executed by him for securing it to have precedence over earlier mortgages executed by the parties. He may be unaware of such prior mortgages or even if aware, may not give notice to those mortgagees. This power of the Court being thus incidental to and necessary for the performance of its duty to protect and preserve the subject-matter of the suit, which it has taken upon itself by appointing a receiver, must be measured and limited by its duty, where its exercise comes into conflict with the rights of third parties which are not before it and to whom no notice had been given, or who had not consented. In such a case the principle of breach of faith cannot be the decisive factor. It is a question of power or jurisdiction of the Court. 45 C.W.N. 68.

PRIVATE RECEIVER.—A private Receiver deriving his power from the appointment of a mortgagee is almost unknown to the Indian people. 40 I.C. 865.

POSSESSORY SUITS.—A *bona fide* possessor of property should not be superseded by a Receiver except on equitable grounds. 21 M.L.J. 821=11 I.C. 870. See also 1937 O.W.N. 197=1937 Oudh 280. The provisions of R. 1 refer to the case of the removal of a person other than a party to the suit and Court is not debarred from remov-

ing one of the parties from possession of the property. (18 C.W.N. 537; 24 M.L.J. 658, Foll.) 1922 L. 444; 61 I.C. 605=12 L.W. 254; 119 I.C. 687=1929 N. 283. The words "any person" in R. 1 (2) are not confined to persons who are not parties to the suit. A tenant could not be ousted to be replaced by a Receiver in an interlocutory order. 61 I.C. 605=12 L.W. 254. The possession of the Receiver although in a sense the possession of the Court is also the possession of all the parties to the suit according to their title. 49 I.C. 89=8 L.W. 551. Property in possession of persons with a paramount title—Their rights not affected by appointment of Receiver. 1927 P. 397=104 I.C. 295=8 Pat.L.T. 717. The possession of Court through its Receiver does not suspend the operation of adverse possession if the successful party is holding it by adverse possession. 40 I.C. 50=32 M.L.J. 85. A property not forming part of the pending litigation cannot be made over to a Receiver appointed by the Court without jurisdiction. 5 P.L.J. 513=1 P.L.T. 653=58 I.C. 405. Where a person refuses to deliver possession to a Receiver appointed by the Court appeal lies under O. 43, R. 1. 48 I.C. 779. If plaintiff does not ask for a particular relief, in the plaint, it would be in very rare cases and under exceptional circumstances that Court would feel disposed to grant it. Where the only substantive relief asked for by plaintiff was one for possession and there was no prayer for mesne profits either before the suit or from the date of suit, *held*, that as there were no exceptional circumstances apparent on the face of the record the appointment of a Receiver in order to have mesne profits safeguarded should not be made, nor an order against defendant for security for mesne profits should be passed. 1933 S. 364. In a suit for possession under S. 9 of the Specific Relief Act, which is a suit of a limited character and in which no mesne profits pending suit can be ordered, it is not competent to the Court to appoint a receiver to collect the rents of the property in dispute. 31 S.L.R. 28=1937 Sind 161.

SUCCESSION CERTIFICATE.—A receiver who is an officer of the Court although he represents the estate of the deceased, does not claim by right of succession. Therefore he can maintain a suit for a debt due to a deceased person to whose estate he has been appointed a receiver without a succession certificate. 1941 Cal. 579.

SCHEME SUIT.—R. 1 (2) is intended to protect third persons and not parties to the suit and does not debar Court from appointing a Receiver in a scheme suit. 20 I.C. 767=24 M.L.J. 658; 41 M.L.J. 545=16 L.W. 927=1923 M. 224. Scheme decree—Power given to District Judge to remove trustees—General control conferred over trustees and their management of the trust—Power to appoint Receiver pending enquiry into con-

Remuneration.

2. The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver.

LOC. AM.—[RANGOON.] R. 2.—The following shall be *substituted*, namely:—

The fees to be paid as remuneration for the services of the receiver shall be in accordance with the following scale:—

(a) On rents or outstandings recovered or on the proceeds of the sale of movable or immovable property, unless for special reasons to be recorded, the Court orders the remuneration to be at some other rate—5 per cent.

(b) For taking charge of money or of immovable property which is not sold, unless for special reasons it is otherwise ordered by the Court, on the estimated value—1 per cent.

(c) For any special work not provided for above, such remuneration as the Court on the application of the receiver shall order to be paid.

Duties.

3. Every receiver so appointed shall—

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duct of trustees after suspension of trustees. 38 Bom.L.R. 1137.

SECRET AGREEMENT.—No secret agreement can be enforceable which puts the receiver in a position which might affect his advice to the Court. 1940 Rang.L.R. 129=1939 Rang. 217. Where under an agreement with J.D. the receiver got something more by way of interest to which he was not entitled under the decree, it was his duty to report the agreement to the Court and get it ratified. If the agreement was kept from the knowledge of Court it would amount to a fraud on the Court. The agreement thus being not enforceable at law, a claim for interest could not be sustained. 1940 Rang.L.R. 129=1939 Rang. 217.

TRUST PROPERTY.—As a trust property cannot be sold in execution of a decree against the trustee, the only method by which a judgment-debtor may be compelled to satisfy the claim of the execution creditor is by the appointment of a Receiver. 57 I.C. 70=30 C.L.J. 231. Where a person takes possession of the trust property in direct contravention of the terms of the trust deed which he himself executed and thus deprives the co-trustees of possession of the trust property, his act is entirely illegal. In a suit by him for the removal of the other trustees, it is certainly just and convenient that a receiver should be appointed. It is not necessary for the appointment of a receiver that proof should be forthcoming of any embezzlement or mismanagement on his part. 1936 O.W. N. 1134=1936 O. 337. Where the property in question is dedicated property, being *wakf* property, which under the terms of the *wakf* deed has to be managed by a trustee enjoined to perform certain religious duties as trustee, it would not be just and convenient to appoint a receiver of such property. No receiver of such property can therefore be appointed in execution of a simple money decree, as the property is not liable to attachment and sale and as the judgment-debtor has no proprietary interest in the same. S. 51, C.P. Code, must be read subject to O. 40, R. 1. I.L.R. (1938) All. 35=1937 A.L.J. 1103=1938 All. 3.

PROCEEDINGS UNDER TRUST ACT.—Receiver cannot be appointed in proceedings under

S. 74 of the Trust Act. 1927 S. 237=103 I.C. 816; where the income of the mutt was not sufficient both to meet the expenses and to pay off debts contracted by its head, a Receiver was directed to be appointed. 54 I.A. 228=50 M. 497=53 M.L.J. 196=1927 P.C. 131 (P.C.).

PROCEEDINGS UNDER GUARDIANS AND WARDS ACT.—R. 1 has no application to a petition under the Guardians and Wards Act. 36 B. 20=11 I.C. 554=13 Bom. L. R. 417. But see 1929 N. 119=116 I.C. 642.

SUIT FOR CANCELLATION OF LEASE.—In a suit for cancellation of a lease on the ground that it was obtained by the defendant fraudulently, for recovery of *khas* possession, and for mesne profits on that footing, the fact that the defendant had not been paying the stipulated rent to the plaintiff is not a ground by itself for the appointment of a receiver. 41 C.W.N. 951.

O. 40, R. 2.—An order increasing remuneration to be paid to a receiver, is an order made under R. 2 and not under cl. (d) of R. 1 and is not appealable. 22 I.C. 352. Remuneration must not exceed the income of the estate realised by receiver. 91 I.C. 54=1925 N. 462. Receiver—Remuneration of—Commission—Order of Court providing for percentage on "gross sales" of business—Commission on "trade discount", packing charges and freight, 131 I.C. 655=1931 M. 500=60 M.L.J. 332.

RANGOON HIGH COURT, RR. 204 AND 205—RECEIVER'S FEES—POWERS OF COURT.—Official Receiver, in making his lists, should consider under what head the fees are to be charged and charged at the rate specified in the sub-section. The Court may then, in the circumstances of any particular case, review such remuneration, and, whilst not exceeding the maximum laid down, may direct such remuneration at any less rate as may be thought fit. 178 I.C. 30=1938 Rang. 357.

O. 40, R. 3.—Security not furnished by plaintiff receiver—Suit if may be dismissed on that ground. 46 C. 70=22 C.W.N. 520. The liability of a surety for a receiver. 28 I.C. 31=20 C.L.J. 123. The surety is liable for the payment of interest on balances improperly retained by him as also costs of proceedings. (*Ibid.*) When the surety

- (a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property ;
- (b) submit his accounts at such periods and in such form as the Court directs ;
- (c) pay the amount due from him as the Court directs ; and
- (d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

Enforcement of receiver's duties.

4. Where a receiver—

- (a) fails to submit his accounts at such periods and in such form as the Court directs, or
 - (b) fails to pay the amount due from him as the Court directs, or
 - (c) occasions loss to the property by his wilful default or gross negligence,
- the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

LOC. AM.—[MADRAS.] Substitute the following for r. 4 :—

“4. (1) If a receiver fails to submit his accounts at such periods and in such form as the Court directs, the Court may order his property to be attached until he duly submits his accounts in the form ordered.

(2) The Court may, at the instance of any party to any suit or proceeding in which a receiver has been appointed or of its own motion, at any time make an enquiry as to what amount, if any, is due from the receiver as shown by his accounts or otherwise, or whether any loss to the property has been occasioned by his wilful default or gross negligence and may order the amount found due or amount of the loss so occasioned to be paid by the receiver into Court or otherwise within a period to be fixed by the Court. All parties to the suit or proceeding and the receiver shall be made parties to any such enquiry. Notice of the enquiry shall be given by registered post of the surety, if any, for the receiver, but the cost of his appearance shall be borne by the surety himself unless the Court otherwise directs :

Provided that the Court may, where the account is disputed by the parties and is of a complicated nature or where it is alleged that loss has been occasioned to the property by the wilful default or gross negligence of the receiver refer the parties to a suit. In all such cases the Court shall state in writing its reasons for the reference.

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satisfies the claim of the plaintiff he will be entitled to stand in place of the receiver to the extent of the payment made by him and to reimburse himself from the sums to be paid to the receiver without derogation of his right to sue him. (*Ibid.*)

LIABILITY OF RECEIVER.—Receiver advanced to an infant more than the amount sanctioned and it was not shown that it was applied for his benefit. *Held*, that a receipt by the infant for the amount was no valid discharge to the receiver. 28 I.C. 25=20 C.L.J. 113. A bribe to the Police Officer to release the minor is unauthorised and the receiver cannot claim the amount against the payee. (*Ibid.*) The receiver is bound to furnish details of litigation expenses and he is not entitled to the salary of officers appointed without leave of Court. (*Ibid.*) A succeeding receiver cannot sue a former receiver for recovering funds which he should have realized and accounted for. 24 I.C. 768=41 C. 92. The receiver must keep his accounts and vouchers ready for examination at any time. At the time of adjustment of accounts receiver and other interested parties have a right to be heard. 12 I.C. 780=14 C.L.J. 445. A receiver will not be permitted without Court's sanction to incur expenditure seriously diminishing the funds entrusted to him. If a receiver proves that a transaction made by him is beneficial to

the parties interested, he must be allowed credit for such transaction. A receiver should be allowed fees or legal assistance though not previously sanctioned by the Court. The fees will not be allowed where no legal skill is required. Receiver's account filed and vouched before an examiner can be reopened on the discovery of errors though a Judge's certificate is attached, and the receiver may be surcharged though he has been discharged. (*Ibid.*) Accounts—Mesne profits—Expenses of litigation when allowed. 22 M.L.J. 253=14 I.C. 396. If receiver had failed to realize rents by taking proper proceedings he will not be exempt from liability. Mistaken proceedings though taken in good faith will not absolve receiver from liability for rent. (*Ibid.*) Court which has to pass receiver's accounts. 4 P.L.J. 636=54 I.C. 297.

O. 40, R. 3 (c).—Scope—Appointment of party to suit as receiver—Order directing payment into Court of money collected prior to appointment — Effect of — Appeal. 68 M.L.J. 628.

O. 40, R. 4.—Under this rule the Court is ordinarily bound to deal with all matters relating to the receiver in the proceeding itself in which he was appointed. The proper occasion for making allegations against the receiver is when his accounts are passed, and the Court ought to protect its officers and not to allow parties to pester the receiver

(3) If the receiver fails to pay any amount which he has been ordered to pay under sub-r. (2) of this rule, within the period fixed in the order, the Court may direct such amount to be recovered either from the security (if any) furnished by him under r. 3, or by attachment and sale of his property or if his property has been attached under sub-r. (1) of this rule, by sale of the property so attached, and may apply the proceeds of the sale to make good any amount found due from him or any loss occasioned by him and shall pay the balance (if any) of the sale proceeds to the receiver."

5. Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.

LOC. AM.—[MADRAS.] Add the following as r. 6, viz.:—

"6. Where the property belongs to a co-operative society registered under the Madras Co-operative Societies Act or to a member of such co-operative society, and the Court considers that the interest of those concerned will be promoted by the management of an officer of the Co-operative department, the Court may, with the consent of the officer, appoint him to be receiver of such property."

ORDER XLI.

Appeals from Original Decrees.

1. (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The Memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.

Form of appeal.

What to accompany memorandum.

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with actions. Although under R. 4 as amended, the Court may at its option refer the parties to a separate proceeding, it is bound, when it makes such an order, to record its reasons therefor. 43 L.W. 460=1936 Mad. 321=70 M.L.J. 282. An order passing a receiver's account is one under R. 4 and is appealable. 45 B. 99=22 Bom.L.R. 1126. Appeal from order for accounts is not competent. 1924 N. 53. Order directing the Receiver to pay money in Court is not appealable. 1921 M.W.N. 806=1922 M. 234. Receiver ordered to pay damages—If appealable. 92 I.C. 631=1925 R. 206. See also 62 M.L.J. 199=1931 M. 760. It is competent to the Court in the course of passing the accounts of a receiver, under O. 40, R. 4 to make an order, after holding him liable to make good the loss caused to the estate through his wilful negligence. A separate suit against the receiver is not necessary for the purpose of establishing his liability or for enforcing it. 40 C.W.N. 479. The proper procedure to bring to sale the properties of a deceased receiver in the hands of his legal representatives is by way of execution and not by separate suit. 39 M. 584=30 I.C. 383. Order directing receiver to pay into Court amount lost by his negligence is appealable. 1931 M. 760=62 M.L.J. 199. As to what would amount to gross negligence, see *ibid.* "Property" is synonymous with estate and covers income from property. Cl. (c) applies to the case of misappropriation also. A receiver is not liable to account for any period other than that for which he is appointed. 5 Pat. L.J. 97=55 I.C. 15. A receiver who has given up possession of the estate must insti-

tute a separate suit for recovery of sums due to him in respect of salary, allowances, etc. 4 P.L.J. 636=54 I.C. 207. An order declaring a receiver liable in respect of a sum of money is not appealable unless it is accompanied by order of attachment under R. 4. (*Ibid.*) Procedure to be adopted in passing receiver's accounts. See 43 M.L.J. 707=16 L.W. 754; 100 I.C. 996=6 Bur.L.J. 15. Order removing receiver is appealable at the instance of one or other of the parties; but the receiver himself has no right of appeal. 36 C.W.N. 903. Court which has the power of appointing a receiver is also invested with the power of dismissal. Order removing receiver is not appealable by the receiver. 1931 A. 72=1931 A.L.J. 13. See also 36 C.W.N. 903. If money paid to some one else by the receiver does not reach its proper destination, receiver will be compelled to make good the loss unless he can show that he has acted with perfect regularity and has used such a degree of prudence as would be expected from a private individual in relation to his own affairs. 1930 P. 232=125 I.C. 117.

O. 40, R. 5.—See 1933 L. 203=14 L. 330.

O. 41, R. 1: APPLICABILITY.—There is a tendency on the part of Subordinate Courts to ignore the provisions of O. 41, and to set aside the decrees of trial Courts in their entirety. Nothing can be clearer than the provisions of O. 41, and Courts must realise that they should not, as far as possible, travel beyond the provisions of the Code and make orders to support which the so-called inherent jurisdiction has to be brought in. 59 Bom. 430=37 Bom.L.R. 241=1935 Bom. 222. O. 41 has no application to appeals

(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

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from the original side of a High Court. 48 M. 631=48 M. L.J. 384. It applies to an appeal under S. 476-B, Cr. P. Code, against an order of Civil Court. 54 C. 355=100 I. C. 351=1927 C. 284; 134 I.C. 1063=35 C. W.N. 775=1931 C. 604. Also to Letters Patent—Appeals. 50 M.L.J. 190=49 M. 291; 48 C. 480=48 I.A. 76 (P.C.). As to applicability to appeals from proceedings under S. 201, C. P. Land Revenue Code, see 155 I.C. 557=1935 Nag. 125 (1). O. 41, R. 1 is applicable to appeals under the Land Revenue Act and hence the production of the copy of the judgment appealed against can be dispensed with by the appellate Court. 1941 A. W. R. (Rev.) 993=1941 O. A. (Supp.) 837. As to whether copy of order sought to be reviewed should be filed along with application for review, see 157 I.C. 965=16 P.L.T. 595=1935 Pat. 486. The provisions of this rule applies to applications for leave to appeal *in forma pauperis*. 165 I.C. 471=44 L.W. 152=1936 Mad. 600. The provisions of R. 1 are mandatory and an omission to attach a copy of decree is fatal to the appeal. As regards judgment it is for the Court to decide whether a copy of judgment may be dispensed with or not and the matter is not optional with the litigant and if the Court does not dispense with it and if a copy of judgment is not filed, the appeal is incompetent. 175 I. C. 33=1938 Nag. 233. See also 1937 O. W. N. 978=1937 Oudh 513; 1940 A.W.R. (B. R.) 39=1940 R.D. 97; 186 I.C. 58. Under R. 1, the Appellate Court may, in a fit case, dispense with the filing of the judgment appealed against. The rule does not say that the Court must record an order dispensing with the judgment. The absence of a recorded order does not therefore necessarily show that no order was passed. It may be presumed from the circumstances of a case that the dispensation had been granted. 43 C.W.N. 1139=1939 Cal. 711. Where an application for review of judgment is granted, no appeal is competent against the original decree as that decree must be deemed to have been superseded and therefore non-existent. But it is doubtful whether an amendment in the decree, apart from the review of the judgment, to however slight an extent, and even a correction of a mistake under S. 152, C. P. Code, in the decree, have the effect of superseding the original decree so as to necessitate the dismissal of an appeal, which is presented with a copy of the original decree. 1938 Lah. 76. The provision in R. 1 requiring that the memo. of appeal shall be accompanied by a copy of the decree appealed from must be read to mean that it shall be accompanied by a copy of that part of the decree which is appealed from and against which the

grounds of appeal are all directed. Court under its inherent powers under S. 151 can dispense with the production of portions of the decree which are unnecessary for purposes of the appeal before the Court. 40 C.W.N. 1298=1936 C. 751. O. 41, R. 1 does not expressly require that a copy of an order which has the force of a decree but which is not a decree shall be filed with the memorandum of appeal. Where in one of two analogous appeals between the same parties arising out of one and the same judgment under S. 47, the appellant files a copy of the judgment and prays that the copy of the judgment in the other appeal may be dispensed with, his prayer should be granted. There is no reason why the appellant should be obliged to file a copy of the judgment which is already on the record in the analogous appeal and which is available for use in both the appeals. 20 Pat.L.T. 801=1940 Pat. 176. Under O. 41, R. 1, it is imperative that a copy of the decree should accompany the memorandum of appeal. An order under S. 47 is by S. 2 (2) included in the definition of a decree, and an appeal against such an order not accompanied by a copy of the formal order which is filed beyond limitation, is incompetent. 1940 O. W. N. 528=1940 Oudh 351=15 Luck. 669. An appeal filed against an order passed in a contentious proceedings is an appeal filed under R. 1, and not under S. 104 of the Code. Hence an appeal against an order in a contentious proceeding granting probate or letters of administration with the will annexed is incompetent without the production of a copy of a formal decree prepared in terms of such order. Such contentious proceeding should be registered as a suit and the form in which a decree should be prepared in such a proceeding should be that adopted by the Calcutta High Court. 173 I.C. 284=1938 Sind 36 (F. B.). Estate under Court of Wards—Plaintiff obtaining decree affecting ward both with regard to her estate and individual status—Right of ward to appeal—Separate appeals, not necessary. 41 C.W.N. 374=65 C.L.J. 127. Where the copies of judgment and decree accompanying the memo. of appeal were not properly stamped till after the period of limitation had expired, the appeal is time barred. 39 P.L.R. 502. See also 12 Luck. 472=1937 Oudh 65.

RIGHT OF APPEAL.—An order refusing to appoint a Receiver during pendency of a suit is appealable. 33 I.C. 735.

CONSTRUCTION.—R. 1, which is a rule of procedure, should not be construed as would hinder justice and lead to an absurd result. 115 I.C. 67=1929 L. 42.

WHO CAN APPEAL.—Right of appeal is only to an aggrieved party. 45 I.C. 181=82 P.L.R. 1918.

LOC. AMS.—[LAHORE.] Add the following proviso to sub-rule (1) :—

"Provided that when two or more cases are tried together and decided by the same judgment and two or more appeals are filed against the decrees, whether by the same or different appellants; the officer appointed in this behalf may, if satisfied that the question for decisions are analogous in each appeal, dispense with the production of more than one copy of the judgment."

[MADRAS.] (1) Add the following sentence to sub-rule (1) of r. 1 of O. 41 :—

"The copy of the judgment shall be a printed copy in every case in which the High Court has prescribed that the judgment shall be printed when a copy is applied for, for the purpose of appeal."

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WHO CANNOT APPEAL.—A party cannot appeal from a decree in his favour merely because of an adverse finding on an unnecessary issue. 120 P.L.R. 1911=9 I.C. 1030. An unconditional adoption and enjoyment of benefits under an order bars the right of appeal. 37 I.C. 804=21 C.W.N. 232. As to parties in appeal, see 34 C.W.N. 642=1930 C. 748.

CONNECTED APPEALS.—Where there are appeals arising out of connected cases each appeal must be accompanied by copies of judgments of all the lower Courts. 14 L. R. 879 (Rev.).

SEPARATE APPEALS.—If there are two distinct orders in two separate execution proceedings, there cannot be a joint appeal in respect of both. 24 I.C. 438. This is so even though they were decided in one judgment. 10 I.C. 415=15 C.W.N. 994. If two separate cases are decided in one judgment, two separate appeals should be filed. 56 I.C. 69=1 L. 368; 3 P.L.J. 96=44 I.C. 418; 96 I.C. 336. Three brothers, X, Y and Z, who owned an estate died childless, leaving behind them only widows, and the Court of Wards assumed charge of the entire estate. The plaintiff obtained a decree declaring that he was Y who was supposed to be dead and that he be put in possession of an undivided one-third share in the properties in suit—the share in enjoyment of the first defendant who was his wife, jointly with the other defendants' possession over the rest. An appeal was filed against this decree and a question was raised whether the first defendant could appeal both as represented by the Court of Wards and also in her individual capacity. Held, that as the decree affected the first defendant both ways, that is to say, both with regard to her estate and also individually, inasmuch as there was a declaration to the effect that the plaintiff was her husband, she was entitled to file appeal and that there was no reason to ask her to file a separate appeal and pay separate Court-fees. 41 C. W.N. 374=65 C.L.J. 127.

PLEADER CAN FILE.—Presentation of appeal by pleader not duly authorised is invalid. 62 I.C. 259. See also 1940 O. W.N. 1253. But a pleader with a power of attorney to present the same, can validly present it. 86 I.C. 207. Presentation by vakil whose vakalat is not signed by the party at the time but the defect is subsequently rectified is valid. 21 I.C. 444=11 A.L.J. 779. Strictly speaking the memorandum of appeal should be presented to the Court or some officer appointed by it

in this behalf. But if the Court has adopted the practice of presentation of appeals by putting them in a petition box, the person who puts the memorandum in the box would be the person presenting the appeal, and not his junior who subsequently appears in Court for taking a date. The appeal should, therefore, be deemed to have been properly presented even though the former alone held a power-of-attorney and not the latter. 39 P.L.R. 456. Memorandum of appeal presented only by one of two vakils, who alone has accepted a joint vakalat, is validly presented. 16 M. 285. Vakalat not filled up—Presentation is not proper. 1926 A. 252=91 I.C. 865. Appellant executing power of attorney in favour of a certain advocate—Presentation of appeal by another advocate on behalf of latter—Whether proper. 38 P.L.R. 258. Memorandum filed by unauthorised person is no proper appeal. 1930 A.L.J. 394=121 I.C. 546=1930 A. 112; 1936 Lah. 195. Presentation of appeal—Validity—Apprentice practitioner presenting memorandum without signature and permission of senior counsel not good. 179 I.C. 895=41 P.L.R. 327=1939 Lah. 41.

NECESSARY CONDITIONS OF A VALID FILING.—An appeal is barred if the vakalatnama is filed after limitation time. 11 I.C. 387=13 C.L.J. 544. Per *Sharpe, J.*—If a memorandum of appeal had been improperly presented by one advocate for another and the Judge accepted the document and admitted the appeal, he can hold that there was no proper appeal and can dismiss the appeal at a later stage, when his attention is drawn to the true legal position, for he was originally acting *ex parte* and accepted the document and admitted the appeal *per incuriam*. 1939 Rang.L.R. 108=1939 Rang. 1. An appeal by a legal representative without being recorded as such is not maintainable. 45 I.C. 541=16 A.L.J. 394. A mistake in the description of the respondents does not entail dismissal of the appeal, when the defect is a formal one. The appellate Court should allow it to be corrected when brought to its notice. 39 P.L.R. 188=1937 Lah. 60.

SIGNING BY APPELLANT.—Memorandum of appeal should be signed by appellant or his agent. 83 I.C. 543 (1)=1923 L. 484.

MEMORANDUM OF APPEAL TO BE IN ENGLISH.—Even if an accompanying document is in the vernacular. 2 Lah.L.J. 507=55 I.C. 24. An appeal is preferred only when a copy of the decree is filed. Without it, it will be rejected as not validly presented. 16 A. 77; 30 I.C. 165=42 C. 433; 27 I.C. 447;

(2) Add the following as a proviso to sub-rule (1) of r. 1 of O. 41 :—

"Provided that in appeals from decrees or orders under any special or local Act to which the provisions of Parts II and III of the Limitation Act (IX of 1908), do not apply and in which certified copies of such decrees or orders have not been granted within the time prescribed for preferring an appeal, the Appellate Court may admit the Memorandum of Appeal subject to the production of the copy of the decree or order appealed from within such time as may be fixed by the Court."

Add the following sentence to sub-r. (2) of r. 1 of O. 41 :—

"The memorandum shall also contain a statement of the valuation of the appeal for the purposes of the Court-Fees Act."

Add the following as sub-r. (3) of r. 1 of O. 41 :—

"(3) When an appeal is presented after the period of limitation prescribed therefor, it shall be accompanied by a petition supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period, and the Court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it either under r. 11 of this order or on the ground that it is not satisfied as to the sufficiency of the reasons for extending the period of limitation) until notice has been given to the respondent and his objections, if any, to the Court acting under the provisions of S. 5 of Act IX of 1908 have been heard."

[PATNA.] Add the following proviso to sub-r. (1) of r. 1 of O. 41 :—

"Provided that when the decree appealed from is a final decree in a partition suit and embodies the allotment papers the appellate Court may accept a copy of the decree containing only a portion of the allotment papers; provided further that the appellate Court may, subsequently, on the application of the respondent require a copy of the remaining or any further portion of the allotment papers to be filed by the appellant."

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1922 L. 191; 54 I.C. 36; 53 I.C. 137; 10 I.C. 866=7 N.L.R. 67; 1925 N. 52; 96 I.C. 336. If appeal is filed with copy of judgment alone, but the copy of the decree is filed within limitation, there cannot be any objection. 1936 O.W.N. 1008=1937 Oudh 65. The rule is inflexible and the appellate Court has no dispensing power. 11 Lah.L.T. 31. Filing of copy of translation of decree is not sufficient. 132 I.C. 3=32 P.L.R. 127; 38 P.L.R. 288. There is no proper presentation without a copy of the decree even when there is no decree in existence. 69 I.C. 895=1922 L. 170. Where in an appeal from a mortgage decree, certified copies of preliminary judgment and final decree alone were filed and no copy of preliminary decree had been filed and the memorandum purported to be of an appeal from final judgment and decree, *held*, that it could not be regarded as an appeal from the preliminary decree and that the appellant could not impugn the final decree on grounds appropriate to the preliminary decree. 59 C. 781=36 C.W.N. 420=1932 C. 589. In the case of partition decree, where appeal is only with reference to right of maintenance, the copy of the whole decree including Commissioner's report, maps, etc., is not necessary to be filed. It is sufficient if only copy of that part of the decree which is appealed from and against which grounds of appeal are directed is filed. Court may dispense with the filing of the rest of the decree under its inherent powers under S. 151. 40 C.W.N. 1298=1936 C. 751. When after filing an appeal a decree is amended and the amended copy, is permitted to be attached to the appeal the appeal becomes an appeal on the amended decree. 43 I.C. 772. An appeal from an amended decree must be accompanied by a copy of that decree and not the original decree. 11 I.C. 8. Non-filing of an award which is both judgment and decree along with memorandum of appeal is fatal to the appeal. 7 L. 539=1927 L. 49. Appeal from award under Land Acquisition

Act—Copy of the award to be filed. 94 I.C. 145=1925 L. 438. Copy of decree in cross appeal not necessary. 95 I.C. 256=1926 L. 540.

MEMORANDUM OF APPEAL—FRAME OF—GROUNDS—HOW TO BE SET OUT.—Memorandum of appeal or revision to High Court should only contain very briefly and concisely the grounds upon which it is contended Court's decision is wrong. To set out legal arguments in the grounds is a gross misuse of the grounds of appeal or revision. 58 M. 771=1935 M. 282=68 M.L.J. 218.

WHEN ORDER NOT DRAWN UP.—Copies of both order and judgment are to be filed unless the formal order had not been drawn up, in which case a copy of judgment alone will do. 1924 A. 162; 17 I.C. 119=16 C. L.J. 133; 14 I.C. 1006=15 C.L.J. 498; 58 B. 573=36 Bom.L.R. 1064=1934 B. 489; 1933 A.L.J. 1301=1933 A. 762. But *see contra* in 1924 L. 352. Trial Court intended to draw up decree in prescribed form, but it did not strictly comply with requirements of law, as laid down in O. 21, R. 6, and drew up a document which could not be called a proper and correct decree. The memorandum of appeal was accompanied by the judgment and the document and the proper decree was filed after limitation when it was prepared on application by appellant. *Held*, that appeal was properly presented and was not barred. 147 I.C. 13=1933 L. 938. The proper course is to adjourn the appeal till a copy of decree is obtained. 1924 L. 352; 49 I.C. 573=19 P. R. 1919. In a miscellaneous appeal a copy of the decree cannot be dispensed with. 40 A. 12=15 A.L.J. 801. The definition of decree in S. 2 renders an order rejecting a plaint equivalent to a decree and hence eliminates the necessity for preparing a separate decree sheet. Hence an appeal filed from such order without any decree sheet is correctly presented. 164 I.C. 181=1936 Pesh. 155. Failure to file copy of order, which was a precise copy of the operative part of the judgment, matters little

[RANGOON.] The following shall be substituted for sub-r. (2) :—

"1. (2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from, without any argument or narrative; and such grounds shall be numbered consecutively. When Burmese dates are given, the corresponding English dates shall be added. The memorandum shall also contain—

- (i) the full names and addresses of all parties;
- (ii) particulars (class, number, year and Court) of the original proceedings; and
- (iii) the value of the appeal (a) for Court-fees and (b) for jurisdiction.

Material corrections or alterations shall be authenticated by the initials of the persons signing the memorandum."

And add as sub-r. (3) :—

"(3) The appellant shall present, along with the petition of appeal, as many copies on plain paper of the grounds of appeal as there are respondents."

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and will not affect the appeal. 21 A.L.J. 452=1923 A. 579. Copy of interim order on preliminary issues need not be filed. 103 I.C. 224=1927 L. 629. Filing a vernacular translation of the decree is invalid. 4 Lah. L.J. 381=1921 L. 266; 2 Lah.L.J. 728. A copy of the judgment too is necessary. If its filing after limitation is not duly explained, appeal may be dismissed. 67 I.C. 670; 63 I.C. 30=2 L. 227; 67 P.R. 1917=41 I.C. 918; 25 I.C. 28. Though appeal is filed without a copy of judgment, when notice is issued, it amounts to dispensing with necessity of filing the same. 90 I.C. 135. Where several persons appeal from same judgment, a copy of judgment should be filed with each memo.; but where one appellant files more than one appeal, he may file a copy with one of the many memos. of appeal. 1 P. 670=4 P.L.T. 290; 6 L. 218. Two judgments one on preliminary issue and the other on other issues, both must be filed. 9 L.L.J. 502. Defective memo. admitted—Objection to memo. at a later stage is barred. 1927 L. 451. See also 104 I.C. 545=1927 L. 449.

SECOND APPEAL.—Copy of decree and judgment. The word "copy" as used in O. 41 and O. 42, means copies duly certified under Evidence Act and thus rendered capable of production before a Court of law for examination. Where appeal was presented with an unattested copy, *held*, that there was no valid presentation. 30 P.L.R. 587=1929 L. 771. Provisions of this rule are imperative and presentation of memo. of second appeal without a copy of decree appealed against is invalid. 1930 R. 182; 44 M.L.J. 279; 15 A. 123 (127). But delay can be excused. An *ex parte* order excusing delay can be attacked by respondent. 44 M.L.J. 279=17 L.W. 352. When two decrees are passed in two appeals from the same decree, both of them should be filed in second appeal. 3 L. 215=1922 L. 390. See also 33 I.C. 742=84 P.R. 1916. Claim decreed only in part—Both parties appealing—Lower appellate Court dismissing appeal by plaintiff while allowing appeal by defendant—Plaintiff appealing against dismissal of his appeal but filing copy of decree of defendant's appeal in lower Court. *Held*, that there was no proper presentation of second appeal as plaintiff should have appealed against a decree dismissing his appeal under R. 1 to the lower Court and should

have filed a decree of that appeal. 165 I.C. 137=1936 L. 293. Memo. of appeal not accompanied by copies of judgments of lower Courts such copies being on record of another appeal by opposite party is no good reason for dispensing with such copies. 104 I.C. 290 (1). A second appeal filed with a copy of decree of lower appellate Court but not with the grounds of appeal in first Court is valid presentment. 80 P.R. 1918=43 I.C. 102. See also 1930 L. 935=130 I.C. 519. In a second appeal, a copy of the trial Court's judgment need not be filed. 74 I.C. 330=1923 P. 19. Omission to file judgment of first Court with memorandum of appeal is fatal. 97 I.C. 80 (2)=1926 L. 638 (1). See also 1927 L. 423 (2)=101 I.C. 776. Presentation of appeal with unattested copy of judgment—Proper when attested copy is not available. 94 I.C. 2=1926 L. 404. Non-filing copy of interlocutory order of the Court below referred to in the judgment when filing second appeal, does not affect validity of presentation. 4 Lah.L.J. 20=1922 L. 93. See also 115 I.C. 67=1929 L. 42; 30 P.L.R. 236; 10 L. 587=1929 L. 481. Where there was a preliminary and a final judgment in a suit it is sufficient to file final judgment along with memorandum of appeal. (10 L. 587, Foll.) 127 I.C. 719=1931 L. 202. See also 59 C. 781; 134 I.C. 300. Four cases were governed by the same judgment of trial Court. Four appeals were filed and copies of four decrees were attached but a copy of the judgment was filed in one case only. In the other cases it was stated in writing on the memo. of appeal that a copy of the judgment had not been obtained and time was asked for. *Held*, that the appeals were technically incomplete and the Court should in returning the papers grant time for the defect to be cured. 14 R.D. 476. See also 1929 N. 229=25 N.L.R. 183. Order disposing of a preliminary issue need not be filed. 10 Lah.L.T. 23.

GROUND OF APPEAL.—In every appeal, the appellant must show some reason why the judgment should be disturbed. 17 N.L.R. 72=63 I.C. 898=25 C.W.N. 866 (P.C.).

RESTORATION.—Court has inherent power to restore to file an appeal dismissed for default, even though pleader could not adduce sufficient cause for default. 15 C. L.J. 334=39 C. 34.

TIME AND PLACE OF RECEIPT.—Appeal can be received by Judge at his residence and

2. The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule:

Grounds which may be taken in appeal.

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

LOC. AM.—[PESHAWAR.] Add the following to O. 41, r. 2:—

"In addition to the copies specified in O. 41, r. 1, the memorandum of appeal shall be accompanied by a copy of the judgment of the Court of first instance unless the appellate Court dispenses therewith.

3. (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

Rejection or amendment of memorandum.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge or such officer as he appoints in this behalf, shall sign or initial the amendment.

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out of Court hours. 34 A. 482=9 A.L.J. 743.

DELAY.—Under R. 1 (3) as amended in Madras the question of delay is decided beforehand and the appeal is not admitted till that point is decided in appellant's favour. 57 M. 741=1934 M. 303=66 M.L.J. 486.

O. 41, R. 2.—Grounds not raised in memo. of appeal cannot be urged. 54 I.C. 531; 70 I.C. 653=1923 M. 11. See also 25 I.C. 443. Especially long after period of limitation. 30 I.C. 22=7 P.R. 1916. Ground of attack raised in plaint and not in memo. of appeal will not be allowed to be raised, being deemed to have been abandoned. 17 I.C. 247=217 P.L.R. 1912. In appeal new grounds can be traversed with permission of Court, though not specified in grounds of appeal. 57 P.L.R. 1916=30 I.C. 817. See also 1931 R. 314. As to when Courts will prevent it, see 57 I.C. 800=11 L.W. 611. Plea not raised in trial Court cannot be raised in appeal. 19 I.C. 48; 68 I.C. 227. A new case cannot be raised. 17 I.C. 247=190 P.L.R. 1912. A pure question of law which went to the root of the matter was allowed to be raised. 135 I.C. 839=33 Bom.L.R. 590=1931 B. 466. Plea of *res judicata* can be raised for first time in second appeal at its hearing though not in the memo. of appeal. 22 I.C. 12. So also an objection to jurisdiction under S. 21. 131 I.C. 603=1931 A. 556.

FILING OF ADDITIONAL GROUNDS.—Additional grounds should not be allowed to be filed at a late stage. 49 P.R. 1914=25 I.C. 443. Where alternative grounds of appeal are raised an appellate Court is not debarred from going into questions which are admitted for the purpose of an alternative argument. 84 I.C. 1039. An appellant should not be

allowed to raise and succeed on defences not raised in the written statement or in the memorandum of appeal. It is true that the Appellate Court under R. 2, in deciding the appeal is not confined to the grounds of objection in the memorandum, but it is not permitted to rest its decision on any other ground unless the party affected thereby has had a sufficient opportunity of contesting the case on that ground. When an appellant seeks to raise a point not taken in the Courts below or in the memorandum of appeal, the propriety of allowing him to do so and of basing the appellate decision on such a ground is a matter which the Appellate Court ought to decide. 1940 Pat. 33.

O. 41, R. 2, proviso: POWER OF COURT UNDER—DECISION OF CASE ON POINT RAISED BY COURT SUO MOTU—IF JUSTIFIED.—It is no doubt open to a Court of appeal to decide a case on any rule of law which it considers applies, but it is not entitled to decide a case on a point taken by itself without giving the parties to the appeal an opportunity of meeting it. I.L.R. 1938 Mad. 829=48 L. W. 76=1938 Mad. 357 (F.B.).

O. 41, R. 2 (Peshawar Amendment).—Where an appeal was filed within limitation but without a copy of the judgment of the trial Court as required by the amendment to O. 41, R. 2, made by the Judicial Commissioner's Court, Peshawar, and it was returned with the directions that the copy of the trial Court's judgment be produced and the appeal was afterwards presented again with the copy when the period for filing the appeal had expired. Held, that the appeal was time barred. 168 I.C. 878=1937 Pesh. 50.

O. 41, R. 3.—A memorandum of appeal which has not been registered is not to be regarded as an appeal. As long as there are defects in it, Court can under R. 3

LOC. AMS.—[ALLAHABAD AND OUDH.] *Substitute* the following for r. 3 (1) :—

"3. (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed or accompanied by the copies mentioned in r. 1 (1), it may be rejected, or where the memorandum of appeal is not drawn up, in the manner prescribed, it may be returned to the appellant for the purposes of being amended, within a time to be fixed by the Court or be amended then and there."

[BOMBAY.] After r. 3 of O. 41, the following rule shall be *inserted*, namely :—

"3-A. Where an appellant applies for delay to be excused, notice to show cause shall at once be issued to the respondent and the matter shall be finally decided before notice is issued to the Court from whose decree the appeal is preferred under r. 13."

4. Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all.

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return it and give the party a chance of putting it again in a complete form; and any time that it allows for re-presentation is only by way of concession. Hence a continuance or extension of the concession cannot be demanded as a matter of right at any rate after the expiry of the period of limitation. If a party fails to complete the memorandum of appeal even though it was returned to him thrice and sufficient time was allowed each time to represent it, it must be rejected. 144 I.C. 608=1933 M. 358. Where an appeal was filed within limitation but without a copy of judgment of trial Court and it was returned with directions that the copy be produced and the appeal was afterwards presented again with the copy when the limitation period had expired. *Held*, that the appeal was time barred. 1937 Pesh. 50. No duty on Court to add proper parties when the appellant neglects. 18 I.C. 37=59 P.R. 191. Wrong naming of respondent due to clerical error can be rectified and the mistake is not fatal. 21 C.W.N. 774=27 C.L.J. 129. Where appeal is preferred against a dead person L. Rs. cannot be added after limitation period. 21 I.C. 306. Rejection on account of limitation does not come under this rule but under R. 11. It amounts to a dismissal and is *appealable*. 60 I.C. 493.

O. 41, R. 4: OBJECT AND SCOPE.—This rule gives Court ample powers to make appropriate order in the interests of justice. 30 C.L.J. 417=24 C.W.N. 110. Scope of. See 100 I.C. 346=1927 A. 311. O. 41, R. 4 is based on two considerations, firstly to give the appellate Court full power to do justice to all parties whether before it or not, and, secondly, to prevent contradictory decisions in the matter in the same suit. 1937 A.L.J. 1111=1937 All. 796. The rule is limited to a case of appellants and does not apply to a case where all the respondents are not present on the record as parties to the appeal. 1935 O.W.N. 401=1935 O. 329; 90 I.C. 986=30 C.W.N. 45; 40 L.W. 604=1934 M. 730=67 M.L.J. 681. Object of this rule enunciated in 20 I.C.

952=25 M.L.J. 248. One plaintiff may appeal for the benefit of other plaintiffs only if the co-plaintiffs are made parties to appeal. 106 I.C. 313=1928 L. 43; 157 I.C. 502=1935 Pesh. 106. See also 58 C. 1341=135 I.C. 797=1932 C. 134 (where the L.Rs. of one of the plaintiff respondents were not impleaded in time. The words of R. 4 only mean that if an appeal is filed by only one of the parties, the whole case is re-opened. This is different from saying that all the co-plaintiffs or co-defendants become appellants, *ipso facto* merely by one man out of them filing the appeal. A party becomes an appellant only when he either signs the memorandum of appeal or authorises the person actually signing it, to file it on his behalf. Hence on the withdrawal of an appeal filed by only one of the several defendants, the other defendants who had not cared to join in the presentation of the appeal, cannot claim to continue that appeal. 1940 R.D. 439=1940 A.W.R. (B.R.) 235. Under R. 4 read with R. 33 of this order one of several defendants can file an appeal without impleading the other defendants as parties, if the decree under appeal proceeds on a ground common to all of them, and appellate Court has power to vary the decree in favour of the non-appealing defendants also. 61 C. 919; 40 C.W.N. 553=1936 C. 424; 45 C.W.N. 15; 1937 O.W.N. 768. See also 1940 A.W.R. (C.C.) 478; 1940 O.W.N. 1155; 1937 A.L.J. 1111=1937 All. 796. In such a case where one of the defendants-appellants dies during the pendency of the appeal and no one is substituted in his place but the appellate Court passed an order that the appeal had abated so far as the deceased appellant was concerned. *Held*, that the appeal was not incompetent by reason of that fact. 59 C.L.J. 318. Where defendants are advisedly impleaded as respondents, it is competent for one of the defendants to appeal in his own name even though the interests of the other defendants are not inseparable from the interest of the appellant and the success of the appeal enures for the benefit of the appellant as well as his correspondents. 165 I.C. 66=

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1936 L. 612. This rule prevents two contrary decisions in the same suit. 35 I.C. 547=1 P.L.J. 143; 1937 A.L.J. 1111=1937 All. 796. For the distinction between this rule and R. 33, see 30 I.C. 868=22 C.L.J. 61; also 42 C. 451=19 C.W.N. 233; 24 I.C. 924=1 L.W. 376; 160 I.C. 1005=1936 Pesh. 20; 1937 All. 796. Provisions of O. 41, R. 4 enable the Court to vary the decree as a whole even though the appeal of one of the appellants might have abated by reason of death. 1938 Mad. 374. R. 4 of O. 41 is based on the assumption that all the plaintiffs or defendants in the suit are alive at the date of the passing of the appellate decree, and it cannot override or create an exception to O. 22, Rr. 4 and 11; in the case of one or more appellants dying even where a decree proceeds upon a ground common to all, the matter must be governed solely by Rr. 4 and 11 of O. 22. To hold otherwise is to hold that O. 41, R. 4 gives the Court power to set aside an abatement and to reverse or vary a decree which has become final against a deceased appellant. 19 Pat. 870=21 P.L.T. 597=1940 Pat. 346 (F.B.). See also 19 Pat.L.T. 398=1938 Pat. 147; 1937 All. 796. No effective decree for partition can be passed in a partition action unless all the co-sharers are before the Court. But it does not follow that a suit for partition cannot be dismissed against an absent defendant. In an appeal from a partition decree which proceeds on grounds common to all the appellants, if there is a partial abatement owing to the death of some of them, the surviving appellant may continue the whole appeal having regard to the provisions of O. 41, R. 4. Where the decree appealed from is of such a nature that the hearing of the appeal after partial abatement may result in the passing of two inconsistent decrees, the whole appeal must fail. 19 Pat. 172=21 P.L.T. 577=1940 Pat. 341. Appeal by some of the parties—Power of Court to grant relief in its entirety. 99 I.C. 1041. See also 1927 P. 103=98 I.C. 846=8 P.L.T. 316; 106 I.C. 875 (2). As to whether several persons who have obtained leave to institute suit under S. 92, C.P. Code, constitute several plaintiffs, see 16 L. 782=1935 L. 251. Although only some of the defendants appeal, the other non-appealing defendants are entitled to take advantage of any decision which has been arrived at in favour of the appealing defendants. 60 C. 733=37 C.W.N. 504=1934 C. 632. Power of Court to reverse decree as against non-appealing party. See 57 M.L.J. 789=1930 M. 65; 52 M. 322=1929 M. 230=56 M.L.J. 255. The use of the word "may" shows that appellate Court is given a discretion in the matter. Where some of the parties have not appealed, Court will be justified in refusing them relief. 133 I.C. 556=32 P.L.R. 787. The discretion exercised will

not be interfered with in second appeal. 88 I.C. 535=1926 A. 64. Under this rule it is enough if decree proceeds on any ground common to all the parties. Every ground need not be common. 42 C. 451=19 C.W.N. 233; 63 I.C. 973. See also 1933 L. 933. This rule applies where the interests of the appealing party are inseparable from those of the non-appealing parties. But where they are separable the case is different and the rule has no application. 44 I.C. 762=3 P.L.J. 166. See also 12 L. 534=32 P.L.R. 798. But see 165 I.C. 66=1936 L. 612 (noted *supra*). It does not apply where there is no common ground of appeal. 40 I.C. 184=35 P.W.R. 1917; 1926 L. 303=94 I.C. 557 (1); 44 C.W.N. 141. Nor to parties not appealing and made *pro forma* respondents. They cannot be heard supporting the appeal. 34 I.C. 714 (F.B.). Where the sole appellant died his co-defendant who is a *pro forma* respondent cannot apply to continue the appeal after the expiry of 90 days. 53 A. 521=131 I.C. 877=1931 A. 349. See also I.L.R. (1938) All. 350=1938 A.L.J. 159=1938 All. 235. Except under this rule no relief in respect of persons not parties to the appeal can be given. 44 I.C. 480. Under no provision of law can an appellate Court interfere with a decree in a suit not appealed from. 53 I.C. 883=116 P.R. 1919; 1 L.W. 169=23 I.C. 620; 15 I.C. 409; 35 I.C. 547=1 P.L.J. 166; 84 I.C. 68=1925 C. 23. In an appeal by one unsuccessful defendant relief can be given to the non-appealing defendants as well, provided their defence was also the same. 40 M. 846=41 I.C. 546; 23 C.W.N. 372; 31 I.C. 886; 60 I.C. 460; 31 C.L.J. 75=24 C.W.N. 463. This is left to the discretion of Court. 36 A. 510=24 I.C. 439=12 A.L.J. 883; 139 I.C. 718=1932 A. 710. But see *contra* 2 P.L.R. 1912=12 I.C. 605. Even in favour of a non-appealing heir of a deceased defendant. 35 I.C. 743=3 O.L.J. 279. See also 57 M.L.J. 719; 56 M.L.J. 255. Where one of two appellants died before hearing of appeal and the fact was not known to counsel or Court, a decree passed in favour of both is valid and the L.R. of the deceased appellant can be brought on record at the time of passing a final decree. 48 M.L.J. 601=1925 M. 235. Where pending an appeal one of the two defendant-appellants died and his heirs did not come forward to be substituted in his place, *held*, that the surviving defendant was competent to rely on all such grounds on which the deceased defendant could have resisted and did resist the plaintiff's claim. 56 C. 487=33 C.W.N. 150=1929 C. 263. See also 146 I.C. 26=1933 M. 655; 1933 A.L.J. 1049=1933 A. 733 (Joint decree for pre-emption—Death of one pending appeal—Legal representative not brought on record—No abatement). 15 L. 667=1934 L. 206 (Suit for accounts—Death of one appellant pending appeal—Legal representative not brought on record

Stay of proceedings and of execution.

5. (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only, of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

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—Appeal abates). 61 C. 879=38 C.W.N. 743=1934 C. 703; 1934 M. 730=67 M.L.J. 681.

WHERE RELIEF IN FAVOUR OF NON-APPEARING PARTY CANNOT BE GIVEN.—Where one of several joint plaintiffs appeal, the others must be made parties. 45 A. 286=21 A. L.J. 91; also 53 I.C. 548. But see *contra* 25 I.C. 91=63 P.R. 1914. Where a person is a necessary party to the suit, he is a necessary party to the appeal as well. Not bringing him as a party to the appeal will entail a dismissal of the appeal. 3 P. L.T. 456=66 I.C. 780. See also 40 P.L. R. 6. When relief against non-appealing defendants has been granted in the first appeal, they form necessary parties to the second appeal. 22 I.C. 90=18 C.L.J. 621. Not bringing on record the L.Rs. of deceased co-defendant, during pendency of appeal, only abates the appeal so far as the deceased alone is concerned and does not affect the appeal as a whole. 90 I.C. 986=30 C.W.N. 45; 10 I.C. 27; 26 I.C. 486=88 P.R. 1914. But see 70 I.C. 168=16 L.W. 330=1923 M. 58. Where in a suit against two defendants some of whom remained *ex parte* and a joint decree against both was passed, and the contesting defendant alone appealed, the whole suit cannot be dismissed even as against the *ex parte* non-appealing defendant. 24 I.C. 924=1 L.W. 376. Relief against non-appealing defendants as well cannot be given when the appeal is not on the entire decree, but only so far as it affects the appealing defendant. 63 I.C. 95. Where relief is claimed alternatively against A and B and decreed against B, in the appeal by B, cross-objections against A need not be raised. The rights can be settled by the Court. 42 I.C. 548.

O. 41, Rr. 4 and 33: RELIEF TO PERSONS NOT BEFORE COURT—EXERCISE OF DISCRETION—PRINCIPLES. Ordinarily when a person submits to a decree it is no part of the Court's duty to interfere and give that person gratuitously a relief which he has not prayed for and which possibly he may not want. The general principle of law is that when there is no appeal or motion the decree will stand. This principle should be adhered to unless it is found that such adherence will hamper the Court in doing complete justice.

To meet this contingency O. 41, Rr. 4 and 33 have been enacted. These provisions give the Court a wide discretion to grant relief to persons who are not before the Court either as appellants or respondents. These discretionary powers, however, should be cautiously used and the exercise of these powers, when it is not necessary, would constitute an error of law and procedure justifying an interference by the High Court. 43 C.W.N. 15.

O. 41, R. 5.—The policy underlying the rule, see 38 C. 754=15 C.W.N. 475. O. 41, R. 5 does not apply to revision. 117 I.C. 815=1929 L. 167. In an appeal under O. 43, R. 1 (r) against an order of temporary injunction granted under O. 39, R. 2 the appellate Court is competent under O. 41, R. 5 (1) to direct a stay of operation of the interim injunction pending appeal. The words "stay of proceedings" in O. 41, R. 5 (1) do not mean stay of proceedings in the Court itself, so as to preclude the appellate Court from interfering with the operation of the injunction already issued. 1937 A.L.J. 377=1937 All. 528.

SCOPE OF.—See 37 I.C. 752; 99 I.C. 763 (1). Where an appeal is properly filed in accordance with R. 1, an application for stay of execution under R. 5 is maintainable, even though the appeal is not registered owing to an adverse report of the Stamp Reporter. 41 C.W.N. 374=65 C. L.J. 127. An undertaking by Court of Wards to hold the income of the estate under its management as a condition for stay of execution of the decree passed in respect of such estate, cannot be enforced as a personal security under S. 145, and its legal validity is also not free from doubt. 41 C. W.N. 374. The Registrar of Patna High Court has power to receive and dispose of applications for stay of execution proceedings. 59 I.C. 883=2 P.L.T. 70. The words "proceedings under a decree" include the proceedings relating to the passing of final decree in a mortgage suit, and an appeal against a preliminary decree will not operate as a stay of such proceedings. 53 A. 283=1931 A.L.J. 508=1931 A. 386 (F.B.). The mere fact that an appeal from a preliminary decree is pending in the appellate Court does not preclude the trial Court from passing a final decree. Hence the question of stay of further proceedings

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made ;

(b) that the application has been made without unreasonable delay ; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Notwithstanding anything contained in sub-rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application.

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after preliminary decree depends upon the particular facts of each case; and unless the conditions of R. 5 are fulfilled (i.e., there must be likelihood of substantial loss to the party applying who must also give full security) stay cannot be ordered. 1933 L. 724; 150 I.C. 59=1934 N. 160. Though R. 5 does not empower Court to impose terms prior to granting stay, yet it prohibits stay except in the circumstances mentioned in sub-Cl. (3) of the rule. In the absence of such circumstances, stay order ought not to be passed except with the consent of the decree-holder or *ex parte* in anticipation of such consent and on such conditions as the decree-holder is likely to agree to. 150 I.C. 59=1934 N. 160. See also 41 C.W.N. 374=65 C.L.J. 127. In cases where the Code does not apply High Court has inherent jurisdiction as a Court of appeal to stay proceedings in a lower Court. 4 P.L.J. 371=52 I.C. 185. High Court has inherent powers to direct stay of execution of final decree pending an appeal from preliminary decree. 54 A. 344=1932 A.L.J. 43=1932 A. 238. The proper procedure in an appeal against a *preliminary decree in a mortgage suit* is to stay the passing of a final decree. 136 I.C. 729=1932 L. 271; 107 I.C. 486. But see 54 A. 344=1932 A. L.J. 43=1932 A. 238, holding that it is generally expedient that proceedings for the preparation of the final decree should not be stayed as the mere passing of a final decree will not affect the rights of parties. In the absence of any evidence that the proceedings in the lower Court will be of protracted nature or that their continuance will cause any substantial loss, it is unnecessary to stay all further proceedings in the lower Court in pursuance of a *preliminary partition decree*. If the passing of the final decree however, will cause some loss to the petitioner by obliging her to file another appeal from the final decree the proceedings in the lower Court should continue until the stage of the passing of the final decree is reached, but no final decree should be passed if the petitioner gives adequate security for the income of the property. 149 I.C. 1010=1934 L. 184. See also 1935 L. 181 (1)=158 I.C. 894. In cases relating to *possession of land* it is ordinarily desirable not to disturb the possession of a party unless good ground to the contrary is shown to exist, and the Bench hearing a Letters Patent

appeal can grant stay when single Judge has not exercised any discretion and has not given any decision on the merits of the application. 150 I.C. 985 (1)=1934 L. 361 (2). High Court has inherent jurisdiction to grant a stay of execution under an award where the application to set aside an award has been refused and an appeal to High Court is pending therefrom. The analogy of R. 5 may in such a case be followed and the conditions in that rule may be required to be fulfilled. 55 B. 801=33 Bom.L.R. 702=1931 B. 384. High Court can suspend imprisonment under S. 43 of the Provincial Insolvency Act till the disposal of the appeal from the sentence. 44 B. 673=22 Bom. L.R. 322. Interim order of stay of execution by appellate Court—Receipt of order by lower Court—Anything done in contravention of the order cannot become good by reason of the order of stay being ultimately vacated. 99 I.C. 989=1927 M. 450. *Bona fide* sale held before order of stay is communicated is good *na valid* sale. 1930 L. 17=125 I.C. 53.

PROVISO (c).—Under sub-Cl. (3) of O. 41, R. 5 no stay could be granted unless security had been given by appellant for the due performance of such decree or order as may ultimately be binding upon him. 152 I.C. 687 (2)=40 L.W. 650; 84 I.C. 302=1925 R. 5. Proviso (c) does not contemplate a decree or order in a separate proceeding in future by decree-holder. 22 M.L.J. 190=12 I.C. 692. Where a sum of money which is deposited in Court as security is more than sufficient to meet the claim ultimately awarded, the surplus can be applied towards payment of costs. 58 C. 1=133 I.C. 97=1931 C. 474. Mere presentation of appeal or presentation followed by dismissal does not in any way affect the operation of original decree. 46 C. 670=36 M. L.J. 557=50 I.C. 444 (P.C.). Also 63 I.C. 799.

POWERS OF TRIAL COURT.—An appeal having been filed, trial Court cannot oust decree-holder who has been put in possession in execution and put judgment-debtor in possession. 35 A. 119=17 I.C. 728. See also 73 C.L.J. 297. Appellant can before filing an appeal obtain an order for stay from trial Court. 33 I.C. 685=23 C. L.J. 310.

FORUM.—Application for stay should be made in executing Court though an appeal be pending. 11 I.C. 22. When stay of a

LOC. AM.—[MADRAS.] Substitute the following for the existing sub-rule (1) to r. 5 of O. 41.—
P. Dis. No. 164 of 1932:—

"5. (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree and may, when the appeal is against a preliminary decree, stay the making of a final decree in pursuance of the preliminary decree or the execution of any such final decree, if already made."

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decree on the original side pending an intended appeal is to be applied for in the original side, it should be made to the Judge who decided the case. 25 C.W.N. 928=48 C. 796. It is left to the discretion of the appellate Court to stay execution. An order passed by an appellate Court should not ordinarily be disturbed, unless it was passed without jurisdiction or with material irregularity or would occasion substantial loss. 1922 L. 185.

WHEN STAY CAN BE ORDERED.—Under Cl. (3) no order for stay of execution can be made unless certain conditions are fulfilled, one of which is the furnishing of security. But no such limitations are imposed when proceedings, as distinct from execution of a decree, are stayed. The difference is that the furnishing of security is compulsory in the one case, but within the discretion of the Court in the other. 31 N.L.R. 72=1935 N. 16=154 I.C. 461. Stay ought to be granted in appeal when decree-holders have sufficient security in the property itself remaining under attachment. 75 I.C. 791=1923 L. 445 (2). See also 31 P.L.R. 268=1930 L. 108. No security is necessary, when the decree itself is secured on the property. 66 I.C. 201. Stay of execution pending appeal—Surety for stay of execution—Can be proceeded against before proceeding against the judgment-debtor. 117 I.C. 65. See also 146 I.C. 764=1933 A. 664. In a suitable case appellate Court has power to stay execution of a decree which is under appeal even though decree-holder may not have applied to execute it. 57 B. 202=35 Bom.L.R. 134=1933 B. 118. Stay should be granted when appellant could not recover properties sold in the event of his succeeding in the appeal. 15 I.C. 876=94 P.W.R. 1912. When execution is being taken for costs fixed, but respondent is insolvent, the proper order is to grant stay on payment of costs to respondent's pleaders on the latter's undertaking to return it if appellant succeeds in appeal. 16 L.W. 975=70 I.C. 784=1923 M. 229 (2). See also 4 P.L.J. 642=54 I.C. 222 (Stay in case of directions given to Receiver by lower Court). What constitutes "substantial loss" within the meaning of O. 41, R. 5, Cl. (3), see 1927 L. 169=99 I.C. 767.

WHEN STAY CANNOT BE GRANTED.—Without an appeal on the decree on file a stay order is *ultra vires* and a nullity. 43 A. 513=19 A.L.J. 462; 43 A. 198=18 A. L.J. 1121. Under R. 5, no order of stay of execution during pendency of an appeal can be made unless Court is satisfied that

substantial loss may result to the applicant and this rule applies to immovable equally with movable property. Where appeal is filed from a decree for possession of land and for mesne profits and the land in dispute is under a permanent lease at a uniform rent and the respondents who own considerable immovable property are prepared to give adequate security for restitution in case the decree in their favour is reversed on appeal, it cannot be held that the applicant will suffer any substantial and irreparable loss if execution proceedings are not stayed. 35 P.L.R. 727. A bare statement that appellant will suffer substantial loss is not a sufficient ground for granting stay. 61 I.C. 77=2 L. 61. The kind of loss must be specified, details must be given, and the conscience of Court must be satisfied that such loss will really ensue. The burden of proof is on the appellant to show that substantial loss may result unless execution is stayed. 150 I.C. 59=1934 N. 160. Application for restitution can be made as soon as decree is varied or reversed and it ought not to be stayed under R. 5, because an appeal has been filed. 117 I.C. 288=1929 N. 138. Stay cannot be granted by lower Court when no execution application is pending. 63 I.C. 897; 58 I.C. 302. Stay of execution to be granted in an appeal from a pre-emption decree. 1927 L. 169=99 I.C. 767. Stay cannot be granted on the ground that a claim by a prior mortgagee, is pending. Only amount sufficient to satisfy claim should be retained out of the sale proceeds. 60 I.C. 378=57 P.W.R. 1920. On a mere vague speculation stay cannot be granted; failure to furnish security required cannot give benefit of stay; stay after execution of decree cannot be granted. 58 I.C. 442. A decree for possession should not be stayed unless the three conditions of sub-R. (3) are satisfied. The crucial test is whether substantial loss will result if stay is not granted. 61 I.C. 827; 31 P.L.R. 216. Annoyance of feelings is not a sufficient ground for granting stay. 17 I.C. 219=23 M.L.J. 316. Stay of proceedings for taking accounts will not be allowed, unless irreparable injury will otherwise be caused. 61 I.C. 9. When an appeal against an order refusing to set aside an *ex parte* decree is pending, appellate Court has no power to stay execution, though the lower Court may. 33 I.C. 443. Sufficiency of security must be enquired into by the executing Court when High Court allowed execution on furnishing security. 44 I.C. 156=22 C.W.N. 657. Ordinarily no stay of execution should be granted in a money

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decree when decree-holder furnishes security for restitution. Ind. Rul. 1932 L. 651; also 33 P.L.R. 799 (1). Where after a decree for redemption the mortgagor deposited the decree amount and prayed for possession in execution, the deposit is a sufficient security for mesne profits in case the decree is reversed on appeal and no additional security need be furnished. 11 M. L.T. 248=15 I.C. 383. R. 5 cannot be construed so as to empower High Court to stay the proceedings of a Revenue Court which is not subordinate to it. The rule contemplates proceedings of Court subordinate to the appellate Court which passed the decree. 53 A. 180=1930 A.L.J. 1469=1931 A. 57.

WHEN STAY ORDER TAKES EFFECT.—Stay order takes effect only after communication. So an attachment order by lower Court after passing of the stay order by appellate Court, but before the communication is received, is valid. 33 M.L.J. 515=41 M. 151 (F.B.). But see 96 I.C. 137=1926 A. 457; 1941 O.W.N. 1044. But knowledge of the fact of stay order passed by appellate Court is sufficient to stop execution by lower Court, though the official communication had not been received. 38 M. 766=26 M.L.J. 275. A stay order passed by a higher Court takes effect from the date on which it is pronounced and not on the date on which it is communicated. A sale held despite the passing of such a stay order even though the same is not communicated is *ultra vires*. 1941 A.W.R. (Rev.) 774=1941 O.W.N. 1044. An *ad interim* stay order operates from time of its pronouncement and not when it is communicated. 41 I.C. 752=53 P.W.R. 1917; 96 I.C. 137=1926 A. 457.

SALE IN CONTRAVENTION OF STAY ORDER.—A sale held between the time when an *ex parte* order for stay was passed and the time when the order was set aside, is not void. 43 I.C. 656 (1)=16 A.L.J. 46. Interim stay of sale ordered by appellate Court—Sale held in ignorance of order—Sale not a nullity. 1927 A. 401=102 I.C. 665=50 A. 41 (F.B.). See also 1930 L. 17=125 I.C. 53.

SECURITY BOND—FORM OF AND STAMPS FOR.—A security bond under Rr. 5 and 6 must be in the form of a bond to some one and not a mere undertaking to the Court. The bond must be addressed to some officer of the Court. The Court is not a juridical person and a bond in favour of the Court, is not one in proper form. 40 C.W.N. 1281. Surety bond under Rr. 5 and 6—Hypothecation of properties—Stamp duty—Mortgage deed or security bond. (*Ibid.*) This security bond under, in *moffusil*—Court-fee and stamp duty. 1936 Sind 41.

SECURITY BOND—ACCEPTANCE BY COURT.—A security bond executed by the surety under O. 41, Rr. 5 and 6 does not become operative until and unless it is accepted by the Court. 15 L. 282=149 I.C. 300=1934 L. 138 (F.B.).

SECURITY BOND—ENFORCEMENT.—Where security bond creating personal liability and hypothecation of property is executed by the surety to the executing Court under Rr. 5 and 6, the decree-holder can move executing Court to enforce the bond as against the surety. 15 L. 282=149 I.C. 300=1934 L. 138 (F.B.). In a *mortgage suit* the property mortgaged in usually security for the decretal amount and no further security need as a rule be taken. But when decree is for sale, with right to a personal decree attached, then if the mortgaged property is insufficient to satisfy the decree Court is bound to order security for the balance. 150 I.C. 59=1934 N. 160. A *consent decree* is not any the less a decree and therefore where a surety undertakes to be bound by such decree or order as may be passed by the Court, he undertakes to be bound by a consent decree as well as by one after contest. If however there is fraud or collusion or any of the matters on which a contract can be set aside, or the decree compromises matters not arising out of the litigation he could claim exemption on those grounds. 31 N. L.R. 172=1935 N. 16=154 I.C. 461.

REALISATION OF SECURITY.—When immovable property is given as security, it can be realised by execution and no need for a separate suit for its realisation. 41 M. 327=34 M.L.J. 84. See also 1933 M.W.N. 486=38 L.W. 818.

APPRECIATION OF VALUE OF SECURITIES.—Where judgment-debtor deposited decree amount as condition for stay of execution, and decree-holder was permitted to draw it on furnishing security; and where the decree-holder failed to furnish security and draw it; and the amount was invested in Government securities, on application by judgment-debtor; and where before the appellate Court passed its decision the securities became very much appreciated in value. *Held*, that under the decree all that the decree-holder could claim was only the sum found due with interest at the rate awarded and no more and that the profits arising out of the appreciation of the securities in value should go to the judgment-debtor who made the deposit. 156 I.C. 244=37 Bom.L.R. 200=1935 B. 200.

LOSS OF SECURITY BOND—PRESUMPTION AS TO ITS TERMS.—Where owing to the loss of the bond and the lapse of time, it is not possible to expect oral evidence of the terms of a security bond executed as per order staying further proceedings, the only reasonable presumption is that the bond must have been executed according to the tenor of the Court's order, and in accordance with the prevailing practice, of which the Court can take judicial notice. 31 N.L.R. 172=1935 N. 16=154 I.C. 461.

APPEAL.—An appeal lies from an order staying execution of a decree. I.R. 1932 L. 636; 32 P.L.R. 756=1932 L. 30 (1). See also 40 Bom.L.R. 1198. No appeal lies from an interlocutory order for furnishing

6. (1) Where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

(2) Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

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security. 75 I.C. 793=1923 L. 446; or from order accepting security as sufficient. 3 R. 255=1925 R. 225. See also 32 P.L.R. 806=1932 L. 120=136 I.C. 792. A stay order is automatically vacated the moment the appeal is dismissed and therefore it ceases to have effect from that date. 1939 N.L.J. 13=1939 Nag. 107.

COSTS.—In the absence of special circumstances the general rule is that costs of an application for stay of execution pending an appeal should be costs in the appeal. 56 B. 276=1932 B. 127 (F.B.).

PRACTICE.—Where an appeal is preferred against a decree during the pendency of its execution in the transferee Court and the execution is stayed and the appeal is subsequently dismissed and the stay order is discharged, it cannot be said that fresh applications for transfer and execution are necessary. The execution in the transferee Court may be revived by a mere application to that Court. Where a decree is affirmed in appeal, the result is not to wipe out the decree of the trial for all purposes. Where the terms of the decree of the trial Court are not in any way affected by the appellate decree, the fiction of merger should not be carried so far as to lead to such a palpably absurd and inequitable result that the decree-holder should be put to the inconvenience of filing a fresh application in the Court which originally passed the decree, getting a fresh transfer certificate to another Court and pursuing the proceedings for execution in that Court. 1941 O.W.N. 1186=1941 A.W.R. (Rev.) 1031.

PRACTICE—EXTENSION OF TIME.—In an execution petition an order was passed staying delivery of possession conditional on the judgment-debtor paying the kist and rent by a certain year itself but the Court granted extension of time. Held, that the order of stay was not under R. 5 (3) but one under S. 151, that though the order was under S. 151 still it was one allowed by the Code and that S. 148 applied by which extension of time could be given. 38 L.W. 201=1933 M. 563=65 M.L.J. 538.

O. 41, R. 6: SCOPE.—O. 41, R. 6 is inapplicable if no application for stay of sale is made to the executing Court. 39 P.L.R.

C.C.M.—168

601=1937 Lah. 841. The inherent powers given to appellate Courts under R. 5 regarding stay of execution are not restricted or cut down by the special and emergent powers given to the executing Courts under sub-R. (2). 41 M. 813=34 M.L.J. 470 (dissenting from 17 I.C. 763=23 M.L.J. 677). See also 1930 L. 108; 138 I.C. 847=1932 A. 551. Where properties (subject of mortgage decree) are deteriorating in value and not insured and are capable of being destroyed by fire, earthquake or other similar causes it is only fair that before sale is stayed J.D. should be ordered to give security for any deficiency that may occur in recovery of the amount due to the decree-holder under the decree on sale of the mortgaged property. 148 I.C. 941=1934 L. 117. Under R. 6 it is incumbent upon the Court to stay the sale on suitable terms as to security, if an application is made to it. The fact that the stay for execution has been refused by the appellate Court under R. 5, or that the rule for stay must be taken to have been discharged by reason of the non-fulfilment of the terms on which the stay was granted by the appellate Court, does not justify the Court in refusing to exercise the jurisdiction vested in it under R. 6. 44 C.W.N. 1150=1940 Cal. 582. A mortgage decree for sale is not separable or divisible, and when the Court which has ordered the sale has taken security for further interest pending appeal from the decree, it is bound to stay the sale under R. 6 (2). The fact that the appeal is directed only against a part of the decree and not against the whole decree, is no ground for holding that the Court cannot stay the sale of the entire mortgaged property. 22 Pat.L.T. 236.

Sub-rule (2): SCOPE.—Court cannot dismiss summarily an application for stay of sale of immovable property, pending appeal. 161 I.C. 936=1936 P. 443. On the wording of R. 6 (2), the Court has no option but to grant stay of sale on such terms as to giving security. There is no limit to the discretion of the Court in imposing terms, but it has no discretion to refuse to stay the sale. 1940 M. 82=I.L.R. (1940) M. 420=(1940) 1 M.L.J. 460. When an appeal is pending executing Court has power to stay the sale though the Court can make it a condition of

7. [Omitted by A.O., 1937.]

LOC. AM.—[OUDH.] In r. 7, for the tenth word "and" substitute a comma and between the figure "6" and the word "shall" insert "and 10."

Exercise of powers in appeal from order made in execution of decree.

8. The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree.

Procedure on admission of appeal.

9. (1) Where a memorandum of appeal is admitted, the Appellate Court or

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the order that the decree amount should be deposited in cash. 9 I.C. 323=15 C.W.N. 432. See also 1929 L. 68. But such an order is against the spirit of the rule. 1925 L. 69. An order of the appellate Court refusing to stay execution of the decree under R. 5 (1) of O. 41, does not fetter the power of the Court which passed the decree to stay under R. 6 (2) the sale ordered in execution of the decree. In fact such Court has no option but to stay a sale on such terms as it thinks fit if a proper application to that effect is made. 44 C.W.N. 701. Under R. 6 (2), Court has jurisdiction to make it a condition that the stay would be given only on judgment-debtor depositing the decree amount in Court. The words "on such terms as to giving security or otherwise" mean that terms may be either giving security or any other term, such as the deposit of the decree amount in the Court ordering stay. 40 L.W. 704=1934 M. 709=67 M.L.J. 650. Under the provisions of O. 41, R. 6 (2) the Court which passed the decree has full powers to stay a sale on taking security from the judgment-debtor. It need not, and ought not to grant a limited stay order and ask the judgment-debtor to obtain a further order of stay from High Court. 45 C.W.N. 382=1940 Cal. 543. Security bond executed by a member of a joint Mitakshara family when it consists of other members including minors should not be accepted by the Court. 18 Pat. L. T. 62=1137 Pat. 380. A person who has stood as surety for costs and against whom a decree for costs has been consequently made is a judgment-debtor within the meaning of S. 2 (10) and is entitled to apply for stay of execution of the decree pending an appeal therefrom. 58 B. 485=36 Bom.L.R. 499=1934 B. 252. Final decree passed pending appeal from preliminary decree for sale in mortgage suit—Application for execution of final decree Court can only stay, and not dismiss. 1933 A. 732. The Court which directs security to be furnished is directly interested in seeing whether its orders have been complied with or not, and though it may have delegated the function of enquiring into the sufficiency of security to a Subordinate Court and left it entirely to that Court to decide the sufficiency or otherwise of the security, it can always intervene if the Subordinate Court misdirects itself in conducting the enquiry. At the same time if certain matters have been left to the discretion of the Subordinate

Court, the appellate Court will interfere only when the Court below has acted perversely or either misconstrued or misdirected itself on any principle of law and justice. It is the duty of the Subordinate Court to examine the titles of the sureties carefully and be reasonably satisfied as to the validity and the sufficiency of the bonds so that no difficulty may arise in their enforcement if it becomes necessary to enforce them in future. 1937 P.W.N. 216=18 Pat.L.T. 621=1937 Pat. 380.

APPLICABILITY.—This rule applies only to cases where appeal is against the decree which is to be executed. So, it has no application in case where an appeal is preferred on a decree in claim suit. In this case the remedy is an injunction under O. 39. 1922 L. 518. Where after a decree in High Court in appeal, there was an appeal to the P.C. the proper Court which could demand security from the decree-holder who had taken possession is not the trial Court under this rule, but the High Court has to be moved under R. 13. 13 R. 158=4 Bur.L.J. 50. A surety under this rule is not discharged on the death of judgment-debtor. 32 I.C. 807. No arrangement between decree-holder and surety can bind judgment-debtor's interest on reversal of decree. 32 I.C. 807. An order under I. 6 directing stay of sale of immovable property does not bar decree-holder from proceeding against movables of the judgment-debtor. 93 I.C. 897 (2)=1926 L. 463. See also 117 I.C. 88=1929 L. 552.

REVISION.—Order for security to stay sale pending appeal passed without enquiry as to value can be set aside in revision. 6 L. L.J. 510=1925 L. 256. See also 44 C.W.N. 701; 73 C.L.J. 297.

APPEAL.—Order under O. 41 is appealable—S. 47, applies. 102 I.C. 25=28 P.L.R. 617. See also 58 B. 485=36 Bom.L.R. 499=1934 B. 252. Order directing execution to proceed on furnishing of security—Security to the 'satisfaction of the Registrar'—Report by Registrar—Objection thereto—Appeal to Court does not lie—Revision. 66 C.L.J. 169=42 C.W.N. 188.

O. 41, R. 8.—The Registrar of Patna High Court has no power under the High Court Rules, to hear an application under this rule. 138 I.C. 334=1932 P. 217. As to his powers under R. 5, see 59 I.C. 833, cited under that rule.

O. 41, R. 9.—An appeal filed out of time should not be registered without Court deci-

Registry of memorandum of appeal.

the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

Register of appeals.

(2) Such book shall be called the Register of Appeals.

LOC. AM.—[MADRAS.] Substitute the following rule:—

Registers in accordance with Forms Nos. 22, 23, 24 and 25 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of suits specified therein."

10. (1) The Appellate Court may in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both:

Appellate Court may require appellant to furnish security for costs.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immovable property within British India other than the property (if any) to which the appeal relates.

Where appellant resides out of British India.

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal.

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ding the question as to extension of time under S. 5 of the Limitation Act. 59 C. 388 = 138 I.C. 643 = 1932 C. 482.

O. 41; R. 10: SCOPE.—The object of R. 10 of O. 41, is to secure the respondent from the risk of having to incur further costs which he might never recover from the applicant, and an application under the rule must therefore be made promptly. The Court must be careful to see that a poor appellant is not deprived in effect of his right of appeal. Poverty is always a handicap in litigation and there is no justification for the Court to add to this handicap by requiring impossible things to be done. Different considerations would arise if the appeal were not *bona fide* or if the appellant were only a puppet in the hands of others. But when there is nothing to show that the appellant has no real or substantial interest in the subject-matter of the litigation or that he is a mere name lender for another, and when on the other hand the application of the respondent for calling on the appellant to furnish security is not only belated, but also not *bona fide*, the Court should not allow the application, especially when even otherwise it is not desirable in the interests of justice that an order should be made for furnishing security which might very likely stifle the appeal itself. 45 L. W. 232 = 1937 Mad. 285. The rule applies to Letters Patent Appeal. The provision regarding rejection is mandatory. 48 C. 481 = 48 I.A. 76 = 40 M.L.J. 308 (P.C.); also 25 Bom. L. R. 468 = 73 I.C. 474; 68 I.C. 306; 2 L.L.J. 391; 61 M.L.J. 688 = 34 L.W. 783. "Costs of the appeal or of the original suit"—Meaning of—Court-fee due to Government by pauper plaintiff or pauper appellant application by Government for security for costs is not maintainable. 45 L. W. 186 = 1937 Mad. 267. Where security for costs

of appeal is ordered to be furnished within a particular time, it is a compliance with the order if it is tendered within the time; and the appeal cannot be rejected unless the security is tested and found insufficient, even though the testing is after the time fixed for furnishing it. The testing of the security itself need not be within the time. (Decision of *Jackson, J.*, in 52 M.L.J. 53 (Short Notes), relied on). (1941) 2 M.L.J. 291. R. 10, is concerned with costs incurred up to and in the appellate Court and has no bearing whatever in costs which may be dependent upon something occurring in the Privy Council. 101 I.C. 551 = 1927 A. 522 (2). It applies to appeals from the Original Side of High Court. 21 L.W. 662 = 1925 M. 1132. O. 41, R. 10 is applicable to appeals from decrees or orders made on the original side of the High Court, whether the judgment appealed against is one made in a suit or in a petition. The expression "original suit" in O. 41, R. 10 is not used in the technical sense of a proceeding commenced by a plaint, but is used to cover also an original application on which the judgment appealed from was given, whatever its nature. I.L.R. 1938 Bom. 399 = 40 Bom. L.R. 470 = A.I.R. 1938 Bom. 351. Also to appeals from an order of High Court in its insolvency jurisdiction. 43 C. 243 = 20 C. W.N. 140, but does not apply to pauper appeals and security cannot be demanded of a pauper appellant. 42 B. 5 = 19 Bom. L.R. 771; 48 I.C. 971; 3 L. 30 = 67 I.C. 256; 149 I.C. 453 (1); 45 L.W. 186 = 1937 M. 267; I.L.R. (1940) Mad. 420 = 1940 Mad. 82 = (1940) 1 M.L.J. 460. But see *contra* 43 M. 902 58 I.C. 794. As to demanding security for costs in revision application, see 40 Bom. L.R. 1025. Security for costs of guardian *ad litem* of a minor respondent can be demanded under this rule. 47 I.C. 928. Applications for security for costs should be

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made promptly without delay. 20 P.L.R. 1918=44 I.C. 23; 1930 C. 520; 45 L.W. 232=1937 M. 285; 1931 M.W.N. 1157 (Delay by itself is no ground for refusing to direct security). Application for correcting clerical error in security bond filed, should be allowed. 86 I.C. 752=1925 O. 402. No power is given under the rule to order appellant to pay the entire decree amount and not costs alone. 139 I.C. 866=1932 A.L.J. 722=1932 A. 511 (F.B.). R. 10 empowers appellate Court to demand security for costs from appellant, and the appeal Court is final authority for deciding upon sufficiency or otherwise of security offered. The mere fact that for reasons of convenience it had delegated to Subordinate Judge the duty of taking security does not prevent the appeal Court from satisfying itself that the security taken was sufficient or that the security was taken after proper inquiry. 148 I.C. 1140=35 Bom.L.R. 1114=1934 B. 13.

SECURITY FOR COSTS OF APPEAL.—Security bond not properly executed—Dismissal of appeal forthwith—Propriety. 47 C. L. J. 328=107 I.C. 349 (2) (P.C.). See also 1930 M. 355.

WHEN TO BE ORDERED.—The power to demand security must be exercised according to well-known principles for which, see 25 Bom.L.R. 468=73 I.C. 474. See also 45 L.W. 232=1937 M. 285; 34 C.W.N. 495=1931 C. 40=58 C. 117 (collusive suit). Court is not bound, as a matter of law, to order security to be furnished. It is a matter absolutely discretionary. In special circumstances, Court may direct the furnishing of security but where highly penal consequences will entail upon the appellant by the order, Court would not be bound to make the order for security. 121 I.C. 61=1930 N. 28. Where appellant has been allowed to prosecute his appeal as pauper, the order implies the case is fit to be placed outside the purview of R. 10. In the absence of special circumstances showing that the pauper is a mere creature in the hands of persons well able to find security an order directing the pauper to furnish security would be improper and inconsistent with the order granting him leave to appeal. 121 I.C. 61=1930 N. 28. (47 B. 104; 3 M. 66; 17 M.L.J. 583, Ref.). See also 1931 M. W.N. 1157; 56 M. 323=64 M. L. J. 433; 13 R. 511. Such circumstances are where appellant has suppressed a material document in his possession. 1933 M.W.N. 263; where a Court on a perusal of judgment of lower Court finds that there is no chance of appellant's success. 56 M. 323=1933 M. 519=64 M.L.J. 433. The mere fact that an appellant has not paid in full or in part the costs of the original suit is no ground for calling upon him to furnish security unless his conduct has been shown to be vexatious, that is, such as indicates a wilful determination on his part not to obey the

order of Court in respect of costs. 130 I. C. 771=1931 L. 70. An appellant's poverty would not by itself be sufficient to warrant his being required to furnish security for costs. But that does not mean that the appellant can rely upon his own poverty as being an important or decisive factor, and resist an application for security, on that ground, particularly where it is found that appellant's claim was of a vexatious character and his conduct has been *mala fide* throughout. Though a respondent should be prompt in applying for security for costs, yet where the delay was due to the steps taken for recovering costs incurred in the lower Court, and where the very occasion for the application for security is non-recovery of such costs, such a delay cannot deprive an applicant of his remedy under O. 41, R. 10. 47 L.W. 133=1938 Mad. 380=(1938) 1 M.L.J. 142. Where a minor pauper is an appellant and is a mere creature in the hands of persons well able to find security, he can be called on to furnish security for costs. The fact that the appellant is both a minor and a pauper does not by itself entitle him to resist the application for security for costs. 47 L.W. 153=1938 Mad. 313=(1938) 1 M.L.J. 235. Court has a discretion in demanding security—Poverty of the appellant is not sufficient—Each case stands on its own facts—In many cases at least security for costs of appeal alone, may be justly ordered. 25 Bom.L.R. 195=1923 B. 264; 17 L.W. 26=70 I.C. 586; 1 P.L.T. 114=55 I.C. 835; 114 I.C. 708=1930 L. 384 (1); 123 I.C. 538=1930 L. 382; 1930 L. 629 (2)=129 I.C. 121; 17 P.L.T. 187=1936 P. 433; 14 R. 289=1936 R. 294. If appeal is not vexatious, poverty of appellant and existence of relations who can pay is not sufficient ground. 28 I.C. 598=19 C.W.N. 446. Even though appellant is a public servant who is defended by Government, security from the Secretary of State can be ordered when the amount of costs is very high. 13 I.C. 335=16 C.W.N. 119. Court-fee due to Government by pauper plaintiff or appellant is not "costs of the appeal or of the original suit" within the meaning of R. 10. Hence this rule cannot be utilised for the benefit of Government in order to enable it to collect the Court-fee due. 45 L.W. 186=1937 M. 267. No extension of time can be granted after dismissal of appeal. 67 I.C. 883=1923 C. 417; 7 R. 445=1929 R. 289. But see 42 A. 626=18 A. L.J. 838. See also 1932 M.W.N. 655.

APPEAL.—See I.L.R. (1940) All. 19=187 I.C. 31. An order rejecting an appeal under O. 41, R. 10 (2), for failure to furnish security for the costs of the respondent is not a decree within the meaning of S. 2 (2), C.P. Code and is hence not appealable as such. Nor is it one of the orders mentioned in O. 43, R. 1 and so is neither appealable as an order. 1939 A.L.J. 998=1939 All. 733. Where owing to a

11. (1) The Appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

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dispute as to the sufficiency of the security furnished by an appellant under R. 10, a date is fixed for its decision and the appellant does not appear on such date and the appeal is dismissed, the rejection of the appeal is under R. 10 (2), and not under R. 17. Hence a refusal to restore it would not come under R. 19 of O. 41 and so it would not be appealable. 1939 A.L.J. 998=1939 All. 733.

REVISION.—A rejected appeal under sub-rule (2) can be restored and further time for furnishing security may be given in revision though there is no explicit provision to that effect. 42 A. 626=18 A.L.J. 838; 3 L. 30; 40 I.C. 234. Notice to the respondent is necessary when re-admitting a rejected appeal. 40 I.C. 234. No appeal lies from an order under this rule. 62 I.C. 751; 3 L. 30. No appeal or revision lies from an order setting aside an order rejecting an appeal under sub-R. (2). 42 A. 626=18 A.L.J. 838. Nor against an order rejecting an appeal under sub-R. (2). 161 I.C. 233=1936 R. 109. Sureties are discharged when appeal is allowed and cannot again be made liable, when the appellate order is reversed. 38 C.L.J. 190=76 I.C. 510.

RESTORATION.—Power of Court to restore appeal dismissed for failure to furnish security within time. See 117 I.C. 791. Application for restoration is governed by Art. 168 of the Limitation Act. 61 M.L.J. 688.

O. 41, R. 11: SCOPE.—A dismissal of an appeal under this rule is not equivalent to confirmation of decree under R. 32. When appeal is against a mortgage decree the dismissal of appeal under this rule does not extend time for payment fixed in the decree. 47 B. 950=25 Bom.L.R. 990. See also 24 C.L.J. 517=21 C.W.N. 430. When an appeal is heard under O. 41, R. 11, the Court may either act under sub-R. (1) or sub-R. (2). Under sub-R. (1) the dismissal may be on the merits and this may be after hearing the pleader, if he appears, but the words indicate that a dismissal on the merits may also be ordered if the pleader does not appear. Under sub-R. (2) if the appellant does not appear the Court may dismiss for fault. But this does not prevent a dismissal on the merits where there is no appearance under sub-R. (1). The power of the appellate Court to take these two

courses under R. 11 is not taken away when a notice is issued to the respondent and the respondent appears in accordance with that notice. I.L.R. (1938) All. 814=1938 A.L.J. 901=1938 All. 548. An appellate Court should not dismiss an appeal summarily without any due regard to the nature of the questions of fact and of law that arise for consideration in the appeal. The powers of summary dismissal ought not to be lightly used specially in cases where the questions at issue between the parties are not simple but complicated and require careful examination and investigation by Courts of fact. 19 Pat.L.T. 305=1938 Pat. 330. In a case where elaborate questions of fact and of law have to be decided, an appellate Court is not justified in dismissing the appeal summarily under R. 11. The appellate Court in such a case should admit the appeal, hear arguments on both sides, apply its mind to the oral and documentary evidence in the case and then come to a decision, which in many cases would be final between the parties. 19 Pat.L.T. 210=1938 Pat. 608. Summary dismissal by District Judge of an appeal under S. 476 (8), Cr.P. Code, is wrong in law and R. 11 has no application. 51 C.L.J. 45=1930 C. 282=127 I.C. 265. Collector's case—Appeal—Dismissal for default—Refusal to restore—Revision to Governor-in-Council from order of Deputy Commissioner—If open. 19 N.L.J. 314.

JUDGMENT NECESSARY.—Court must write a formal judgment in dismissing appeal. 37 B. 610=15 Bom.L.R. 765 (overruling 36 B. 116=12 I.C. 564=13 Bom.L.R. 1002); 27 C.W.N. 501=1923 C. 558. Appeal dismissed under R. 11—Writing judgment is not obligatory though advisable. 25 N.L.R. 55=115 I.C. 168=1929 N. 68. See also 13 P. 540=150 I.C. 817=15 P.L.T. 293=1934 P. 331. In dismissing an appeal under R. 11, it is not obligatory upon the lower appellate Court to write a regular formal judgment giving reasons for the decisions as required by R. 31 of the said Order, because R. 31 applies only to a judgment under R. 30. 171 I. C. 625=1937 Sind 247. Some elaborate questions of fact and also a question of law as to whether the Mahant had power to make certain grants fell to be decided and the appellate Court dismissed the appeal summarily under R. 11. Held, that in these circumstances the case was one where ap-

Day for hearing appeal.

12. (1) Unless the Appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the

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Appellate judgment was called for and therefore the appellate Court was wrong in dismissing it summarily under R. 11. (1934 Pat. 341, Dist.) 17 Pat. L. T. 607=1936 Pat. 505. Appellate Court dismissing appeal should generally record reasons and must write judgment according to O. 41, R. 31. 4 R. 66=1927 R. 208=103 I.C. 766; 4 R. 18=95 I.C. 521=1926 R. 129; 67 I.C. 471. See also 1926 C. 992=96 I.C. 136=43 C.L.J. 499; 53 A. 528=132 I.C. 200=1931 A. 589; 1931 A.L.J. 875=1931 A. 597 (F.B.). This should be done specially when the order summarily dismissing an appeal is itself subject to an appeal. 147 I.C. 194=59 C.L.J. 293=1934 C. 26. The dismissal of an appeal under R. 11, is a decree and the expression of opinion dismissing the appeal is judgment. 30 C.W.N. 334=1926 C. 638=93 I.C. 939 (2). Where an appeal is dismissed under the rule, the decree remains the decree of the lower Court and not of the appellate Court. So it is the ground for amendment of the decree. 11 P. 409=1932 P. 238; 142 I.C. 143=1933 N. 117. The discretion given by this rule is not an arbitrary discretion but a judicial discretion. 33 I.C. 666. Where the case is a fairly arguable one and there is a reasonable prospect of success Court has to order notice to issue and not to impose conditions on appellant. An order for notice conditional on the appellant depositing the entire decretal amount is bad in law. 1932 A.L.J. 722=1932 A. 511 (F.B.). The appellate Court is bound to fix a date for hearing the appellant. The date of hearing is the one to be fixed by the Court and not the one fixed by any ministerial officer. An appellant had a right to be heard unless he is guilty of misconduct or gross negligence. 18 N.L.J. 157. It is imperative to hear appellant before passing final order on appeal. 11 Lah. L.T. 32. When appeal is against a condition fixing period of payment, and the period elapsed during pendency of appeal, the appeal ought not to be dismissed on the ground that payment was not made within the period fixed. 17 I.C. 868=10 A.L.J. 421.

ADMISSION OF APPEAL IN PART.—It is open to the appellate Court under R. 11 to dismiss an appeal in part and to admit it in part, if appeal is severable. 152 I.C. 418=1935 L. 34; but not to admit it and at the same time to restrict the grounds on which the appeal is to be heard. 58 B. 397=36 Bom.L.R. 451=1934 B. 207 (F.B.).

RE-ADMISSION.—Any order restricting grounds of appeal to be heard, at the time

of re-admission, is *ultra vires*. 15 C.W.N. 921=14 C.L.J. 146. No review when a second appeal is dismissed under this rule. Discovery of new evidence is not sufficient ground for review. 50 I.C. 431=27 C.W.N. 918. When once admitted on review without notice to respondents, succeeding Judge cannot question the order subsequently. 50 I.C. 431.

APPEAL AND REVISION.—An order under sub-rule (1) is a "decree" and therefore appealable. But if no decree is drawn up, the appeal may be treated as an application for revision. 191 P.L.R. 1914=23 I.C. 90. Order refusing to take action against receiver under O. 40, R. 4—Appeal—Maintainability. 150 I.C. 750 (1)=1934 A. 907. Appeal dismissed under O. 41, R. 11—Lower Court's decree is superseded. See 1937 Nag. 381. See also 18 Pat.L.T. 321=1937 Pat. 349. An appellate Court has jurisdiction to dismiss an appeal summarily under O. 41, R. 11, although when difficult questions arise for consideration it would not be doing justice to the parties to dismiss the appeal under R. 11. Since the dismissal under R. 11 is not without jurisdiction, the High Court will not interfere in revision. 1937 P. W. N. 843=18 Pat. L. T. 812=1937 Pat. 639.

O. 41, Rr. 11 and 12 (1): CONSTRUCTION AND SCOPE.—A Court in dealing with an appeal under O. 41, R. 11 cannot direct that it be admitted in part only. By virtue of R. 11 the appellate Court may dismiss the appeal without serving notice on the respondent, but if it does not dismiss the appeal summarily, it must, by virtue of R. 12 (1) fix a day for hearing "the appeal". There is nothing in either rule to suggest that the Court may admit the appeal in part only. There are only two courses open to the Court, namely, to dismiss or admit the appeal as whole. I.L.R. (1940) Mad. 785=1940 Mad. 483=(1940) 1 M. L. J. 857 (F.B.).

O. 41, R. 11 and Ss. 151, 152: DISMISSAL UNDER O. 41, R. 11—EFFECT—AMENDMENT OF DECREE APPEALED AGAINST—APPLICATION FOR PROPER FORUM.—Where the Chief Court dismisses an appeal under O. 41, R. 11 it neither confirms nor varies the decree of the lower appellate Court allows it to remain as it was. Hence when the decree in question is sought to be amended, it is the lower appellate Court which could amend the decree and hence an application for amendment of the decree should be made to that Court and not to the Chief Court. 1941 O.W.N. 1=1941 O.A. 8.

service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

Appellate Court to give notice to Court whose decree appealed from.

13. (1) Where the appeal is not dismissed under rule 11, the Appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

Transmission of papers to Appellate Court.

(2) Where the appeal is from the decree of a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court.

Copies of exhibits in Court whose decree appealed from.

and given to, the applicant.

(3) Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made; and copies of such paper shall be made at the expense of,

Publication and service of notice of day for hearing appeal.

14. (1) Notice of the day fixed under rule 12 shall be affixed in the Appellate Court-house, and a like notice shall be sent by the Appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer; and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice.

Appellate Court may itself cause notice to be served.

(2) Instead of sending the notice to the Court from whose decree the appeal is preferred, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to.

LOC. AMS.—[ALLAHABAD.] Add as sub-rule :—

"(3) Notwithstanding anything in sub-rule (1) it shall not be necessary to serve notice of any proceeding incidental to an appeal on any respondent, other than a person impleaded for the first time in the Appellate Court, unless he has appeared and filed an address for service either in the trial Court or in the case of a second appeal, in the lower Appellate Court or has appeared in the appeal."

[CALCUTTA.] Insert the following clause as clause (3) :—"(3) It shall be in the discretion of the Appellate Court to make an order, at any stage of the appeal whether on its own motion, or *ex parte* dispensing with service of such notice on any respondent who did not appear, either at the hearing in the Court whose decree is complained of or at any proceeding subsequent to the decree of that Court or on the legal representatives of any such respondent :

Provided that—

(a) the Court may require notice of the appeal to be published in the newspaper or newspapers as it may direct.

(b) no such order shall preclude any such respondent or legal representatives from appearing to contest the appeal."

[MADRAS.] Add the following proviso :—

"Provided that the Appellate Court may dispense with service of notice on respondents against whom the suit has proceeded *ex parte* in the Court from whose decree the appeal is preferred."

[NAGPUR.] Rule 14.—To r. 14 the following sub-rule shall be added :—

"(3) The Appellate Court may in its discretion dispense with notice to any respondent against whom the suit was heard *ex parte*."

[N.-W.F.P.] Add the following proviso to sub-rule (1) :—

"Provided that with the permission of the Court no notice need be served upon a respondent who was a *pro forma* defendant in a suit which was decided *ex parte* against him."

[ODDH.] Add the following sub-rule :—

"(3) Provided that in a case where a respondent has not appeared either during the hearing of the case in the Court from whose decree or order the appeal is preferred or at any proceeding subse-

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O. 41, R. 14.—A Judge cannot decide appeal *ex parte* when notice of appeal does not specify the date of hearing of appeal. 31 I.C. 624. The duty of furnishing correct address of respondent lies on appellant, and not on respondent. When notice has

not been duly served, presumption of knowledge of date of hearing could not be raised. 41 I.C. 819=136 P.L.R. 1917. Where a minor is represented by a guardian *ad litem* notice need not be served on minor himself. 1926 C. 1106=30 C. W. N. 949=97 I.C. 614.

quent to that decree, it shall only be necessary for the Court to make one attempt to effect personal service on such respondent or, if such respondent is dead, on his legal representative; and, thereafter, service may be effected by affixing a notice in some conspicuous place in the Court-house of the District Judge within whose jurisdiction the suit or proceeding was instituted along with one or other of the following methods, namely publishing the notice in a newspaper or affixing it to the wall or door of the chaupal of the village where the respondent last resided or any other method as the Court may direct."

[PATNA.] Add the following as r. 14-A in O. 41 :—

"14-A. The Appellate Court may, in its discretion, dispense with the service of notice hereinbefore required on a respondent, or on the legal representative of a deceased respondent, in a case where such respondent did not appear, either at any stage of the proceedings in the Court whose decree is appealed from or in any proceedings subsequent to the decree of that Court and no relief is claimed against such opposite party or respondent or his legal representative either in the original case or appeal."

[RANGOON.] Add the following sub-rule :—

"(3) Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to an opposite party or respondent who did not appear either at the hearing in the Court whose decree is complained of or at any proceeding subsequent to the decree of that Court or on or to the legal representative of any such opposite party or respondent if deceased."

[SIND.] Add the following as sub-rule (3) :—

"(3) The Appellate Court may, however, in its discretion, dispense with the service of notice of the appeal or interlocutory application therein, on a respondent or opponent who has made no appearance at the trial Court."

Add the following as r. 14-A :—

"14-A. Subject to the leave of the Appellate Court nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent, where such opposite party or respondent did not appear, either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court."

Contents of notice.

15. The notice to the respondent shall declare that if he does not appear in the Appellate Court on the day so fixed the appeal will be heard *ex parte*.

LOC. AM.—[CENTRAL PROVINCES.] In O. 41, insert the following as r. 15-A :—

"15-A. Where, after admission of an appeal in the High Court, the rules of the High Court require the appellant to take any steps in the prosecution of the appeal before a fixed date, and where, after due service of a notice intimating the steps to be taken and the date before which they must be taken, the appellant fails to take such steps within the prescribed time, the Court may direct the appeal to be dismissed for want of prosecution or may pass such other order as it thinks fit."

Procedure on hearing.

16. (1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

Right to begin.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

17. (1) Where on the day fixed or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

Dismissal of appeal for appellant's default.

Hearing appeal *ex parte*.

(2) Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte*.

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O. 41, R. 15.—Adequate time must be allowed from date of the service and the hearing of appeal. 136 I.C. 258=1932 L. 248.

O. 41, R. 16.—Council for one party could not be heard after the case had been closed and in absence of the Council for the other party, and a judgment based on such hearing is not valid. 63 I.C. 945. Right of respondent to put in appearance on date of hearing. See 96 I.C. 326=1926 B. 424=28

Bom.L.R. 738. All. that R. 16, compels Court to do is to hear arguments if any addressed and not to permit written argument. 115 I.C. 173=1929 N. 89.

O. 41, R. 17: SCOPE.—Rr. 17 and 19 are exhaustive in respect of cases where appellant makes default in appearance in appeal. 103 I.C. 425=1927 L. 622. O. 41, R. 17, C.P. Code, only applies when the appeal is called on for hearing, and not when it is called on merely in order to be postponed.

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42 P.L.R. 271. Where an appeal is adjourned for a short while to enable a party to engage a fresh counsel to argue his appeal but the new counsel files his appearance and asks for an adjournment and the Court thereupon orders 'No body appears to argue this appeal, I therefore dismiss it with costs', it is clearly an order dismissing the appeal for default. Appearance in the legal sense means that a party or somebody on his behalf either expressly in words or by his conduct demands an adjudication from the Court. 1939 A. L. J. 355=1939 All. 451. If appellant fails to intimate any change of address and a notice sent to him by Court to the address specified in the memorandum of appeal is returned unserved on the ground that he has left the place and taken up residence elsewhere, Court will not postpone hearing of appeal for benefit of appellant; and if appellant is absent at the hearing, the appeal is liable to be dismissed. 1936 R.D. 448 (1). If the discretion to dismiss is not exercised, the appeal must be adjourned and cannot be disposed of on merits. 1925 R. 96. An order dismissing an appeal for default is not a decree, and lower Court's decree is not superseded. Therefore first Court can set aside *ex parte* decree. 39 A. 393=15 A.L.J. 289.

DEFAULT—WHAT IS.—Where materials essential for progress of suit are wanting owing to appellant's default, an appeal may be dismissed, for default. 47 I.C. 691. When appellant is present in Court and states that his pleader is engaged elsewhere the presence of the appellant is not an appearance within this rule. 5 Pat.L.J. 17=54 I.C. 715. Mere unpreparedness of appellant's counsel to argue appeal is no ground for Court to dismiss it for default. 115 I.C. 173=1929 N. 89. R. 17 does not contemplate that Court should decide an appeal on merits in the absence of appellant. The law contemplates that appellate Court should hear both parties to the appeal and then decide it according to its judgment. 56 C. 412=1929 C. 475; 1925 R. 96; 11 Lah.L.T. 136. Appearance by pleader who is instructed only to apply for adjournment is no appearance. 62 I.C. 57. Appearance of appellant at Court to ask time to get pleader is not appearance within the meaning of the Code. 30 I.C. 878=22 C. L.J. 72; 51 M.L.J. 654. When appellant was not present, and pleader asked for adjournment and when it was refused reported no instructions, this amounted to default, and appeal should not have been disposed of on the merits, but dismissed for default. 28 O. C. 166=1925 O. 549; 43 M.L.J. 317=45 M. 882; 74 I.C. 947; 1923 P. 536=5 Pat.L.T. 46; 51 I.C. 46=42 M. 451=36 M.L.J. 222. *See contra* 83 I.C. 257=1925 N. 236 (1). Remand for further enquiry and report on a fixed date—Appellant absenting on date fixed for enquiry—Appeal cannot be dismissed for default before date fixed for report.

C.C.M.—169

96 I.C. 308=1926 L. 574.

DEFAULT—WHAT IS NOT.—When appellant alone is present without pleader and could not argue the appeal, the appeal should be decided on the merits considering the grounds of appeal. 35 A. 105=11 A.L.J. 18; 39 P.L.R. 34=1937 Lah. 691. There is no default when pleader is present but is prevented from physical disability from arguing. 9 I.C. 857. Pleaders or counsel should be sent for. No doubt peon's calling out at the door of the Court very often proves sufficient, but when there are pleaders, the ordinary practice of sending for them should not be discontinued. In appeals especially, it is not absolutely necessary that parties should be present in person when there are constituted agents in the shape of counsel in Court and so it is conducive to good work that they should be sent for. 52 A. 536=1930 A.L.J. 632=1930 A. 217. The clerk of Court has no power to fix a date in the absence of the Judge, and the failure of the appellant to appear on a date so fixed does not justify dismissal in default. 36 P.L.R. 63=1934 Lah. 984.

RESTORATION.—Court has an inherent power of restoration of an appeal dismissed for default. 47 M. 171=45 M.L.J. 813. Non-appearance, because no date of hearing was fixed, is not default; a dismissal for default is without jurisdiction. 69 I.C. 618=1924 L. 279. There is sufficient cause for restoration, when, due to want of notice of the fact of transfer of appeal from one sub-Court to another, the appellant was not present at the latter Court. 46 I.C. 881. When, within a month from date of dismissal for default, both parties apply for restoration and file a petition of compromise, it ought to be restored and a compromise decree passed. 68 I.C. 448=1923 C. 319. An appeal dismissed for default when the appellant was present to ask for time to get his pleader should generally be restored. 50 I.C. 878 (1)=22 C.L.J. 72. Appeal may be restored when appellant himself has shown all possible diligence towards causing appearance to be made, but there was default due to negligence of pleader. 14 I.C. 823=22 M. L. J. 284. Restoration should be refused when vakil's conduct amounts to gross negligence. 35 I.C. 429=1 Pat.L.J. 65. Summary rejection for application for restoration of appeal dismissed for default is invalid. 104 I.C. 347 (2)=1927 C. 888.

APPEAL AND REVISION.—Against an order of dismissal for default, when it should have been disposed of on merits no appeal lies but it is revisable. 83 I.C. 257=1925 N. 236 (1); 28 O.C. 166=1925 O. 449. *See also* 53 C. 827=1927 C. 98=99 I.C. 124.

O. 41, Rr. 17 and 19.—Appellant's counsel leaving Court to attend another case after waiting for considerable time on date of hearing—Appeal called in his absence and dis-

18. Where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that the appeal be dismissed:

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing.

LOC. AM.—[MADRAS.] In O. 41, r. 18, after the words "cost of serving the notice" insert the words "or if the notice is returned unserved, to deposit within any subsequent period fixed the sum required to defray the cost of any further attempt to serve the notice."

19. Where an appeal is dismissed under rule 11, sub-rule (2), or rule 17 or rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

Re-admission of appeal dismissed for default.

LOC. AMS.—[MADRAS.] Re-number r. 19 in O. 41, as r. 19 (1) and add the following as—
r. (1). " (2) The provisions of S. 5, Limitation Act, 1908, shall apply to applications under sub-r. (1)."

[CENTRAL PROVINCES.] In r. 19, O. 41, after the words and figures "r. 11, sub-r. (2)" insert the words and figures "or r. 15-A" followed by a comma.

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dismissed summarily—Propriety of order can be challenged and appeal restored. 40 P.L.R. 76.

O. 41, Rr. 17, 30 and 31: DISMISSAL UNDER R. 17 OF O. 41, WHEN JUSTIFIED—COURT WHEN BOUND TO PROCEED UNDER RR. 30 AND 31.—Where on the day fixed for the hearing of an appeal, the appellant does not appear when his appeal is called on for hearing, the Court is entitled under R. 17 to make an order that the appeal be dismissed. In such a case the Court is not bound to proceed in the manner laid down by Rr. 30 and 31, for this reason that, that procedure has to be adopted only 'after hearing the parties or their pleaders'. To say that it should be followed even when a party does not appear, is to require the Court to do something which the law does not require it to do. 1940 A.L.J. 121=1940 All. 310.

O. 41, R. 18.—Applicability. 52 I.C. 179=169 P.R. 1919. Appeal cannot be dismissed, because appellant failed to provide a person to identify respondent. 65 I.C. 49=3 Pat.L.T. 498. A dismissal under this rule is wrong, when the *Talabnama* has been deposited but notice to the respondent for the issue of process has not been filed. 15 C.L.J. 683=13 I.C. 694=16 C.W.N. 498. No appeal lies from an order under this rule. 52 I.C. 179=169 P.R. 1919. Appeal dismissed against respondent who is necessary party and order not appealed against—Whole appeal abates—Appeal being imperfectly constituted—Court cannot make contradictory decrees. 1930 C. 346=133 I.C. 813. Dismissal of appeal for failure to serve no-

tice on some of the respondents—Appeal—Maintainability—Application under R. 19 not the only remedy. See 9 P. 408=10 Pat.L.T. 589=1929 Pat. 609.

O. 41, R. 19: SCOPE.—The rule is not exhaustive of the power of appellate Court in the matter of restoration. 20 Bom.L.R. 110=45 B. 648. But see 103 I.C. 425=1927 L. 622. The rule does not take away other remedies of the appellant if any. 2 P. 739=4 Pat.L.T. 405. Dismissal of appeal in the absence of appellant permits only restoration. 1925 R. 96. Unless the dismissal of an appeal falls under either R. 11 (2) or R. 17 or R. 18 of O. 41, there can be no restoration or re-hearing under R. 19. I.L.R. (1940) All. 220=1940 A.L.J. 126=1940 All. 248. Dismissal of appeal for not depositing printing charges—Remedy. 4 P. 704; 134 I.C. 1169=1931 S. 153. See also 1939 Pat. 678 (F.B.); 1938 Pat. 111=19 Pat.L.T. 17. Appeal dismissed for default—Restoration on condition that appellant pays a certain amount by a certain date—Power of Court to extend time. 1935 O. W.N. 706. Appellant unable to argue case and applying for adjournment—Refusal of adjournment and dismissal for want of prosecution—If one for default—Remedy of appellant—Application for restoration or second appeal. 1937 A. 284. Jurisdiction under—Nature of—If appellate jurisdiction—Order refusing to restore second appeal dismissed for default—Letters Patent appeal—Certificate—Necessity for. 156 I.C. 454=1935 L. 815.

WRONG DISMISSAL.—It is wrong to dismiss an appeal when appellants have not been

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served and though pleaders are present, they have no instructions. 30 I.C. 199=2 O.L.J. 198. Notice of date fixed for hearing should be sent to next friend of minor appellants. Otherwise dismissal for default could not be sustained. 53 I.C. 333. In an application under R. 19 for the restoration of an appeal which has been dismissed for default, it is not necessary that any particular party should be expressly impleaded. There is nothing in the Code, which requires it. All that is required is that an application should be made for the restoration of the dismissed appeal. It is no doubt ordinarily advisable to mention in the application the names of all the parties on whom notice of the application should be served. But omission to mention the name of a party respondent does not entail the dismissal of the application on that ground, if the record enables the Court to ascertain the names of the persons to whom notice of the application should be, and is in fact, given. 1937 A.L.J. 407=1937 All. 362. Courts exist not for the purpose of imposing discipline on practitioners or parties but for the purpose of administering justice. Where an appeal was summarily dismissed and an application for restoration was rejected on the ground of 'Court discipline'. Held, that the order should have stated the reason for rejecting the petition and its merits should have been investigated by the Court. Even if the order gave reason, it was not sufficient and the order must be set aside. 1937 Pat. 624.

SUFFICIENT CAUSE.—Applicant should be given an opportunity to prove sufficient cause for default. 57 I.C. 762; 52 I.C. 926=59 P.L.R. 1919; 1925 C. 269=82 I.C. 330. In dealing with an application under O. 41, R. 19 to restore an appeal which has been dismissed for default, the appellant's Counsel being engaged before another Court, the Court has to consider the position of the party concerned rather than the conduct of the members of the bar, though it may sometimes be difficult to dissociate the one from the other. A litigant should not be deprived of hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be set right by his being ordered to pay costs. Where the non-appearance is due to default of counsel engaged in the case a similar consideration will *mutatis mutandis* be applicable, when the Court has to decide whether there was sufficient cause for the non-appearance of the party or of his counsel. This consideration is all the more weighty when dealing with cases of default in the High Court where in some cases the party is not present at all having entrusted his case to counsel. It will be unmerited hardship if the party's interests should be irreparably prejudiced by reason of every default on the part of Counsel. I. L. R. (1937)

Mad. 607=1937 Mad. 503=(1937) 1 M.L.J. 632. Where an application is made for restoring a suit dismissed for default of appearance Court should give the party an opportunity to substantiate his plea. 31 Punj.L.R. 969. See also 120 I.C. 791=1930 L. 112; 157 I. C. 171=1935 Pesh. 110 (1). There is sufficient cause when the order of postponement of the appeal was not communicated to the parties, resulting in non-appearance of appellant. 32 I.C. 936. Proof that appellant had no knowledge of the date fixed for hearing of appeal is sufficient cause under R. 19. 101 I.C. 203=1927 L. 365; 97 I.C. 687=1926 M. 1210. There is a good cause for non-appearance when no notice of transfer of case from one Court to another was given. 3 Pat.L.J. 218=43 I. C. 925 (F.B.); 1925 C. 500. It is the duty of the counsel to enquire what cases he has on a particular day and his failure to do so is not sufficient excuse. 1933 L. 1043 (1)=147 I.C. 698. Laches of an advocate or careless mistake of his clerk is not a sufficient cause. 3 R. 488=1926 R. 50; 145 I. C. 528=34 P.L.R. 831=1933 L. 642 (1). Pleader's mistake in noting a wrong date though not a sufficient cause, yet being a *bona fide* and unintentional error, appeal may be restored. 51 I.C. 607=53 P.R. 1919; 1933 P. 128=142 I.C. 576. Non-appearance of pleader due to engagement in another Court is not sufficient cause. 24 I.C. 826; 68 I. C. 785=1923 L. 97 (1); 1925 O. 234; 96 I.C. 377 (1)=1926 C. 1132; 1926 C. 1231=97 I.C. 573. But see I.L.R. (1937) M. 607=1937 M. 503=(1937) 1 M. L. J. 632; 1936 N. 85. Absence of pleader for an hour, because five appeals above his could not be expected to be disposed of in an hour is a sufficient cause. 89 I.C. 795=1925 L. 617; 4 R. 18=95 I.C. 521=1926 R. 109. See also 134 I. C. 120=1932 L. 65 (1). Where the case which was last in the list was called earlier in order and the time given to call counsel who was absent in another Court was too short, the appeal should have been restored. 138 I.C. 702=1932 L. 387. See also 41 P. L.R. 97=1939 Lah. 267; 11 Lah.L.T. 26 (The Counsel came half an hour late in a Revenue Court and applied for restoration of appeal on the same day). Whether restoration may be ordered when pleader's absence was unintentional, see 5 Lah.L.J. 89. Want of notice to the appellant's counsel when the case is put down lower in the list is not a sufficient cause. No notice is necessary. 71 I.C. 813=1924 L. 189. Where a notice of appeal mentions the date of hearing wrongly the appeal cannot be dismissed for default on the parties being absent on the day fixed. Another appeal filed against the same decree on exactly the same grounds and within the limitation is maintainable. 14 L.R. 362 (Rev.)=17 R.D. 568. No notice is necessary for restoring when dismissal was occasioned by the absence of both parties. 17 I.C. 292=10 A.L.J. 399. Notice before

20. Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.

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restoration must issue on default in not making good the stamp in sufficient time; the opposite party has the right to a hearing even in second appeal. 63 I.C. 99=1921 P. 337. O. 41, R. 19 contemplates that the applicant seeking to have an appeal restored to file has to prove that the appeal was his, and also that he was prevented by sufficient cause from appearing when his appeal was called on for hearing. A person who has got an assignment of the property in dispute from the appellant after the filing of the appeal has no *locus standi* to apply under O. 41, R. 19 to restore to file the appeal which has been dismissed for default of the assignor appellant. 1938 P. W. N. 601=1938 Pat. 574.

LIMITATION.—Where an appeal has been dismissed for default, an application for its restoration should be made within 30 days and failure to file such an application within the 30 days can only be condoned by the Court by resorting to the provisions of S. 151. 1938 A.M.L.J. 124.

O. 41, R. 20: SCOPE.—See 31 S.L.R. 486. R. 20 is not intended to override the provisions of O. 22. 5 P. 755=1927 P. 23; 105 I.C. 569=28 Punj.L.R. 468. See also 26 S.L.R. 362=1932 S. 220; 1935 O.W.N. 401=1933 O. 329. It is left to the discretion of Court to add a party as respondent even after appeal time has expired. 66 I.C. 365; 25 I.C. 480=3 P.R. 1915; 38 C. 913=16 C.W.N. 49; 27 I.C. 609=18 O.C. 90; 75 I.C. 90=1923 L. 503; 16 I.C. 771; 54 C. 430=1927 C. 394; 14 R.D. 442; 1941 O.W.N. 998; 1937 Mad. 228; 1937 Bom. 602. See contra 79 P.R. 1914=25 I.C. 549; 2 R. 541; 157 I.C. 502=1935 Pesh. 106; 18 L. 136=1937 L. 180; 1937 A.L.J. 436=1937 A. 243. An appellate Court has power under R. 20 to add as respondents to the appeal persons who were parties to the suit in the original Court but who are not parties to the appeal, although the time in which the appeal may have been preferred as against them has expired. No question of limitation arises under R. 20. 18 Pat. 768=21 P. L. T. 420=1940 Pat. 137; 1939 R. 213=182 I.C. 1005. The Law of Limitation has no application when action is taken under R. 20. 97 I.C. 174=1926 L. 679. (25 I.C. 549; 25 I.C. 480, Foll.) 105 I.C. 569; 103 I.C. 223. But see 9 R. 624=135 I.C. 645=1932 R. 16 and 140 I.C. 483=1932 O. 288. (The defendant should not be deprived of the valuable right he has acquired under the decree by adding him as party after

appeal time is over). See also 13 Luck. 659; 1940 Lah. 314=42 P.L.R. 355; 1940 Rang. 97; 182 I.C. 1005=1939 Rang. 213. A party to the suit against whom the right of appeal has been barred by limitation so far as he is concerned is not a person "interested in the result of the appeal" within the meaning of R. 20. 171 I.C. 315=1937 Sind 236; I.L.R. (1937) Bom. 602=39 Bom.L.R. 444=1937 Bom. 228; 1937 Mad. 228; 1937 Lah. 180=18 Lah. 136; 1938 Lah. 235; 1938 Lah. 35=18 Lah. 746. A co-defendant against whom the claim in the trial Court has been dismissed and appeal has been barred, is not a 'person interested in the result of the appeal' filed by the other defendant, within the meaning of R. 20. 1937 Sind 312; 1932 A. 120=1931 A.L.J. 1004; 6 R. 29 (P.C.); 58 C. 923=1931 C. 738. S. 151 is circumscribed by this rule and in exceptional cases only should it be resorted to. 73 I.C. 136=1923 L. 490. Only parties to suit and not strangers can be made parties in appeal. 73 I.C. 136=1923 L. 490; 47 A. 853=23 A.L.J. 757=1925 A. 768; 105 I.C. 569=1928 L. 202. "Party to the suit" includes a legal representative of a party. 29 I.C. 490. Where a party to the suit was not impleaded in appeal but it appeared that the omission was due to an oversight and that the party whose name was omitted was not a contesting party in the suit, *held*, that the proper procedure for Court was not to dismiss the suit on a technical ground but to exercise the powers vested in it under this rule. 11 Lah.L.J. 523=1930 L. 295; 1938 R.D. 270=1938 A.W.R. (B.R.) 140; 41 P.L.R. 816=1939 Lah. 346. (Party supporting appellant impleaded after limitation period). Where the appellants were not able to show any good reason why the omitted parties were not impleaded though they were obviously necessary parties, the Court would refuse to permit them to be impleaded in appeal, in the exercise of its powers under R. 20. 40 P.L.R. 6; 1935 L. 802 (Omission to implead auction-purchaser in appeal from order refusing to set aside sale.) See also 15 R.D. 217; 15 R.D. 286=12 L.R. 56 (Rev.); 15 R.D. 291=12 L.R. 96 (Rev.). There were three appeals against one order. Two were rejected on the ground that a necessary party was not made a respondent. The third was accepted on merits; Court refused to condone the omission in the first two appeals. The points in all appeals were similar. *Held*, that the Court should have exercised its discretion under R. 20 and condoned the omission. 146 I.C. 148=1933 L. 304. Rule 20 is permissive and it is in no

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way binding on a Court to act on that rule in order to bring in a necessary party against whom an appeal is already time barred. 14 R.D. 88. See also 1929 M.W.N. 381=1929 M. 479. The power conferred on the Court of appeal by O. 41, R. 20 can be used in favour of that person alone who is interested in the result of the appeal and the defendant against whom a suit has been dismissed and as against whom the right of appeal has become barred is not a person interested in the result of the appeal filed by a plaintiff against the other defendants. In view of the above principle in a case where a declaration has been made jointly in favour of some persons who had claimed the right, title and interest in dispute and one of them was not impleaded in appeal until after the limitation for the appeal had expired, the appeal could not proceed against the other respondents inasmuch as the declaratory decree had become final in favour of the person omitted. 18 Lah. 136=1937 Lah. 180. An appellate Court has no power to implead persons who were not parties to the suit. The provisions of S. 107, C.P. Code, cannot be invoked in this respect because they are subject to R. 20. 53 B. 598=119 I.C. 654=1929 B. 353. See also 1940 R.D. 440=1940 A.W.R. (B.R.) 223. This rule does not apply to the case where the heirs of a deceased respondent were not parties in the Court from whose decree the appeal is preferred. A party against whom an order of abatement has been passed cannot get over that order under cover of R. 20. 1935 O. W.N. 401=1935 O. 329. A person against whom an appeal has abated is not a party interested in the result of the appeal within the meaning of R. 20 and Court has no jurisdiction to add him as a party to the appeal. Nor can the Court act under R. 33 which is very special power to be used in special circumstances. 1935 M.W.N. 398=41 L.W. 111=1935 M. 175. Parties who have not been impleaded in an appeal and against whom the right of appeal has become barred by limitation, cannot under O. 41, R. 20 be made respondents to an appeal against the others. 1941 O.W.N. 998=1941 O. 580. Appellant whether bound to implead unnecessary party—Plaintiff not added as party respondent—No relief asked against him—Parties not claiming under him—Plea of non-joinder—Sustainability. 7 R. 398=1929 R. 265. Where omission to implead proper and necessary parties in second appeal was not due to any natural mistake but was a piece of gross carelessness, the discretion given by this rule cannot be invoked. 1936 R.D. 450 (2). The appellate Court informed the appellant that a wrong respondent had been impleaded and that he was given 15 days' time to implead the right person who was specially made a party in the trial Court to the knowledge of the appellant. The appellant failed to bring the right person on

record within the stated time. *Held*, that it was neither a case for the application of R. 20, nor was there a sufficient cause within S. 5, Limitation Act, and the appeal was time-barred. 164 I.C. 154 (1)=1936 L. 793. Persons who were parties to the suit but not to the first appeal can be made parties in second appeal. 59 I.C. 798; 115 I.C. 305=1929 S. 120. See also 1939 A.W.R. (B.R.) 73=1939 R.D. 270. But see 1926 L. 499=97 I.C. 338; 1934 P. 589. The appellate Court can even add parties who were struck off in the suit before decree. 27 I.C. 423. Where though an opportunity was given to the plaintiff to add a person as defendant he did not avail himself of it, but later on in appeal made that person, a respondent, it was *held* that the new party should have an opportunity of putting forward his case before it could be decreed against him and hence there should be a remand for a *de novo* trial. 1941 R.D. 422. Where in a suit for profits a finding was given that first defendant was not liable and subsequently on plaintiff's own application, name of first defendant was struck off from plaint (without any permission of Court reserving plaintiff's right against him) he cannot be made a respondent under R. 20 in the appeal by plaintiff. 1933 N. 66=143 I.C. 88. Under this rule an unnecessary party cannot be added and cross-objections raised against him. 11 M.L.T. 157=13 I.C. 906; 53 C. 270=91 I.C. 649=1926 C. 533. A formal defendant need not be added as a party in appeal. 1925 L. 87. The plaintiffs sued for a declaration that they and defendants 2 to 7 were the owners of certain plots and of the cattle market held thereon, and that the first defendant had no right to any part of the profits accruing from that market. The suit was contested by defendant No. 1 only, and defendants 2 to 7 who were described in the plaint as *pro forma* defendants were absent throughout. Decree in favour of plaintiff against defendant 1—Appeal by latter without impleading defendants 2 to 7—Court adding them as respondents after limitation for appeal., *Held* (*per Sulaiman, C. J., Niamatullah J, Smith, J., contra*), that in the special circumstances of the case, there being in strictness no decree in favour of defendants 2 to 7, the appellate Court had jurisdiction to implead them as respondents, so that they might be bound by the final order. 1937 A.L.J. 424=1937 A. 82 (S.B.). See also (1937) 2 M.L.J. 100=1937 Mad. 741. Nor defendants claiming paramount title in a suit on a mortgage. 144 I.C. 267=15 N. L.J. 173. The assignee of a decree is not a necessary party who will be bound by the decree in appeal by judgment-debtor. 38 M. 36=23 M.L.J. 513. Where an appeal against a person has become barred by time he ceases to be "a person who is interested in the result of the appeal" within the meaning of O. 41, R. 20 and his name cannot be

21. Where an appeal is heard *ex parte* and judgment is pronounced against the respondent, he may apply to the Appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

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subsequently added as a respondent under R. 20. I.L.R. (1938) Lah. 398=1938 Lah. 325. Defendant dying during pendency of suit—Legal representatives brought on record—In appeal, legal representatives not impleaded until right of appeal barred against them—Court cannot implead them. 18 Lah. 746=1938 Lah. 35.

APPLICATION OF THE RULE.—The discretionary power of an appellate Court under Rr. 20 and 33, however ample it may be, cannot be exercised to the detriment or prejudice of any party against whom the suit has been dismissed by the trial Court and against whom no appeal has been preferred. While it is, therefore, open to appellate Court to vary the decree in favour of plaintiffs who have not joined in the appeal filed by a co-plaintiff, it is not open to that Court to pass or modify any decree to the detriment of a person who is not a party to the appeal before it. 152 I.C. 304=1934 O. 496; 15 P. 219. The Court can add the defendants whose names were omitted by mistake in the appeal. 63 I.C. 352. See also 1929 M. 343=56 M.L.J. 315; 97 I.C. 223=1926 L. 689 (2); 104 I.C. 400 (1); 1928 L. 43=106 I.C. 313. A person not a party to a first appeal can be joined in second appeal under R. 20. 1938 A.M.L.J. 91. Omission of a party's name from decree—Not noticed in appeal can be added in second appeal. 1939 A.W.R. (B.R.) 73=1939 R.D. 270. Under certain circumstances the Court may well refuse to add representatives of a deceased respondent, when the appellant has not done so in time, which he might have. 90 I.C. 986=36 C.W.N. 45; 24 C.W.N. 44=30 C.L.J. 217. See also 1936 R.D. 450. The power to add parties will not be exercised in cases of extreme negligence. 79 P.R. 1914=25 I.C. 549. See also 1936 R.D. 450. A third party cannot appeal on behalf of co-sharers who are interested in the appeal against a co-sharer. If they are not made parties in time, appeal will be dismissed. 75 I.C. 90=1923 L. 503. If plaintiff in second appeal failed to implead necessary respondent, the power to add him could not be exercised. The case being on a joint footing against all respondents the appeal abated *in toto*. 57 I.C. 259. See also 9 R. 624=1932 R. 16; 112 I.C. 605. A respondent can make another a co-respondent and proceed against him by way of cross-objections. 56 I.C. 612=11 L.W. 602. See also 1937 N. 105. As to limitation period for filing cross-objections by party added under this rule,

see I.L.R. (1937) Nag. 401=1937 N. 105. A defendant not joined in appeal against other defendants is not interested in the result of the appeal. 54 M.L.J. 88=6 R. 29=55 I.A. 7 (P.C.); 58 C. 923=1931 C. 738; 1932 A. 120=1931 A.L.J. 1004. In view of the above principle in a case where a declaration has been made jointly in favour of some persons who had claimed the right, title and interest in dispute and one of them was not impleaded in appeal until after the limitation for the appeal had expired, the appeal could not proceed against the other respondents inasmuch as the declaratory decree had become final in favour of the person omitted. 18 L. 136=1937 L. 180. See also 1940 Pat. 137; 1937 A.L.J. 436=1937 A. 243 (Joint decree for possession). Where names of certain persons are not included in the appeal, Board of Revenue can direct the names of the parties omitted to be added and appeal reheard. 18 R.D. 45.

O. 41, R. 21: SCOPE.—Conditions necessary for rehearing. 1933 L. 882=42 P.L. R. 271. O. 41, R. 21, which corresponds to O. 9, R. 13 cannot be limited to cases in which a decree against the respondent has been passed in appeal, because the appeal may have other results than the passing of a decree against the respondent. But the rule is not wide enough to cover the case of an appeal which has been wholly dismissed, merely by reason of some remarks which may be in the nature of *obiter dicta* and thus incapable of constituting a final decision of the matter discussed so as to be *res judicata*. 21 Pat.L.T. 1082=1941 P. 141. A second appeal by a co-respondent dismissed under R. 11 does not take away the jurisdiction of first appellate Court, when it had been moved by an absent respondent under this rule. 14 C.L.J. 42=15 C.W.N. 798; 43 I.C. 902=14 N.L.R. 30. What is sufficient cause must depend on facts of each case. 63 I.C. 737=19 A.L.J. 54. If interval between date of service of notice and hearing of the appeal is only one day, it is obviously inadequate and may be "sufficient cause". 136 I.C. 258=1932 L. 248. See also 1940 Mad. 53=(1940) 2 M.L.J. 568. It is open to respondent to show that he was not duly served in the sense that knowledge of the opponent's claim was not brought home to him, even though the formalities of substituted service were carried through. 61 M.L.J. 813=134 I.C. 1202=1931 M. 813. Where service of summons to father was effected on his son in the father's absence but the son was not residing with the father. Held, that

LOC. AM.—[NAGPUR.] In r. 21 of O. 41, re-number existing rule as sub-r. (1) and add as sub-r. (2) the following :—

"(2) The provisions of S. 5 of the Indian Limitation Act, IX of 1908, shall apply to applications under sub-r. (1)."

22. (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any

Upon hearing, respondent may object to decree as if he had preferred separate appeal.

of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one

month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

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the summons was not duly served on the father and that the appeal should be reheard. (1932 P. 150 and 43 C. 447, Ref.) 146 I.C. 474 (2)=34 P.L.R. 963=1933 L. 797. A principal will be bound by his agent's default. Agent's negligence is not sufficient cause. 15 A.L.J. 413=39 I.C. 636=39 A. 388; 17 Pat.L.T. 261=1936 P. 128. Suit for contribution—Decree passed against several defendants—One of them preferring appeal—Decree modified to the detriment of the rest—Legality—Propriety of acting under R. 21. See 23 C.W.N. 221. On this rule, see also 26 Punj.L.R. 314 (withdrawal of application by guardian). An applicant under R. 21, who admits receipt of notice is obliged like an applicant under O. 9, R. 13 to show that he was "prevented by sufficient cause from appearing". 50 L.W. 515=1940 Mad. 53=(1939) 2 M.L.J. 568.

O. 41, R. 22.—R. 22 applies to appeals from the original side of High Court and in such appeals it is competent for a respondent to file a memo. of objections. 49 M. 291=93 I.C. 293=50 M.L.J. 190 (F.B.). The object of the rule is to allow a respondent content with a decree in his favour an opportunity of contesting findings against him in case his opponent appeals. 5 P.L.J. 328=56 I.C. 262; 112 I.C. 689=1929 L. 161. Where a compromise is effected between the parties to a suit in which some defendants are minors and it is obtained by fraud or under some other circumstances as to render it invalid, the remedy of the minors is not by filing cross-objections in an appeal by one of the defendants. 114 I.C. 101=1929 S. 32. Memo. of objections in pauper appeal—Time limit. See 10 Pat.L.T. 387=119 I.C. 900=1929 P. 31. Cross-objections regarding costs—*Ad valorem* Court-fee payable on amount claimed. See 10 Pat.L.T. 224. Decree passed by lower appellate Court—Aggrieved person not preferring appeal to High Court—Same whether can be raised by way of cross-objections in second appeal. See 1929 O. 41=111 I.C. 843. Where in the lower Court defendant filed an appeal and plaintiff filed a memorandum of cross-objections and lower Court dismissed both of them, it is not competent in the appeal filed by plaintiff against the dismissal of cross-objections for defendant by way of objec-

tions to attack the rejection by the lower Court of his appeal. The proper course for him is to file an independent appeal against the dismissal or rejection of his appeal. 130 I.C. 657=1931 M. 133. But see contra 1935 A.L.J. 418=1935 A. 404. A Court holding that the appeal preferred by the appellant does not lie, has no jurisdiction to entertain the cross-objections of the respondent. 41 P.L.R. 153. The cross-objections filed by a deceased respondent can be maintained by his heirs and legal representatives, although they were brought on record by the appellant and no steps were taken by them in the matter of prosecution of the cross-objections. 42 C.W.N. 304. A *pro forma* respondent in an appeal is not entitled to raise a memorandum of cross-objections to the decree appealed against under O. 41, R. 22. 118 I.C. 867=1929 N. 361; 107 I.C. 569. See also 1940 Cal. 377; 1922 Pat. 483. As to meaning of the word 'respondent', see 107 I.C. 569=1929 A. 195.

SCOPE.—This rule does not control R. 33. 62 I.C. 623. See also I.L.R. (1939) 1 Kar. 149=43 C.W.N. 529=1939 P.C. 86 (P.C.). A respondent is entitled to support a decree under the provisions of this rule. 41 C.L.J. 31=86 I.C. 6. Objection not put as cross-objection cannot be taken if it is not in support of the decree. 84 I.C. 124=1925 C. 94. See also 144 I.C. 16=38 L.W. 263=1933 M. 465; 144 I.C. 1007=1933 R. 120. Trial Court's decree in favour of the appellant should not be interfered with under R. 33 in the absence of cross-objections by the respondent. 46 I.C. 142=22 C. W. N. 526; 57 I.C. 555=23 O.C. 110. Where only one plaintiff-respondent claims a particular relief in his memo. of objection, the relief could be granted to all the respondents when the basis of the claim is common to all of them. 15 I.C. 409. The rule does not apply to Letters Patent Appeals. 1922 A. 55; 32 C.L.J. 48=24 C.W.N. 1016. Cross-objections can be taken by a respondent in a Letters Patent appeal filed from the decision of a single Judge in a first appeal. 42 P.L.R. 499=1940 Lah. 438. The C. P. Code does not contemplate filing of cross-objections against a person not a party to the appeal. 1940 A. L. J. 161=1940 All. 225. A memorandum of cross-

(2) Such cross-objection shall be in the form of a memorandum, and the

Form of objection and provisions applicable thereto.

provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

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objections cannot be filed in a revision petition. 1940 Mad. 55=52 L.W. 487=(1940) 2 M.L.J. 572. On a reading of S. 5 (2) of the Provincial Insolvency Act, it would appear that that the procedure relating to cross-objections contained in O. 41, R. 22, C. P. Code, would apply to appeals under the Provincial Insolvency Act. 1940 N.L.J. 385=1940 Nag. 292.

RIGHT TO SUPPORT DECREE.—A decree can be supported without filing cross-objections by traversing any ground which that Court may have found against him. 41 C.L.J. 31=86 I.C. 62; 123 I.C. 444=57 C. 289=1930 C. 165; 4 I.C. 68; 45 I.C. 232=125 P.L.R. 1918; 103 P.L.R. 1917=40 I.C. 237; 39 I.C. 153=4 O.L.J. 101; 50 M. 866=26 L.W. 125=53 M.L.J. 189; 51 I.C. 981=1919 P.H.C. C. 393; 12 I.C. 20=4 Bur.L.T. 209. *See also* 1940 M.W.N. 71=1940 Mad. 617. A contention that a ground on which the lower Court has decided against the respondent should have been decided in his favour and therefore the lower Court should not have passed the decree under appeal is not a ground which supports the decree but is one which attacks the decree and therefore cannot be urged by the respondent under this order. 131 I.C. 833=1931 M. 513. *See also* 1929 L. 684. The words "support the decree" do not merely mean "support the decision" and it is open to the respondent who has not filed any cross-appeal or objection against the decree of the lower Court awarding compensation in land acquisition proceedings to urge in bar of further enhancement a ground which has been decided against him in the lower Court and which, if accepted in entirety, would have resulted in the dismissal of the plaintiff's suit. 12 Pat.L.T. 659. But *see contra* 146 I.C. 152=1933 N. 310. The word "decree" means the decision by the Court below. 50 M. 866=53 M.L.J. 189=1927 M. 801. When an item in an account appearing in the decree of the lower Court is reduced by the appeal succeeding, the respondent without filing any memorandum of cross-objection can support the said decree by showing that the lower Court had wrongly decided against him on other items, but it is not open to the respondent to have adjudicated by the appellate Court rights or causes of action which have been decided against him in the lower Court without filing an appeal or memorandum of cross-objections. 68 C.L.J. 152=1938 Cal. 563. Where a suit for arrears of rent is dismissed but a finding is given as to amount of rent, there is no need to file a written cross-objection under O. 41, R. 22, as cross-objections are filed only against decrees and not against individual findings. 1941 R.D. 299. Where a suit is dismissed

on one finding it cannot be reversed in appeal without considering the defendant's objection to other findings. 11 I.C. 41=202 P.L.R. 1911. Although no cross-objections had been filed by him. 166 I. C. 1007 (Cal.). In such a case the filing of cross-objection is superfluous. 1936 O.W. N. 1069=1937 O. 159. The same is the case where plaintiff has obtained a decree in part. 165 I.C. 473=1936 A. 717. A decree cannot be supported on an entirely new ground, not decided against respondent, not in issue and not made subject of adjudication. 5 Pat.L.J. 239=55 I.C. 214; 38 I. C. 536=21 C.W.N. 423. But *see contra* in 31 I.C. 740=45 P.R. 1916.

CROSS-OBJECTION—WHEN CAN BE RAISED.—Petition to support decree on other grounds does not amount to cross-objections. 68 I. C. 861=44 A. 577. Time expired appeal may be treated as memorandum of objections. 67 I.C. 478=1922 L. 423; 1925 L. 57=79 I.C. 132. A defendant who has been placed *ex parte* can impugn the decree in appeal by way of cross-objections on the ground that he was wrongly made *ex parte*, provided he has not moved the trial Court under O. 9, R. 13. 45 M.L.J. 805=1924 M. 107. Cross-objections could be entertained only against a party to the appeal. 54 I.C. 971. *See also* 39 I.C. 662=2 P.L.J. 162; 53 C. 270=1926 C. 533. A respondent is entitled to file cross-objections, which could be raised by him in an appeal, against a party to the suit, who is not impleaded in the appeal as a party, at the instance of the appellant. 47 L. W. 760=1938 Mad. 329. As to whether an exonerated defendant can be made a party to the memo. of objections when not a party to the appeal, *see* 31 I.C. 978. A memo. of objections may be filed against the whole or any part of a decree, even though that part may not be the subject-matter of the appeal. 35 M.L.J. 83=48 I.C. 1003. *See contra* 39 M. 365=28 M.L.J. 285. An appeal was filed by two out of 96 defendants and the plaintiff filed cross-objections. The Court refused to entertain them on the ground that in any case the decree would remain intact as against the 94 defendants who had not appealed. *Held*, that the procedure was not warranted by law and that they should be considered on merits. 11 O.W.N. 258 (2)=1934 O. 131 (2). A defendant-respondent whose set-off has not been decreed, or has not been referred to in the decree, may make this ground of cross-objections in appeal. The defendant-respondent under R. 22 is entitled to take "any cross-objection" to the decree which he could have taken by way of appeal. 150 I.C. 433=1934 A. 543. Cross-objection must relate to decree appealed against and not any other although arising

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ing out of the single decree of the trial Court. 96 I.C. 67=1926 A. 582. See also 1931 M. 133=130 I.C. 657.

WHEN CANNOT BE RAISED.—Cross-objection cannot be filed against a person who is not a party to the appeal. 144 I.C. 226=29 N.L.R. 173=1933 N. 186. Nor where the decree itself is merely a decree dismissing plaintiff's suit. 1923 P. 690. Nor with reference to any point in respect of which he could not have filed an appeal himself. 1933 R. 377. If a party fails to make a cross-objection in the manner and within the period of limitation and prefers an appeal which is held to be time-barred, he cannot contend that the appeal was in time because the objection could be raised by way of cross-objection. 14 L.R. 927 (Rev.)=11 O.W.N. 46. Respondents in revision petition cannot file cross-objections. 14 I.C. 562=160 P.L.R. 1912. Respondent having appealed cannot file cross-objections. 1925 L. 2=79 I.C. 670. Where the objector did present an appeal and raised a certain objection he is debarred from putting other objections which he could have taken in appeal but which he did not. 1936 Pesh. 214. Cross-objections as to costs in the Courts below cannot be considered on second appeal. 79 I.C. 977. Cross-objections regarding want of jurisdiction to attach in executing Court, cannot be taken when appeal is against an order refusing to set aside a prohibitory order. 75 I.C. 419=1923 L. 514. Cross-objections which tends to obtain a distinct relief which could have been granted by lower Court if asked for, or by appellate Court if a claim was raised in appeal, should not be allowed. 34 I.C. 916=24 P.R. 1916. It should not be allowed where the question raised thereby is entirely distinct from and in no way related to the question in controversy in appeal. 48 I.C. 78=28 C.L.J. 123. Cross-objections cannot be filed after withdrawal of appeal. Pendency of appeal is a condition precedent to the filing of cross-objections. 39 I.C. 947. Cross-objections filed before the date of receipt of notice would not be cross-objections at all in the strict legal sense of the word. 162 I.C. 336=1936 L. 362. The use of the word "within" would fix two limits; an anterior limit starting from the date of receipt of the notice and a posterior limit of one month after that date. 1936 L. 362. See also 1937 M. W. N. 39; I.L.R. (1937) Nag. 407=1937 Nag. 105. New grounds not set forth in objections cannot be raised at the time of hearing. 19 I.C. 98=15 Bom.L.R. 130.

CROSS-OBJECTIONS AGAINST CO-RESPONDENT—WHEN ALLOWED.—A cross-objection can be entertained at the discretion of Court by one respondent against co-respondents. 16 A. L.J. 587=40 A. 536; 12 A.L.J. 192=36 A. 505; 15 C.L.J. 61=16 C.W.N. 612; 69 I. C. 330; 38 M. 705=27 I.C. 223=27 M.L.

C. C. M.—170

J. 740 (F.B.). Only in exceptional cases could cross-objections against a co-respondent be raised. 13 P. 200=15 P.L.T. 42=1934 P. 134; 70 I.C. 79=1923 O. 108; 37 B. 511=15 Bom.L.R. 781; 31 Bom.L.R. 1179; 23 C.L.J. 26=20 C.W.N. 370=43 C. 790. Also 29 I.C. 610=(1915) 2 U.B. R. 58. In a memorandum of objections a respondent may raise a question that arises only between him and a co-respondent. 53 L.W. 57=(1941) 1 M.L.J. 106. Cross-objection indicates that it should be directed against the appellant, but it may be also taken against another respondent if there is community of interest between the appellant and the latter. But where the cross-objections are directed solely against a co-respondent whose case has nothing in common with that of the appellant but proceeds on the same ground as those on which the appeal does, they are not maintainable. A cross-objection by one respondent against another cannot be permitted under R. 22, where the effect of the same, if successful, cannot be adverse to the appellant to any extent. 57 A. 580=1935 A.L.J. 145=1935 A. 134. It is the settled practice of the Calcutta High Court not to permit a cross-objection raising a question as between two respondents *inter se* in which the appellant is not concerned or interested. Such a question can only be raised in a substantive appeal by the respondent. 59 C. 667=36 C.W.N. 263=1932 C. 524; 1935 O.W.N. 1139=1936 O. 182. A cross-objection by one respondent seeking costs of the lower Court from another respondent does not lie under O. 41, R. 22, 15 P. 510=17 Pat.L.T. 279=1936 P. 513. Where the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened as between co-respondents, it is an exceptional case, which may be allowed under special circumstances. 56 I.C. 469; 5 Pat.L.J. 328=50 I.C. 252. Suit against obstructors of pathway—Decree against all defendants except one—Cross appeal—Decree against remaining defendant also—Correctness of (28 C.L.J. 123, Foll.) 150 I.C. 364=58 C.L.J. 534=1934 C. 345. It can be allowed when the Court cannot do complete justice between the parties without opening the whole case. 53 I.C. 659=6 O. L.J. 495. Plaintiff-respondent can raise cross-objections against a defendant who is not an appellant. 38 I.C. 641. It can be raised in a case where the interest of the objector was really adverse to that of the appellant and other co-respondents and though the appellant took the same objections unnecessarily in his ground of appeal. 29 C.W.N. 784=88 I.C. 866=1925 C. 973. But a cross objection under R. 22 is not maintainable where the objector-respondent has no community of interest with the appellant and where the cross-objection is nothing more than an old appeal which was dismissed as being out of time. R. 33 does not allow an objection of this kind to be

(3) Unless the respondent files with the objection a written acknowledgement from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

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made, but, merely places the Court in a position of doing justice between the parties. 165 I.C. 936=1936 P. 604.

WHEN NOT TO BE ALLOWED.—Cross-objections by one co-respondent against another should not be permitted when they could be raised by an appeal. 37 B. 511=15 Bom. L.R. 781. *See also* 61 I.C. 48=19 A.L.J. 155. It should not be allowed when he has allowed the period of appealing to elapse. 66 I.C. 642=8 O.L.J. 358. But *see* 5 Pat.L.J. 328=56 I.C. 253. No Court-fee is payable when the decree of the lower Court is supported in cross-objections. 68 I.C. 861=44 A. 577; 39 I.C. 176=15 A.L.J. 325. As to valuation of cross-objections. *See* 25 O.C. 275=70 I.C. 286=1923 O. 44 (1); 52 I.C. 1002.

CROSS-OBJECTIONS IN APPEAL UNDER S. 12, OUDH COURTS ACT.—The words "from appellate decrees" in O. 42, R. 1, refer only to second appeals under S. 100, and do not cover appeals filed under S. 12 (2) of the Oudh Courts Act. A respondent in an appeal under S. 12 (2) is not therefore entitled as of right to file a memorandum of cross-objection under R. 22, without applying for and getting the leave of the Court under S. 12 (2); 153 I.C. 371=1935 O.W.N. 8=1935 Oudh 88.

LIMIT OF ONE MONTH.—It is entirely discretionary with the Court of appeal to extend the time for filing cross-objections and in refusing to extend time it cannot be said that it commits an error of law which can be interfered with in second appeal. 70 C.L.J. 397=A.I.R. 1940 Cal. 150. The principle of calculation of a month is that it shall be taken to extend up to and including the day before the corresponding date of the next month, and there is no authority for any special rule as regards February, March. 30 I.C. 832=29 M.L.J. 182. *See also* 1937 M.W.N. 39; I.L.R. (1937) Nag. 401=1937 Nag. 105. Where notice of an appeal was affixed by affixation and it was uncertain when he got the notice. *Held*, that a delay of 4 or 5 days in filing the memorandum of cross-objections could be condoned. 15 L.R. 69 (Rev.)=18 R.D. 56. He can claim 30 days from the date of serving of notice for hearing. The 30 days is not 30 days from the date of serving of notice of appearance. 22 L.W. 792. Where a notice was issued to the respondents merely informing them that an appeal had been preferred in the case by the other

side, so that they might appear to take necessary steps, it is not a notice about the hearing of the appeal as contemplated by O. 41, R. 22, and hence the filing of cross-objections within a month of the notice fixing the date of hearing is within time though it may happen to be more than a month after a first notice giving more information of the filing of the appeal. 1939 O.W.N. 530=1939 O. A. 521. A transfer by a respondent pending the hearing of an appeal will not extend the period of 30 days for filing of cross-objections. 1932 A. 45=1931 A.L.J. 606. Nor does any subsequent devolution of interest of the respondent to another give the latter a fresh starting point from the date of notice to him for being impleaded in the place of the former. 159 I.C. 257=1935 L. 653. In such a case, the respondent remains the same, though his description is changed and the substitute inherits all those disabilities which have already been incurred by his predecessors. If therefore time has run out against the predecessor it cannot revive in the case of the successor, the principle of law being well recognized that if once time begins to run, no subsequent disability stops it. 1935 L. 653. Cross-objections, if can be received even after a month, even during the argument of the appeal. 66 I.C. 217=1922 N. 213. It is not necessary that further time ought to have been granted before objections are actually filed. 39 I.C. 125. Hearing of appeal ought not be advanced so as to deprive respondent the benefit of filing objections in a month. 38 I.C. 522.

Sub-Rule (3).—Under Cl. (3) the respondent should file with cross-objection a written acknowledgment of notice from the party who may be affected by such an objection. But where, though no such acknowledgment was filed, the party against whom the objections had been filed appeared and contested, it is only an irregularity which cannot stand in the way of the objections being allowed. 150 I.C. 364=58 C.L.J. 534=1934 C. 345. *See also* 166 I.C. 1007.

Sub-Rule (4).—The right to be heard provided for by sub-rule (4) is not available when the appeal abates. 44 M. 828=41 M.L.J. 304=62 I.C. 757; 10 L. 208; 151 I.C. 387=1934 L. 136 (2); I.L.R. (1940) Nag. 324; 1938 N.L.J. 399. Cross-objections cannot be proceeded with when appeal is dismissed under R. 10 in presence of the respondent without any objection on his part. 25 O.C. 280=70 I.C. 79. But *see*

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule.

23. Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be

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contra. 50 I.C. 729=4 Pat.L.J. 164. Rejection of appeal as insufficiently stamped is not a dismissal for default, and cross-objections cannot be heard when appeal is rejected. 59 I.C. 795=46 P. W. R. 1921. See also 10 I.C. 207=11 P.R. 1912; 56 M. L.J. 476; 43 Bom.L.R. 475; 8 R. 538=129 I.C. 500=1931 R. 38; 137 I.C. 156=1932 N. 41. But see 1930 M.W.N. 1236=130 I.C. 657=1931 M. 133. The word "default" occurring in the rule includes any default made by appellant which would amount to non-prosecution of the appeal. 130 I. C. 657=1931 M. 133=1930 M.W.N. 1236. Objections can be dealt with even though appeal is dismissed for default. 9 I.C. 572=9 M.L.T. 217; 48 M. 631=48 M. L. J. 384; 25 I.C. 916=1 O.L.J. 485. Cross-objections may be filed even when appeal is unsustainable. 34 A. 140=13 I.C. 19. Cross-objections can be heard even when the appellant admits the appeal to be incompetent and is dismissed. 54 I.C. 506=10 L. W. 605. Objections filed in an appeal which is dismissed as out of time cannot be heard. The right of filing objection stands or falls with the right of appeal. 4 L. 140=73 I.C. 655; 41 M. 904=35 M.L.J. 236 (F.B.); 40 Bom.L.R. 895. Cf. 39 I.C. 947. But see *contra* 3 L.W. 109=32 I.C. 579. Also 30 I.C. 832=1915 M.W.N. 792. If appeal which is withdrawn has not been validly filed, the memorandum of objections should not be heard. 55 M. 975=1932 M. 722=63 M.L.J. 845.

Sub-Rule (5).—Pauper respondents are entitled to present objections without payment of stamp duty. (1 N.L.R. 33, Overr.) 29 N.L.R. 225=1933 N. 158. According to O. 41, R. 22, the provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under that rule. Consequently leave cannot be granted to file cross-objections *in forma pauperis* on grounds which may not be entirely the same as those which it is necessary to put forward in seeking leave to appeal *in forma pauperis* which has been refused. So where the decree of the lower Court is not contrary to law or otherwise unjust or erroneous, leave to file cross-objection *in forma pauperis* cannot be granted. 1939 M.L.R. 244 (Civ.). Leave can be granted to file a cross-objection *in forma pauperis* on grounds which are not entirely the same as those which it is necessary to put forward in seeking leave to appeal *in forma pauperis* which is refused. 168 I.C. 407=1937 R. 81. Leave to appeal *in forma pauperis* refused—Appeal by other party—

Leave to file cross-objection *in forma pauperis* on different grounds can be granted. 1937 Rang. 81.

PRACTICE AND PROCEDURE.—Whether it is open to a respondent in a civil revision petition to prefer cross-objections under O. 41, R. 22. See 31 S.L.R. 1. Where a memorandum of cross-objections is preferred out of time and an application is made to the Court to extend the time for preferring the cross-objection, it is not the proper procedure to allow the application subject to any just objection being taken at the time of the hearing. Application of this kind should be dealt with at the time when they are made and should not be left over for determination till the hearing of the appeal. 40 C.W.N. 1237.

O. 41, Rr. 22 and 33.—In a suit brought by them the co-sharers alleged that in respect of the revenue sale their co-sharer had been guilty of fraud or improper conduct to the prejudice of his co-owners in the estate, and contended that, by reason thereof the purchase was one in which they could claim to share by recovering their former interest upon payment of a proportion of the purchase-money. The trial Judge accepted this contention and gave the plaintiffs a decree directing the co-sharer to convey to them their former share on receipt of a proportionate part of purchase price. On appeal the decree-holders respondents without filing any cross-objections to the decree of the trial Court claimed that the revenue sale should be set aside for want of jurisdiction or irregularity. *Held*, that the claim to relief was founded upon different grounds from those upon which the trial Court's decree proceeded, and upon principles different from those which underlay the relief given by the decree. The case came clearly within the condition imposed by the concluding words of sub-rule (1) of R. 22, "provided he has filed such objections in the Appellate Court, etc., etc.," and R. 33 could not rightly be used in such a case so as to abrogate the important condition which prevents an independent appeal from being in effect brought without any notice of the grounds of appeal being given to the parties who succeeded in the Court below. I.L.R. (1939) Kar. 149=43 C.W.N. 529=20 Pat. L.T. 359=1939 P.C. 86 (P.C.).

O. 41, R. 23: SCOPE.—The appellate Court has inherent powers to remand a case irrespective of the provisions of this rule. 1927 M. 335=52 M.L.J. 90=100 I.C. 135; 1939 Oudh 104=1939 O.W.N. 128; 1939 Pat. 580; 37 C.L.J. 491=1923 C. 606; 122 I.C. 485; 119 I.C. 466; 1929 L. 83; 112 I.

tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

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C. 736=10 L. 360; 73 I.C. 915=1924 L. 245; 1922 C. 279; 64 I.C. 436; 44 C. 129=21 C.W.N. 877 (F.B.); 43 C. 100=20 C. W.N. 1192; 74 I.C. 497=1924 L. 36; 76 I. C. 496=1924 L. 362; 37 M.L.J. 536=53 I.C. 417; 32 C.W.N. 101; 9 I.C. 790=9 M.L.T. 373; 101 I.C. 281=1927 N. 192. *See contra* 38 I.C. 196; 33 I.C. 329=43 C. 148; 41 C. 108=20 I.C. 39=18 C.L.J. 613. Merely because an order of remand is not one under R. 25, it does not follow that it should necessarily be one under R. 23, for there may be remand orders passed under inherent power of Court and not under either of the two rules. 1933 P. 706. *See also* 1939 Pat. 580. Inherent power should be invoked only if necessary for ends of justice and must be exercised with care. 46 I.C. 333=27 C.L.J. 596; 44 C. 929=21 C. W.N. 877=41 I.C. 598 (F.B.); 64 I.C. 599; 3 Pat.L.J. 253=43 I.C. 959; 1930 L. 224. Comparison of the provisions of the old and new Code as to exercise of the Court's inherent power of remand. 117 I.C. 280=1929 N. 63; 26 N. L. R. 44. The Court has no inherent power to disregard a method of procedure enjoined or provided by the Code and adopt a different one unless it is really necessary in the interests of justice. 156 I. C. 381=37 Bom.L.R. 203=1935 B. 216. Where an order of remand purporting to be made under the inherent powers contravenes an express provision in O. 41, R. 23, the High Court will interfere in revision under S. 115 and set it aside. 1935 B. 216. No appeal lies against an order of remand made not under O. 41, R. 23 but in the inherent jurisdiction of the Court unless it could be said that the order amounts to a decree in accordance with the definition in S. 2. 1941 Cal. 446=195 I. C. 864. The inherent power of remand cannot be invoked in a case for which a specific provision is made in the Code, *e.g.*, Rr. 25, 27 and 28 of O. 41. 133 I.C. 205=1931 M. 791=60 M.L.J. 475. Although the Court ordering the remand may have had no jurisdiction under R. 23 to pass the order under that rule, nevertheless if the order of remand as made purports to be an order under R. 23 and appears to be in form and substance an order under that rule it is to be regarded as an order of remand passed under R. 23 and therefore subject to appeal. (31 C.W.N. 878, Foll.). 72 C.L.J. 383. Where a suit is disposed of on merits by trial Court and on appeal lower appellate Court remands the case for re-trial after amendment of plaint, the order of remand is one made under the inherent powers of the Court even though the appellate Court orders refund of Court-

fee paid on the memo. of appeal and the order is not appealable. 141 I.C. 400=1933 L. 135. *See also* 1936 P. 491 (where it was disposed of both on merits and on preliminary point). Court of appeal when it remands a suit to trial Court for fresh disposal should make it quite clear whether the order of the remand is made under R. 23 or independently of that provision. 119 I.C. 705=1929 M. 205. 'Remand' made in an appeal from an order returning a plaint for presentation to proper Court is without jurisdiction as such an order is not a decree within S. 2. 87 I.C. 172=1925 O. 393. Remand means return for decision and not for finding. 92 I.C. 370=1925 O. 303. Appellate Court can pass an order of remand by consent of parties in excess of its powers under the Code. 22 I.C. 41=1914 M.W.N. 90. High Court has ample power to make a remand in order that a point which has not been considered by the lower Court may be considered by it. (44 C. 929, Ref.), 1934 R. 168. Where the procedure adopted by the lower Court in disallowing question in cross-examination was wholly unjustifiable regard being had to the nature of the issues raised in the suit, and the Judge's manner of dealing the points arising for consideration in the case on the pleadings of the parties and on the issues raised for determination in the suit was wholly unsatisfactory, the High Court, on appeal remanded the case for retrial in accordance with law. 162 I.C. 697=1936 C. 195. When an order of remand is made, the presumption is that it is made under this rule. 20 A.L.J. 321; 44 A. 492. As for distinction between this rule and R. 25, *see* 25 O.C. 189=69 I.C. 730; 43 C.L.J. 194=102 I.C. 384=1927 C. 401. The rule applies where the whole suit is disposed of on a preliminary point, 57 I. C. 830=11 L.W. 611; *also* 73 I.C. 591=1923 O. 177; 101 I.C. 89 (1); 1930 L. 639; 123 I.C. 542=1930 L. 181. And not when a portion of it has been disposed of on a preliminary point. 136 I.C. 559=1932 L. 219. As to meaning of preliminary point, *see* 13 L.W. 54=61 I.C. 829; 99 I.C. 974; 1928 M. 991=1928 M.W.N. 164; 1930 N. 295; I.L.R. (1939) Bom. 658=1940 Bom. 22; 1930 M. 1017=60 M.L.J. 72 decided upon the whole evidence and upon all the issues raised. 55 I.C. 484=1 P.L.T. 509; 92 I. C. 1045=1926 M.W.N. 48; 91 I.C. 351=1926 L. 184; 6 P. 381; 96 I.C. 786; 103 I. C. 537=1927 L. 618; 1927 L. 42=98 I.C. 906. Where trial Court gives its findings on all issues and appellate Court remands the case, the remand should be taken to be under R. 25 or under S. 151 and not under R. 23. 139 I.C. 126=1932 L. 443. This rule will

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not apply where an order is not on a preliminary point. 73 I.C. 915=1924 L. 245; 101 I.C. 89 (1); 1927 L. 618=103 I.C. 537; 6 P. 380=103 I.C. 722=1927 P. 296. *See also* 117 I.C. 280=1929 N. 63. (Case-law reviewed.) Except under this rule no case shall be remanded for a second decision which can be disposed of finally by the first appellate Court. 36 I.C. 241=12 N.L.R. 126. *See also* 41 P.L.R. (J. & K.) 43. An order of remand is not justified when the net result of the order is to allow an unsuccessful litigant to fish out evidence in order to prove his case and make up the lacuna which exists. 1941 Pesh. 28. Suit to enforce compromise—Deed of compromise not registered and consequently inadmissible—Fresh suit for specific performance barred by limitation—Remand to lower Court to permit plaintiff to amend plaint so as to include prayer for specific performance—Order as to costs. 27 A.L.J. 487=116 I.C. 871. Preliminary point is not necessarily a point of law upon which the whole case is disposed of nor is it necessarily a point of fact on which the case is disposed of. It is any point the decision of which avoids the necessity for the full hearing of the suit. 1935 P. 49=154 I.C. 859.

REVISION—APPEAL.—There is no doubt that there is an inherent power of remand. That is obvious when the changes between S. 562 of the old Code and R. 23 are considered. The power so conferred must not only be sparingly used by Courts but also the Courts have no power whatever to resort to S. 151, when the matter is expressly dealt with in the Code. If they do so they act without jurisdiction and their orders are revisable. I.L.R. (1940) Nag. 538=1940 Nag. 349. The operative position of an order of an appellate Court was to the following effect:—"I set aside the judgment and decree of the lower Court and allow the appeal of plaintiff No. 3 with costs. The case will be sent back and re-tried according to law from the stage where it has been left by the learned Munsif". *Held*, that the order was an order of remand contemplated by O. 41, R. 23, and as such was appealable under O. 43, R. 1 (4). 1940 O.W.N. 662=1940 Oudh 314.

WHAT IS DISPOSAL ON A PRELIMINARY POINT.—A "Preliminary point" within the meaning of the rule is any point the decision of which avoids the necessity for the full hearing of the suit (45 M. 900 F.B. Foll). 151 I.C. 947=1934 P. 93; 41 Bom. L.R. 1177. A preliminary point is one which when determined in favour of the plaintiff permits the progress of the suit but when determined against him concludes the suit. The preliminary points may arise before or after admission of the plaint. In either case if the decision on the preliminary point is against the plaintiff that would stop the further progress of the suit so as to compel the Court to dispose of the suit finally with-

out deciding the merits of the controversy. 1941 N.L.J. 410. The words "preliminary point" are not confined to such legal points only as will be applied as a bar in suit but comprehends all such points as may have prevented the Court from disposing of the case on the merits whether such points are pure questions of fact or law. The test for determining whether the decision of an issue was on a preliminary point is to see whether the decision of that issue prevented the decision of other issues. Decision as to question of jurisdiction held not to be on a preliminary point. 1933 R. 413; 57 C.L.J. 473. 41 Bom.L.R. 1177. During the pendency of a suit instituted on the original side of High Court (Rangoon) claiming damages for a conspiracy between the defendants to ruin the plaintiffs' credit and reputation and to destroy their business the plaintiffs were adjudged insolvents. The trial judge held that the cause of action thereupon vested in the Official Assignee and the latter declining to proceed with the suit a decree was passed dismissing the suit. On appeal by plaintiffs, the Appellate Bench held that the claim for damages did not vest in the Official Assignee and that the plaintiffs were therefore entitled to continue the suit in their own names. The suit was accordingly remanded to the original Court for trial on the merits. *Held*, that the judgment of the Appellate Court was not a decree but an order passed under R. 23. *Held further* that the order though it decided an important and a vital issue in the case did not finally dispose of the rights of the parties; on the contrary, it left the suit alive and provided for its trial on the merits in the ordinary way. It was not, therefore, a final order under S. 109 (a) and was not appealable. Test of finality laid down. 60 I.A. 76=11 R. 58=64 M.L.J. 307 (P.C.); 39 A. 165=37 I.C. 383=15 A.L.J. 30. Where in a redemption suit, defendant pleaded that in foreclosure proceedings there was a sale in his favour, a disposal on this contention is a disposal on a preliminary point. 57 P.L.R. 1916=30 I.C. 817. Where certain evidence was considered irrelevant by trial Court, and the appellate Court considered the excluded evidence as relevant, held the reversal was on a preliminary point. Also as to instance of preliminary point. *See* 43 M.L.J. 345=45 M. 900 (F.B.). It is competent to an appellate Court to remand a case under R. 23, where the Court of first instance, having framed issues and recorded all the evidence has decided the case with reference to its findings on one or two issues leaving the other issues undecided. 1933 R. 413. In such a case the appellant is entitled to a refund of Court-fees. 151 I.C. 721 (2)=1934 M. 643. Where Court goes into evidence and records findings on all issues but dismisses the suit as not maintainable, the disposal is on a preliminary point. 4 P.L.J. 645=52 I.C. 125. A preliminary point must be

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decided as such and at the earliest stage of the suit. It is not proper that a preliminary point should be decided along with the points involved in the merits of the case. 1930 A. 863=128 I.C. 827.

WHAT IS NOT DISPOSAL ON A PRELIMINARY POINT.—“The decision on a preliminary point” means a determination not affecting the merits of the case. A reversal of a judgment with a direction to admit evidence said to have been excluded is not a disposal on a preliminary point. 37 M.L.J. 536=53 I.C. 417=10 L.W. 359. Disposal on an important issue relative to the merits of the case is not a disposal on a preliminary point. 9 M.L.T. 373=9 I.C. 790. It cannot be said that a Court has disposed of a suit on a preliminary point if it has disposed of it as it stands before it without dealing with further issues which might have arisen if the suit had been framed otherwise or if an amendment of the pleadings had been allowed. 60 M.L.J. 713=132 I.C. 311=1931 M. 1. When appellate Court decides the main point and remands for disposal of the remaining issues the decision is not on a preliminary point. 60 I.C. 609=12 L.W. 667. An order of remand for re-hearing after amending the plaint is not an order under this rule. 73 I.C. 915=1924 L. 245. Dismissal for default is not a disposal on a preliminary point. 14 A.L.J. 347=38 A. 357. The rule does not apply to a case where the plaintiff's suit has been dismissed by the Court proceeding under O. 17, R. 3. 1935 R. 123. Where the appellate Court decides some issues and leaves the others to be determined by the trial Court, a remand order is not under this rule but under R. 25. 40 I.C. 58. *See also* 9 I.C. 224=15 C.W.N. 575. Appellate Court framing additional issue and remanding the case reversing the decree instead of calling for a finding retaining the case on its file. Order of remand is not appealable either under O. 43, R. 1 (a) or under S. 100 as it is not a decree within S. 2. *See also* 103 I.C. 119=1927 L. 386; 55 C. 219=103 I.C. 864=1927 C. 850.

WHERE REMAND SHOULD NOT BE ORDERED.—Except under R. 23, no case should be remanded for second decision by the trial Court which can be finally disposed of by the first appellate Court. It is only where owing to a failure to implead a necessary party or the like, a trial is radically bad, so that the correction of its omissions and defects in the appellate Court is not reasonably practicable that remand for retrial is permissible. (12 N.L.R. 126, Foll.) 31 N. L.R. (Supp.) 72=160 I.C. 202=1936 N. 8.

SUFFICIENT EVIDENCE ON RECORD.—The appellate Court should dispose of the case if there is sufficient evidence and should not put the parties to unnecessary expense. 37 B. 289=14 Bom.L.R. 1154; 41 I.C. 735. It is unusual to remand a case after argument in appeal, which ought *prima facie* to

be decided upon materials on record. 34 M.L.J. 545=45 C. 748=45 I.A. 94 (P.C.). Remand for findings on fresh additional issues cannot be made when they were covered by the issues determined. 43 I.C. 815. A case can be decided on the evidence on record after excluding irrelevant and unsatisfactory portions, without a remand. 50 I.C. 301. An order of remand cannot be made under R. 23, where the decision of the trial Court is not based in any sense on a preliminary point. 1927 B. 111=100 I.C. 578=29 Bom.L.R. 56; 96 I.C. 44. No remand can be made when materials on record are sufficient to decide the case. 180 P. L.R. 1912=16 I.C. 847. *See also* 45 M. 449=42 M.L.J. 372. Nor where appellate Court comes to a different conclusion on some portion. 20 A.L.J. 258=66 I. C. 866=1922 A. 192.

COMPLETE EVIDENCE ON RECORD.—When lower Court has decided all issues it is not proper to remand for trial on merits. 35 I.C. 239; 27 C.W.N. 1025=1924 C. 148; 50 I.C. 984. When appellate Court comes to a different conclusion on merits and on evidence on record, no remand could be ordered on the ground that the evidence was not properly directed. 70 I.C. 655=1923 M. 113. Ordinarily if an appellate Court disagrees with the lower Court and is not satisfied with that Court's opinion its duty is to come to a proper conclusion for itself. In such cases especially after the recent amendment of the Code it is not proper for the appellate Court to direct a *de novo* trial. The practice of delivering a lecture on points of law to the trial Court and sending a case for *de novo* trial to that Court is especially bad when there is no reason to think that either party had not an opportunity of producing all the evidence that it had. 33 C.W.N. 1211=1930 C. 235. Where the Judge of an appellate Court allows an appeal on a preliminary point of law which necessitates the remand of the suit for further trial or retrial of the suit he should refrain from making any remarks in his judgment concerning the merits of the claim, as by so doing, he must necessarily prejudice the further trial or new trial on remand. 163 I.C. 397 (2)=1936 R. 251. Because there was a finding on evidence recorded, but without an issue raised, a remand cannot be made. 46 I.C. 659=137 P.W.R. 1918. No remand in second appeal for re-hearing upon an issue raised and determined by Courts below. 67 I.C. 494=1922 P. 575. *See also* 56 C. 15=49 C.L.J. 1=1929 C. 546; 119 I.C. 2; 31 Bom.L.R. 208; 26 N. L.R. 44; 116 I.C. 586=1929 Sind 159. When full trial has taken place though the case has been disposed of on a preliminary point a remand ought not to be ordered. 66 I.C. 922=1923 C. 323; 29 C.W.N. 614=52 C. 783.

INSUFFICIENT EVIDENCE.—A case should not be remanded for fresh evidence. 2 Pat. L.J. 61=38 I.C. 797. A case should not

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be remanded for local investigation, when it had not been asked for in the first Court. 43 I.C. 815. Case should not be remanded for additional evidence on the ground that evidence adduced by defendant was not satisfactory and sufficient. 39 I.C. 886=25 C. L.J. 473; 46 I.C. 659=137 P.W.R. 1918. Where there is no reason to think that the parties did not get an opportunity of producing all the evidence that they desired to produce before the trial Court. 167 I.C. 922=1937 O. W. N. 377. Case cannot be remanded because necessary evidence was not let in by oversight. 53 I.C. 562. But see 1930 P. 7; 1930 R. 188. A remand in order to enable plaintiff-appellant to ascertain whether or not a demand was made within three years of the institution of the suit which would save limitation, was refused. 1923 L. 645. Remand of the case could not be ordered because the appellate Court considered the appointment of an experienced Commissioner essential to value the property. 46 I.C. 750. An appeal against an *ex parte* order without seeking to set it aside should not be remanded but be decided on the merits by the appellate Court. 24 P.L.R. 1917=39 I.C. 749. See *contra* 26 O.C. 10=73 I.C. 591. Following 30 M. 64 (F.B.). See also 56 I.C. 255=(1919) 3 U.B.R. 198; 1929 C. 636=121 I.C. 409; 1930 A. 863=128 I.C. 827.

CASE OF EXCLUSION OF EVIDENCE.—When evidence which ought to have been taken was refused to be recorded the suit cannot be remanded for trial *ab initio* but additional evidence can be directed to be recorded. 45 I.C. 832=5 O.L.J. 139. See also 1930 A. 220. The case need not be remanded because the lower Court based its decision on inadmissible evidence, when there is sufficient evidence on record to support the decision. 71 I.C. 300=1924 C. 370; but see 41 I.C. 71. Remand should not be made when necessities of the case are specifically provided for by the Code. 1925 C. 274. On this point see also 120 I.C. 460=1929 C. 492.

WHAT IT SHOULD BE UNDER RULE 25.—When all evidence was taken but certain issues were not decided, the proper order is to call for findings under R. 25; 38 A. 520=14 A.L.J. 754; 1925 L. 480; 1925 M. 171; 100 I.C. 578=1927 B. 111; 1927 L. 618=103 I.C. 537; 1939 Pat. 580. Where case has been decided by lower Court wholly on merits and not on any preliminary point, the appellate Court may remand under R. 25 and not under this rule. 151 I.C. 490=1934 L. 576; 60 C. 733=37 C.W.N. 504=1933 C. 632. In appeal from a decree an objection was taken by the appellants that some of the defendants had died during the pendency of the suit in the trial Court. The factum of the death was not admitted and the District Judge set aside the judgment of the trial Court and passed an order under R. 23. Held, that the District Judge should have remanded an issue under R. 25, on the

question of the factum of the death and should not have acted under R. 23 which was not applicable; 146 I.C. 517=1933 L. 224. In a suit for possession and damages where appellate Court differed from trial Court, the whole suit cannot be remanded but only so far as the issue on damages was concerned. 45 A. 565=21 A.L.J. 538. Where lower appellate Court reversed the decree of Court below, modified one of the issues, and remanded the case for a *de novo* trial on the modified issue held the procedure was wrong. 35 C.L.J. 345=70 I.C. 547. Where the appellate Court thinks that the investigation is wrong, and that further investigation and evidence were necessary, such may be ordered retaining the appeal on file and remand ought not to be ordered. 24 C.W.N. 708=31 C.L.J. 300. In case of defective pleadings and a finding on evidence which was sufficient, and which the appellant had not the opportunity of meeting, the proper course would be to remit an issue on the point. 15 I.C. 3. When it comes to the notice of appellate Court from the evidence on record that the consideration for the suit transaction is of an illegal and immoral character, but no issue on that point has been framed by trial Court nor has defendant raised any objection to that effect, the appellate Court should remand the case for a finding on that point. 145 I.C. 599=1933 M. 187. When an important issue was not raised the case should be remanded only for a finding on that issue and the decree could not be set aside entirely and the whole case remanded for re-trial. 38 I.C. 641; 23 A.L.J. 880=1926 A. 65; 1925 M. 169; 145 I.C. 299 (1)=1933 L. 659 (1).

NEW PLEA—NO REMAND.—Only in exceptional cases and on good cause shown should a case be remanded for re-hearing on a new plea not raised in pleadings nor even suggested. 43 C. 1104=43 I.A. 172=31 M.L.J. 745 (P.C.). Where a remand would involve taking of fresh evidence on a point not raised before, it would not be granted. 11 I.C. 84; 2 P.L.J. 8=38 I.C. 509. When a claim for a right of way was originally based on immemorial usage, he cannot obtain a remand for re-trial on issues of implied grant or easement of necessity. 55 I. C. 435. A remand ought not to be ordered permitting plaintiff to supplement his case, when at the time he came to Court he was unequipped. 71 I.C. 28=1914 C. 396. A party is not entitled to remand on a new case set up in appeal when he failed to establish the case he set up on trial. 54 I.C. 645.

WHEN REMAND COULD BE ORDERED.—Powers of remand are much wider in the new Code than in the old. Remand can be ordered though the case had not been disposed of on a preliminary point. Want of proper trial, and disallowance of important questions not giving opportunity to parties to adduce proper evidence are sufficient reasons for remand. 12 I.C. 684=15 C.L.J. 258; 36 M.

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492=24 M.L.J. 512. An appellate Court adding a new party can remand for re-trial. 31 I.C. 263=2 L.W. 1034. When the plaint is amended in appeal under O. 6, Rr. 17 and 18 and a defendant desires to traverse the facts stated in the amendment, the case can be remanded. 32 I.C. 906; 43 C. 938=32 I.C. 791=20 C.W.N. 547; 1927 M. 859=103 I.C. 670; 48 M. 713; 1927 L. 196=100 I.C. 49. Where inadmissible evidence was admitted, the case should not be remanded, for a fresh adjudication excluding that evidence. 55 I.C. 922=1 P.L.T. 224. An order of remand can be made when the ground on which the appellate Court declares a document inadmissible, has arisen subsequent to the disposal of the suit by the lower Court. 10 I.C. 675=9 M.L.T. 317. Where an appeal was decided on the basis of an inadmissible document, the appeal can be remanded in second appeal. 57 I.C. 561=5 P.L.J. 410. A case could be remanded when decision was based on a report of a commissioner who was superseded and whose report therefore could not be admitted in evidence. 39 I.C. 951.

CRIMINAL CASES.—There are no provisions in the Code of Criminal Procedure analogous to Rr. 23 and 25, of this Code; and an appellate Court which allows an appeal against an order by a magistrate under S. 476, Cr. P. Code, has no power to remand the case. 10 Luck. 335=1935 O. 59.

FRESH EVIDENCE.—Where the decision is on pleadings and not on evidence, there ought to be a remand for taking evidence. 67 I.C. 710=1923 P. 174. Case can be remanded when trial Court refused to grant time for production of certified copies of material documents and decided with materials on record only. 43 I.C. 57. Remand could be ordered where appellate Court is satisfied that but for some grave error on the part of the pleader, necessary evidence could have been adduced in lower Court. 39 B. 352=17 Bom.L.R. 187. A case is to be remanded where tenancy rights were pleaded as bar to a suit for possession and was not adjudicated upon. 42 I.C. 550. Where an important issue was not raised by the trial Court, the case can be remanded with the issue raised. 51 I.C. 712=64 P. R. 1919; 223 P.L.R. 1911=12 I.C. 53. When a case was decided on a piece of evidence not placed on record, it could be remanded for taking of such evidence. 36 M. 492=24 M.L.J. 512. See also 1937 O.W. N. 377=1937 Oudh 338. Where the trial Court dismissed the suit on the legal issue and the appellate Court decides that the decision of the trial Court is wrong on the legal issue, it should remand the case for trial on the remaining issues and it should not decide the issues of fact itself when the appellant had not led evidence thereon. 155 I.C. 997=1935 R. 34. Where first appellate Court decides only on technical grounds, second appellate Court can remand it for disposal

on merits. 32 I.C. 387=2 O.L.J. 562. Where a book was used by lower Court to establish certain facts which a party had no opportunity of meeting and which he desired to rebut, the admission of the book in appellate Court might involve a remand. 66 I.C. 287=34 C.L.J. 205. Appellate Court can remand for determination of question of title, when the tenant had pleaded title of a third person, in a rent suit. 11 I.C. 183=15 C.L.J. 6.

ERROR OF JUDGMENT.—In an appeal from an order of remand, findings of fact cannot be examined by second appellate Court. But it could remand the case to lower appellate Court for rehearing when there has been a misappreciation of the true controversy between the parties. 73 I.C. 756=1923 L. 206; 87 I.C. 950=1925 O. 692. Appellant is entitled to have the opinion of appellate Court on an issue of fact, and if such Court fails to determine the point. High Court will remand the case for a re-decision of the appeal. 55 I.C. 233. A case can be remanded where lower Court overlooked a provision of law. 35 A. 533=35 I.C. 41=14 A.L.J. 734. Where the effect of an admission by a pleader was not realised, the appeal might be remanded to lower appellate Court for a fresh hearing on the footing that the admission was in fact made. 44 I.C. 18. If a case is decided on a wrong view of burden of proof, it should be remanded as a case of wrong disposal on a preliminary point. 57 I.C. 525=22 Bom.L.R. 771. Cf. 40 M. 654=30 M.L.J. 514. But see *contra* 34 A. 612=10 A.L.J. 190; 58 I.C. 982=1 L. 429.

EFFECT OF ORDER.—The policy of legislature is in favour of finality of orders of remand. A remand order made on second appeal is, unless a review of it be obtained, a conclusive determination of the points of law involved in it and cannot be questioned in a subsequent second appeal. 72 I.C. 588=1923 C. 385. Also 4 P.L.J. 645=52 I.C. 125. Where High Court in second appeal differs from lower Court on an issue of law and remands the case to Court below, the order is binding upon that Court and cannot be questioned in an appeal from the final decree after remand. 4 P.L.T. 35=1923 P. 226. Jurisdiction to try a remanded case depends on the order of appellate Court. 44 M.L.J. 238=1923 M. 351. A remand order to find whether a person has title includes enquiry as to whether he has lost it or is barred from relying upon it. 31 I.C. 987=20 C.W.N. 149. In the absence of any limitation put by High Court, the whole case on remand is open for decision of lower appellate Court and it is bound to hear the appeal upon the judgment of the Court of first instance. 32 I.C. 240=20 C.W.N. 584. When in an appeal by some defendants who did not join in a reference to arbitration, the case was remanded on the ground that the award did not bind them, the whole case is reopened, even in respect of those

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who did not appeal. 62 I.C. 569=37 M.L.J. 100. Where a case is referred to District Judge on objections being raised to the award of the land acquisition officer, and the case on appeal to High Court by some of objectors is again remanded to District Court, an objector who has not taken part in the proceedings before District Judge and those who have not appealed from order of District Judge, are not entitled to intervene as objectors on remand. 1933 L. 648. A Court can come to a different and contrary conclusion after remand. 56 I.C. 1001; 13 I.C. 813=14 O.C. 321. When a case is remanded to the sub-Court, the sub-Judge can form his own conclusions irrespective of any finding arrived at by his predecessor in respect of matters which were not touched by the High Court. 7 Luck. 454=137 I.C. 102=1932 O. 123. The lower appellate Court after remand cannot consider arguments abandoned or not raised in second appeal or come to fresh findings on points decided by the order of remand. 61 I.C. 575; 35 I.C. 571. As to validity of proceedings taken under a remand order, when the remand order is held to be wrong, *see* 44 A. 211=20 A.L.J. 44. Where an order of remand is passed under R. 23, if a party protests against the order of remand and refuses to take part in the proceeding subsequent to the order of remand, he should not be deprived of the right to appeal from the order of remand within the time allowed by law even if the case has in the meantime been disposed of by the Court of first instance. And if the order remand is found to be bad and is set aside, the decree of the lower Court will automatically go inasmuch as that Judge has derived his jurisdiction to hear the case from the order of remand. But if the party not only does not object to exercise of jurisdiction by the lower Court, but also takes part in the proceeding hoping to win the case ultimately, he should not be allowed to repudiate the whole proceeding as being null and void when he loses the case. 1933 R. 413. Another Judge or Bench differently constituted may consider the propriety of the issues framed by its predecessor and remitted to the lower Court, and if of different opinion may ignore the findings. 43 A. 377=19 A.L.J. 139.

FINALITY OF ORDER.—An order of remand is interlocutory; it can be final if it decides some cardinal point in the suit. But an order of remand which merely decides that the suit is maintainable in the form in which it is brought is not final. 60 I.C. 522=2 L. 106. An adjudication by a remanding Judge would bind him and his successor at the final hearing, when it amounts to a preliminary decree, until it is duly set aside or amended. 32 I.C. 866=20 C.W.N. 43; 53 I.C. 677=1919 M.W.N. 662; 1 P. 246=65 I.C. 175. *See also* 1932 A.L.J. 615=138 I.C. 406=1932 A. 603. The mere fact that the appellate Judge in the first instance

remanded the case for taking additional evidence will not deprive him of his jurisdiction to dismiss the appeal at a later stage if it was found to be competent. 34 C.W.N. 839. Issues decided by order of remand cannot be reopened at any subsequent stage of the litigation. 25 O.C. 245=70 I.C. 983. Where a District Judge remands a suit to the trial Court and the suit is ultimately dismissed by the trial Judge and an appeal is preferred again to the successor of the District Judge who had remanded the case, it is competent for him to go behind the finding of his predecessor. This, however, is a matter entirely at his discretion and cannot be raised on second appeal. 38 P. L.R. 567=1936 L. 708.

REMAND TO ANOTHER COURT.—A case can be remanded to another Court; only when the appellate Court has power to transfer a case from one Court to another. 66 I.C. 113=1922 L. 239; 158 P.W.R. 1913=20 I.C. 788. A case may be remanded to another Court for hearing, when the appellate Court illegally received document very late without assigning any reasons. 35 I.C. 698=24 C.L.J. 457. Where the chief Court remanded a case to lower appellate Court for further enquiry, it does not mean that the lower appellate Court cannot direct the trial Court for recording any additional evidence if necessary. 44 I.C. 907=147 P.L.R. 1917. *See also* 1935 L. 161.

COSTS.—Respondent must be paid the costs of appeal when the appeal and remand were consequent on the appellant not setting forth his case properly. 18 M.L.T. 247=30 I.C. 785.

NOTICE.—No notice of remand is given in C. P. 1925 N. 31.

WHEN APPEAL LIES.—An appeal lies against an order under this rule. 44 A. 176=19 A.L.J. 971; 20 A.L.J. 321=44 A. 492; 24 C.W.N. 708=56 I.C. 516=31 C.L.J. 360; 42 C.L.J. 22=30 C.W.N. 41; 1940 N.L.J. 350; 1941 N.L.J. 410. (Remand from order rejecting plaint under O. 7, R. 11); 51 B. 43=100 I.C. 1004 (2)=1927 B. 129=29 Bom.L.R. 97. Where appellate Court remands the case to Court of first instance giving some directions in its judgment as to the way in which the assessment of the rent in kind should be made order is really a decree because it is not an order of pure remand but contained a determination of the principle on which the assessment was to be made. 143 I.C. 828=37 C. W. N. 1084=1933 C. 416. The right of appeal is determined by what Court purports to do and not by what Court should have done—Where a Court purports to pass a remand order under R. 23, though really the remand is under S. 151, the order of remand is appealable. 107 I.C. 284 (1); 38 P.L.R. 1154; 31 N.L.R. (Supp.) 72=160 I.C. 202=1936 N. 8. *See also* 38 P. L.R. 1154=1937 Lah. 454. But *see* 1933 S. 279=146 I.C. 777 (F.B.) (*contra*). Construction of remand order, (*ibid.*), 1933

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O. 569. See also 1936 N. 8 (noted *infra*). Order of remand by appellate Court without stating provision of law—The remand should be deemed to have been under R. 23 and not under S. 151. 106 I.C. 442. But when it is perfectly clear that R. 23 has no application it should not be assumed that the Court thought it was acting under R. 23, unless it is quite clear that it did in fact so act. 31 N.L.R. (Supp.) 72=160 I.C. 202=1936 N. 8. An appeal can be filed and heard even if remand order is carried out by first Court. 15 I.C. 191=15 O.C. 43. When a person has not been adversely affected by an order of remand, it is doubtful if he can appeal from that order. 132 I.C. 78=1931 O. 242. An appeal lies against an order ordering retrial on merits because it was held that the suit was not barred by reason of *res judicata*. 21 L.W. 318=48 M.L.J. 100. An appeal lies on all orders of remand even though the suit has not been disposed of on a preliminary point. 1922 C. 279. See *contra* 3 R. 490=1925 R. 320. A final decision which effectually disposes of the appeal before High Court amounts to a judgment whether it amounts to a decree or not. If it does not amount to a decree, it would amount to an order. The word "judgment" in Cl. 10 (Letters Patent, All.) should not be read in a restricted sense and an appeal lies against an order of remand passed by a single Judge under O. 41, R. 23. 55 A. 326=1933 A.L.J. 127=1933 A. 262 (F.B.).

WHEN NO APPEAL LIES.—When the order of remand is not under this rule no appeal lies. 1927 M. 335=52 M.L.J. 90; 112 I. C. 710; 48 M. 713=47 M.L.J. 552; 3 P. L.J. 253=43 I.C. 959; 37 M.L.J. 536=53 I.C. 417; 31 M.L.T. 182=69 I.C. 826; 73 I.C. 915=1924 L. 245. Cf. 3 L. 218; 138 I.C. 62=1932 L. 538; 1933 L. 155; 97 I.C. 1=1926 P. 514; 96 I.C. 440 (1)=1926 P. 516; 31 C.W.N. 878=1927 C. 642=104 I. C. 422; 1928 M.W.N. 164; 26 I.C. 519=85 P.W.R. 1915; 60 I.C. 609=12 L. W. 667; 15 I.C. 367=22 M.L.J. 409. But see *contra* 119 I.C. 330=30 P.L.R. 645. A distinction has to be drawn between an order of remand under R. 23, and an order under R. 25, remitting issues for decision. An order under R. 25 does not amount to an order remanding a case, within the meaning of O. 43, R. 1 (u), and is not therefore appealable. 1935 O.W.N. 352=1935 O. 333. An order of an appellate Court setting aside an order rejecting the plaint is not an order under this rule and is not appealable. 131 I.C. 750=1931 L. 497; 133 P.L.R. 1915=26 I.C. 519. There can be no appeal from an order of remand where the question involved is one of custom. 5 L. L. J. 392=73 I.C. 650. No appeal lies against an order of remand passed by the first appellate Court in a suit of a nature cognizable by a Court of Small Causes. 36 I.C. 396. Under the Agra Tenancy Act an order of remand under this rule is not appealable.

14 I.C. 175; 35 I.C. 105.

REVISION.—An order of remand not appealable is not open to revision either. 13 I. C. 855=140 P.L.R. 1912. A remand order passed by an appellate Court which it was not competent to pass can be set aside in revision. 1925 M. 171=79 I.C. 157. See also 52 M.L.J. 90; 138 I.C. 62=1932 L. 538; 128 I.C. 827=1930 A. 863. Where a suit is dismissed by the trial Court on a plea that the matter was *res judicata* in view of a previous decision and on appeal the appellate Judge remands the case for decision on merits under R. 23, such order does not decide case and no revision lies from the remand order. 1933 Pesh. 48. Where an order of remand purporting to be made under the inherent powers, contravenes an express provision in R. 23, the High Court will interfere in revision. 37 Bom.L.R. 203=156 I.C. 381=1935 B. 216.

O. 41, R. 23 (Oudh): SCOPE OF.—O. 41, R. 23 as amended is wider than the rule before its amendment, for under this rule the Court's power of remand is not confined to a case which has been disposed of upon a preliminary point and all that is required is that all questions should not have been decided. The words in the rule as amended make it quite clear that for a remand to be under this rule there must have been a decree and there must have been something left undecided by the original Court. Where a remand is on the ground that one or both parties had been prejudiced and that though every thing had been decided it had been decided improperly, it is not a remand under O. 41, R. 23 and hence no appeal lies against such an order. 180 I. C. 321=1939 Oudh 157. The words 'have not been decided' in O. 41, R. 23 as amended by the Oudh Court, clearly refers to a decision of all the questions arising in the case by the trial Court and not to their decision by the appellate Court itself. 16 Luck. 65=1940 Oudh 367.

O. 41, R. 23 (Allahabad) and Court-Fees Act, S. 13.—Where the trial Court after striking off the defence for non-compliance with an order awarding costs to plaintiff, passes an *ex parte* decree without recording any finding on the questions arising in the case and the decree is set aside in appeal and the suit is remanded to trial Court for rehearing, the remand is one under O. 41, R. 23 (Allahabad)—and the appellant is entitled to refund of Court-fees paid in appeal by him, under S. 13 of the Court-Fees Act. 1941 A.L.J. 604.

O. 41, R. 23 as amended by Madras High Court.—Remand order—Failure to appeal—Effect of. See 54 L.W. 7=1941 Mad. 530=(1941) 2 M.L.J. 47 (F.B.).

O. 41, R. 23-A (Lahore): ORDER OF REMAND—APPEAL.—Where an order reversing the decree and remanding the case to be retried has been passed by the Appellate Court an appeal from the order is competent under O. 41, R. 23-A framed by Lahore

LOC. AMS.—[ALLAHABAD.] In r. 23, for the words "Where the Court from whose decree an appeal is preferred has disposed of the suit on a preliminary point and the decree is reversed in appeal, the appellate Court" substitute the words "Where an appellate Court has reversed a decree and all questions arising in the case have not been decided, it."

[MADRAS.] O. 41, r. 23.—Substitute the following for r. 23 :—

"23. Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, or where the appellate Court in reversing or setting aside the decree under appeal considers it necessary in the interests of justice to remand the case, the Appellate Court may by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand."

[OUDH.] For the words "Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court" substitute the following words :—

"Where an Appellate Court has reversed a decree and all questions arising in the case have not been decided, it."

[LAHORE.] Add the following as r. 23-A :—

"O. 41, R. 23-A.—Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point and the decree is reversed in appeal, and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under r. 23."

Note.—See the undermentioned case.

24. Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after re-settling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

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High Court, although the remand is not covered by O. 41, R. 23. I.L.R. (1940) Lah. 593=1940 Lah. 63.

O. 41, Rr. 23 and 24.—Where the trial Court dismissed the suit on the legal issue and the appellate Court decides that the decision of the trial Court is wrong on the legal issue, it should remand the case for trial on the remaining issues and it should not decide the issues of fact itself when the appellant had not let evidence thereon. 1935 R. 34.

O. 41, Rr. 23-25.—Remand with issue reframed with directions to take additional evidence—Legality. 1935 L. 161. See also 1939 Pat. 580; 1937 Oudh 338.

O. 41, Rr. 23 and 26.—R. 23, O. 41 contemplates a position in which the appellate Court does not retain seisin of the case. The remand under it is for a 'determination of the suit', and after remand the appellate Court has nothing more to do with the matter unless it comes back to it by way of a fresh appeal. But when the appellate Court retains seisin of the case when remanding for a finding on issue, R. 26 or 27 is more nearly applicable. I.L.R. 1936 N. 188=1936 N. 140.

O. 41, R. 24.—When it is not a question of "re-settling" issues but framing new issues requiring additional evidence, Court should act under the next rule and not under the present one. 40 I.C. 411=25 C.L.J.

527. Absence of specific issue does not debar decision and disposal on a point raised in pleadings, provided it does not prejudice the other side. 6 Bur.L.T. 134=20 I.C. 674. When an alternative case is pleaded in appellate Court, it will not act under this rule, unless the case arises on the facts stated in plaint and defendant is not taken by surprise. 36 I.C. 890=20 C.W.N. 773. Where plaint was returned for presentation to proper Court and an appeal was filed against the order returning, it was held that appellate Court had no power to decide the case on the merits. 102 I.C. 467=1927 O. 218. Appellate Court can on evidence on record decide any issue left undetermined by lower Court. 10 I.C. 225. Where trial Court records the whole evidence, but decides the case on facts without considering some evidence as being inadmissible, but appellate Court treats such evidence as admissible and, without remanding the case, affirms the decree on facts after considering the whole evidence under R. 24, the procedure is quite proper. 1933 R. 35=142 I.C. 829 (2). High Court in second appeal has jurisdiction to record its finding on a question of fact left undetermined though it arises from admitted facts. 36 B. 183=13 Bom.L.R. 1183. When judgment is reversed in second appeal on a point of law, High Court is competent to decide the case on the merits. 108 P.W.R. 1914=25 I.C. 144.

25. Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree

Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.

the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;

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O. 41, R. 25: SCOPE.—Where a case has been decided by lower Court wholly on merits and not on any preliminary point, the case must be remanded by appellate Court under R. 25 and not under R. 23. 151 I.C. 490=36 P.L.R. 269=1934 L. 576; 1939 Nag. 173. Rule does not contemplate an order for trial of issues already tried and decided upon. 48 I.C. 959; 22 I.C. 128. Unless issue is material remand should not be ordered. 1925 O. 97. Where first appellate Court fails to take into consideration an important piece of evidence in deciding the case, the case should be remanded for fresh hearing. 14 Pat.L.T. 683=1933 P. 472. Under O. 41, when Court is of opinion that certain findings of fact are necessary for the proper disposal of an appeal and that evidence should be led on those points the proper procedure is under R. 25 by which the appellate Court may frame issues and refer them for trial to the lower Court. Findings should then be returned to the appellate Court which must re-hear the appeal so far as is necessary and so dispose of it. It is not open to appellate Court to act under R. 23 in such a case. 53 B. 335=31 Bom.L. R. 208=118 I.C. 790=1929 B. 175. On this Rule, *see also* 145 I.C. 599=1933 M. 187; 1935 O. 59=11 O.W.N. 1469; 1937 Oudh 338. In cases in which it is possible to deal with the matter effectively under this rule, the decree of lower Court should not be set aside and a retrial ordered. 1933 P. 706. For construction of a remand order, *see* 1933 Oudh 560. Where an issue is sent down by the appellate Court, it is the duty of the trial Court to return a finding on it, whether it considers the issue material or not. 1936 A. M.L.J. 128. Applicability—Order of magistrate under S. 476, Cr. P. Code—Appeal—Power of remand. 11 O.W.N. 1469=1935 Oudh 59.

TRANSFER OF APPEAL.—An appeal cannot be transferred by District Judge from his file to his subordinate after a remand order, but before receipt of findings. 15 I.C. 862=10 A.L.J. 89.

EFFECT OF ORDER OF REMAND.—An order under this rule is not a final order. Court before which the case ultimately comes up can disregard the remand order and the findings under it. The responsibility for the final decree rests mainly with the Court which passes it. 74 I.C. 1014=1923 A. 284. *Cf.* 37 C.L.J. 122=74 I.C. 392=1923 C. 521. *See also* 64 M.L.J. 307=1933 P.C. 58=11 R. 58=60 I.A. 76(P.C.). Appellate Court is not bound to reconsider any opinion definitely expressed before remand, neither is it bound by the opinion expressed before or in remand order.

15 I.C. 39=17 C.W.N. 462; 46 I.C. 922; 25 O. C. 41=68 I.C. 242. Though in some cases it is open to the same Judge or his successor to rectify the mistakes made by the former either on review or under S. 152 of the Code, where the previous District Judge had heard the parties at length and given well-considered and final decisions on the points involved and it was in consequence thereof a remand was considered necessary, the findings and conclusions arrived at the former occasion are binding on the succeeding District Judge to whom the case was remanded by High Court and on High Court in second appeal. 144 I.C. 973=1933 L. 423. When only one of the defendants appealed and appellate Court remanded the case for fresh disposal as regards the appellant the decree against the non-appealing defendants is not affected. 22 P.L.R. 1918=44 I.C. 135.

POWER AND DUTY OF APPELLATE COURT.—Even after the return of the findings, the entire appeal is open for consideration at the final hearing. 24 C.W.N. 145=30 C.L.J. 428; 21 I.C. 760=18 C.L.J. 181. Findings on issues sent to trial Court, ought to be scrutinized by appellate Court, before deciding the appeal, even though objections have not been preferred on those findings by the party affected. 71 I.C. 444=1923 A. 417 (1); 37 C. L.J. 122=74 I.C. 392; 21 I.C. 79=18 C.L.J. 354; 28 I.C. 597. Appellate Court finding certain additional issue necessary—Proper course is to frame the issue and refer it for trial to lower Court. 95 I.C. 123 (2)=1926 C. 954; 95 I.C. 203=1926 C. 976; 95 I.C. 170 (1)=1926 C. 912.

POWER OF SECOND APPELLATE COURT.—High Court in second appeal cannot interfere with findings of fact by lower appellate Court. 40 I.C. 128; 85 I.C. 92. And it is immaterial whether the first Court takes the evidence or the lower appellate Court, I.L.R. 1936 N. 188=1936 N. 140. Finding of lower appellate Court on a question of fact not put in issue can be contested even in second appeal. 5 Lah.L.J. 49=85 I.C. 52. High Court can frame necessary issues and remit them for trial, when lower appellate Court has failed to do so. 38 M.L.J. 476=43 M. 567=47 I. A. 76 (P.C.). High Court can remand even on a point not taken in grounds of appeal. 5 Lah.L.J. 49=85 I.C. 92. High Court has power in second appeal to frame issues and refer them for trial to the first Court. 1934 N. 207 (1).

REMAND.—New issue when can be raised by High Court. 1926 B. 577=95 I.C. 297; 98 I.C. 536=1926 M.W.N. 921; 51 M.L.J. 641=1927 M. 85; 28 Bom.L.R. 1090=1926 B. 577.

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.

26. (1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to any finding.

Findings and evidence to be put on record. Objections to findings.

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APPLICATION OF THE RULE—ADDITIONAL EVIDENCE.—When a case is remanded it is discretionary with appellate Court not to direct lower Court to take further evidence. 15 I.C. 670. To assume that the order of remand does not contemplate taking additional evidence is not wrong. When there are sufficient materials on record, it would be wrong to take more evidence. 20 I.C. 35. Appellate Court cannot define the particular kind of evidence required for the determination of a remand issue. 22 I.C. 128. Opportunity must, in a proper case, be given to both parties for adducing evidence on a remanded issue. 19 A.L.J. 79=62 I.C. 447. A second appeal cannot be remanded for hearing in order that record of right published after the decision of the first Court may be taken into consideration. 43 I.C. 750=2 P.L.J. 564. An appellate Court should not ordinarily frame an issue not raised in the pleadings or even suggested in trial Court. It ought to be done only in exceptional cases after good cause shown and on payment of costs. 66 I.C. 640=34 C.L.J. 319; 28 Bom.L.R. 1090. Fresh opportunity cannot be given to prove one's case by an order of remand. 50 I.C. 933; 29 Bom.L.R. 147=100 I.C. 993 (2)=1927 B. 125. Where a definite case was set up in pleadings but no issue was raised or evidence taken, appellate Court should frame the issue and decide it before disposal of appeal, when it is material. 49 I.C. 475. Case can be remanded for findings on issues framed on points though not raised in the pleadings, yet had governed the case from the first. 10 I.C. 922=4 Bur.L.T. 118. New issues can be raised and the case remanded for trial, when the parties failed to grasp the essential questions arising in the case and to adduce proper evidence. 66 I.C. 833. An appellate Court cannot remit an issue at the instance of a party upon a point which was not pleaded by him; a party cannot be allowed in effect to say that he is prepared to allege or prove anything which is necessary, even if the allegations are not in accordance with the real facts. 1937 A.L.J. 1252. Appellate Court cannot make a new case for a party and remand the suit for trial of a newly framed issue on such point. 146 I.C. 981=1933 A. 829.

DELEGATION OF POWER.—When certain issues were remanded to lower appellate Court for trial, they cannot be sent to trial Court for taking evidence. Delegation of duties is wrong. 71 I.C. 896=1924 L. 354; 102 I.C. 273 (1); 19 I.C. 970=105 P.R. 1913. But see 32 I.C. 634=9 S.L.R. 148 (It may be sent to trial Court for recording evidence but the finding must be by first appellate Court). Where the District Judge sent the

case with consent of parties to the trial Judge for record of evidence, it is not open to the respondent to contend that the report of the District Judge based on the evidence so recorded is invalid on the ground that the order of remand did not permit him to send the case to the trial Judge to record evidence. 39 P.L.R. 14=1937 Lah. 639.

APPEAL.—No appeal against an order under this rule. 76 I.C. 816=1924 R. 131. See also 34 C.L.J. 319; 35 C.L.J. 345; 37 C.W.N. 190; 64 M.L.J. 307=1933 P.C. 58=60 I.A. 76=11 R. 58 (P.C.); 1935 A. 140; 145 I.C. 183=37 C.W.N. 190=1933 C. 496. Where there is a remand by the appellate Court for a decision on certain issues which had not been decided, no appeal lies from such an order of remand. 1941 A.M.L.J. 24. Order calling for a finding, if appealable under Cl. 13 of Letters Patent. 25 L.W. 95. An order remanding a case under R. 25 to Court of first instance for determination of certain issues is not appealable. The alteration made by the Oudh Chief Court and High Court at Allahabad in the language of Cl. (u) of R. 1, O. 43, was intended to and does cover by its language such orders of remand also as are not specifically made under R. 23, but may fall to be made by a Court in the exercise of its inherent jurisdiction *ex debito justitiae* or under the provisions of S. 151. The alteration in question does not cover a remand under R. 25. 10 O.W.N. 664=1933 O. 350. High Court in an interlocutory judgment having set aside the conclusions but not the decrees of lower Court sent down an issue for a finding. On receipt of the finding it passed a decree. *Held*, that the order sending down the issue for finding was one under R. 25, that it was not a final order and that an application for leave to appeal to the P.C. against the said order could be made within 90 days from the final decree. 17 I.C. 258=35 Bom.L.R. 415=1933 B. 251.

REVISION.—Powers of revision should be exercised only in exceptional cases on orders under this rule. 67 I.C. 269=2 Lah. L.J. 662.

O. 41, R. 26.—Court can go behind findings even though no objections are filed. 28 I.C. 597; 40 I.C. 405. Omission to fix a time for finding of objections is a mere irregularity and may be ignored if no party is affected. 26 I.C. 736=1 O.L.J. 681. Where no objections to a finding are filed, Court may refuse to hear them at the time of hearing. 67 I.C. 846=3 Lah.L.J. 230. A memorandum of objections under R. 25 does not require any Court-fee. 105 I.C. 108=9 P.L.T. 19. See also 160 I.C. 38 (1)=1936 O.W.N. 113.

(2) After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.

Determination of appeal.

Production of additional evidence in Appellate Court.

27. (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, the Appellate Court. But if—

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O. 41, R. 27: ADMISSION OF EVIDENCE—DISCRETIONARY.—R. 27 is intended to obtain additional evidence and cannot be used to test the evidence of witness. 155 I.C. 511=1935 Rang. 39. The provisions of S. 107 as elucidated by R. 27 are clearly not intended to allow a litigant who has been unsuccessful in lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal. Under Cl. (1) (b) of R. 27, additional evidence can be admitted only where the appellate Court *requires* it, i.e., finds it needful, to enable the Court to pronounce judgment, or for any other substantial cause. In either case it must be the Court that requires the additional evidence. The legitimate occasion for exercise of this discretion by appellate Court is not whenever before the appeal is heard a party applies to adduce fresh evidence, but on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. The defect may be pointed out by a party or a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands. 58 I.A. 254=10 P. 654=1931 P.C. 143=61 M.L.J. 489 (P.C.). See also 41 P.L.R. 390=1939 Lah. 459; 1937 Lah. 409; 1937 Lah. 285; 1940 Pat. 161; 1940 Nag. 80=1939 N. L. J. 594; 1937 Cal. 537; 40 P. L. R. 646=1938 Lah. 161; 1938 A.L.J. 449; 193 I.C. 129; 45 C.W.N. 498; 67 C.L.J. 223; 1935 R. 21; 13 I.C. 131=9 A.L.J. 59; 1930 L. 750; 49 I.C. 868; 120 I.C. 746=1930 M. 343; 64 M.L.J. 449; 42 C. 675; 132 I.C. 259=1931 O. 298; 89 I.C. 721; 89 I.C. 997; 85 I.C. 385=1925 M. 181=48 M. L.J. 32; 24 S.L.R. 15=1930 S. 105 (F.B.); 1935 R. 21; 1933 M. 407=37 L.W. 471=64 M.L.J. 449; 38 C.W.N. 763=1934 C. 707; 147 I.C. 339=1934 A. 175; 150 I.C. 788=1934 P. 60; 61 C. 412=152 I.C. 130=1934 C. 627; 162 I.C. 152=1936 Lah. 933; 38 P. L.R. 748=165 I.C. 626=1936 Lah. 37. The powers of the appellate Court in the matter of admission of additional evidence are subject to limitations which are clearly laid down in R. 27. The legitimate occasion for the exercise of the discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence but when on examining the evidence as it stands some inherent lacuna or defect becomes apparent. It may well be that the defect may be pointed out by a party or that a party may move the Court to supply the defect but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands. Consequently it is not open to the appellate Court to admit additional evidence in appeal even before the appeal is

heard. (61 M.L.J. 489 (P.C.), Rel. on.) 48 L. W. 655=1938 Mad. 957=(1938) 2 M.L.J. 648. See also 40 P.L.R. 198=1938 L. 114. The word "requires" in O. 41, R. 27 (b) means that it is necessary. R. 27 (b) does not mean that additional evidence should not be admitted except on the definite pronouncement of the Court itself or that if the new and additional evidence is produced by one of the parties it should be ignored. The wording of R. 27 (b) is quite against such an interpretation. Additional evidence may be necessary for the purpose of enabling the Court to pronounce judgment, that is to say, the Court may find that unless such evidence is produced it has not sufficient material before it to decide the case or there may be some other good and substantial cause. 16 Pat. 371=18 Pat.L.T. 618=1937 Pat. 584. This power should be very sparingly exercised and one requirement at least of any new evidence to be adduced is that it should have a direct and important bearing on a main issue in the case. 10 P. 654=58 I.A. 254=61 M.L.J. 489 (P.C.); 18 R.D. 665; 16 Pat.L.T. 49. See also 132 I.C. 259=1931 O. 298; 50 C. 276=36 C.L.J. 345; 102 I.C. 27; 120 I.C. 746=1930 M. 343; 6 O.W.N. 1060=13 R.D. 834; 119 I.C. 561=1929 A. 375; 138 I.C. 513=1932 O. 227; 1932 M. 709; 1933 L. 1024. Still more so in second appeal. 18 R.D. 665=16 L.R. 135 (Rev.). Admission of evidence in appeal is a matter of discretion within certain limits prescribed by this rule. 75 I.C. 331=26 O.C. 66; 38 I.C. 669=15 A.L.J. 21; 85 I.C. 459=1925 P. 504; 98 I.C. 129=1927 C. 140; 138 I.C. 253 (L.). It is not a matter of right. 8 A.L.J. 175=33 A. 379; 1923 C. 285; 131 I.C. 228=1931 L. 506. An appellate Court has not unfettered discretion in the matter of admitting fresh evidence under O. 41, R. 27, and a litigant who has been unsuccessful in the lower Court should not be allowed to patch up the weak parts of his case and fill up omissions in the Court of appeal. 42 P.L.R. 261. O. 41, R. 27 should be strictly interpreted. Where a document was not 30 years old but purported to be a recently made copy and no grounds for admitting secondary evidence were proved. *Held*, that the document could not be admitted in evidence in appeal. 148 I.C. 820=1934 L. 529. Court should not take a narrow view of the rules of procedure. In order to do justice between the parties, Court should allow additional evidence to be adduced in appropriate cases. 132 I.C. 363=1931 P. 181. See also 1937 Lah. 115. Where the documents sought to be adduced in evidence were not in the possession of the party but were in the possession of a Court and the party had to take the help of the trial

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Court in order to have those documents before the Court, but under such circumstances the trial Court refused to admit those documents. *Held*, that the party wanting to produce them did not have a fair chance to put up his case, and so the appellate Court should remand the case to get those documents filed. 1936 Pat. 631. *See also* 41 P.L.R. 377=1939 Lah. 273; 1939 Lah. 265; 1937 Mad. 544. A Court of second appeal should not interfere with discretion exercised by the lower appellate Court. 75 I.C. 331=26 O.C. 66; 27 I.C. 827; 1923 L. 30; 42 M. 737=37 M.L.J. 125; 20 L.W. 840=48 M.L.J. 32; 49 C.L.J. 478=1929 C. 492; 131 I.C. 228=1931 L. 506; 32 P.L.R. 813; 16 P.L.T. 702, unless it were improperly exercised. 129 P.R. 1916=36 I.C. 282. *See also* 30 P.L.R. 693. Rule not intended to enable an appellate Court to re-examine before it, witnesses already examine and cross-examined in the Court of first instance. 38 A. 191=14 A.L.J. 121. An appellate Court cannot admit fresh evidence in appeal where such admission is not for the purpose of remedying some inherent lacuna or defect, but for the purpose of providing corroboration for oral testimony which had been disbelieved by the trial Judge. Where the oral evidence is complete, and would, if believed, substantiate the case of a party, there is no question of any lacuna or inherent defect. If the additional evidence is not necessary for the Court to appreciate a party's case or to pronounce judgment on it, it should not be admitted. 1940 Mad. 911=(1940) 2 M.L.J. 287. The failure of a party to examine a material witness when that witness is available and the consequent existence of a gap in his case is not ordinarily a sufficient reason for examining that witness in appeal, though in a case where the whole case is in such a muddle that the Judge in appeal is unable to pronounce a satisfactory judgment without further materials, such a procedure would be justified. A party should not be allowed to abstain from producing evidence which is obviously necessary in the hope that if an adverse comment is made upon the absence of this evidence the deficiency can be supplied in appeal. 194 I.C. 816=1940 M.W.N. 511=1940 Mad. 707. Where a plaintiff refused to comply with the order for the execution of a commission to prepare a map and locate a spot and the suit was dismissed for want of evidence, on appeal the appellate Court has no jurisdiction to appoint a Commissioner to prepare a plan and receive additional evidence, merely to supply the lacuna in the evidence on behalf of the plaintiff. The powers under R. 27 ought to be very sparingly used. 174 I.C. 394=1938 Oudh 135. Procedure prescribed in this rule must be strictly followed, especially that in Cl. (2) regarding record of reasons. 31 I.C. 873. It is extremely desirable that when the Court exercises its power under R. 27, it should make a direct reference to the rule, giving its reasons in such a form that there is no room for doubt that the Court has

realised the exceptional nature of the powers that it is exercising. 138 I.C. 204=34 Bom. L.R. 372=1932 B. 230 [61 M.L.J. 489 (P.C.), Foll.]. The requirements of Rr. 27 and 29 are so carefully framed to ensure that such exceptional procedure shall be resorted to only in special circumstances and with adequate safeguards. High Court had examined a witness at the hearing of the appeal but there was no record of the order, if any, requiring the examination of that witness, no record of the reason for the admission of this evidence, no specification of the points to which his evidence was to be confined. Further the witness was called at the outset of the hearing in High Court and not after the Court had satisfied itself on examining the evidence taken in the lower Court that there were matters to which his evidence was essential to enable them to do justice between the parties. *Held*, the introduction of the evidence was under the circumstances highly irregular and it must be entirely discarded. 33 Bom. L.R. 1251=35 C.W.N. 925=1931 P.C. 175 (P.C.). Where the appellate Court summons additional evidence of its own motion, not after examining the record of the case at the hearing and in the presence of the pleader for the parties, but after reading the judgment of the trial Court in the privacy of its chamber, and further does not record any reasons whatsoever for admitting fresh evidence as required by R. 27 (2) or fulfil the requirements of R. 29, the additional evidence is admitted contrary to law and must be discarded. 162 I.C. 152=1936 Lah. 933. The provisions of this rule are mandatory. 47 I.C. 12. *See contra* 64 I.C. 238. A preliminary application to admit fresh evidence before the appeal is heard is not warranted by this rule. 42 C. 675=19 C.W.N. 401; 158 I.C. 656=1935 C. 641 [31 B. 381 (P.C.); 58 I.A. 254=61 M.L.J. 489 (P.C.), Foll.]. Oral evidence to prove documents should be allowed when the latter are admitted. 20 I.C. 542. The fact of a document being of unimpeachable authenticity is no doubt very material in considering whether the Court should or should not exercise its discretion in favour of a party under O. 13, R. 2, but in determining whether or not an order should be made under R. 27, considerations of a materially different character arise. 1937 Cal. 537. Documents referred to during trial but not produced—Admission in second appeal allowed under special circumstance. 177 I.C. 547=1938 Rang. 170. Rule 27 (1) (b) cannot apply to the issue of a commission for local investigation by an appellate Court as it is not the production of a document nor is it the examination of a witness. 135 I.C. 243=1932 A. 270. The appellate Court has power to issue such a commission under Ss. 107 and 75 and the Court is not bound to record its reasons. 1932 A. 270. *See also* 1937 M.W.N. 39. R. 27 is intended to obtain additional evidence and cannot be used to test the evidence of witness. 1935 R. 39. Where a Barrister who was an important witness to the proceedings at the time of re-

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gistration of the adoption deed, was tendered as a witness at the trial but refused by the trial Judge on the ground that he was engaged as counsel in the case, the appellate Court would be acting rightly in recording his evidence under R. 27. There might have been good reason why the witness should return his brief and cease to act as counsel in the case, but to deprive a party of the evidence of a witness is a very different matter. I.L.R. (1939) Kar. 258=1939 P.C. 152 (P.C.). Where an application under O. 41, R. 27 is made to introduce new evidence in appeal without giving adequate reason for its non-production at the proper time, and the evidence sought to be introduced has no real bearing on the questions involved in the appeal, such application should not be granted as admission of evidence at this stage will mean introducing new and inconsistent claim in appeal, which the other party will have no opportunity of meeting. 39 P.L.R. 602=1937 Lah. 370.

PROCEDURE.—When additional evidence is admitted, sufficient opportunity must be given to tender rebutting evidence. 36 I.C. 955; 1923 C. 300; 25 P.L.R. 1915=28 I.C. 14; 43 I.C. 320; 20 L.W. 840=48 M.L.J. 32; 41 C.L.J. 194=1925 C. 671; 98 I.C. 129=1927 C. 140; 1935 R.D. 319. But see 56 C.L.J. 246. When appellant raises a new plea, not pressed in Courts below, the other side should be allowed to meet it by additional evidence. 72 I.C. 239=2 P. 607. See also 1938 Pat. 11. When documents are admitted, opportunity must be given for objections to its admissibility. 1924 C. 403; 1938 Pat. 11. Where a party relies upon any documentary evidence or *riwaj-i-am* in support of a custom pleaded by him, for the first time in appeal, then before he can be allowed to do so the opposite party must be given an opportunity of rebutting presumption raised by it in favour of the party relying. 1934 L. 462. Additional evidence which impeaches the testimony of a witness examined in the Court below, should not be allowed, at least without that witness being called and given an opportunity to contradict the additional evidence. 36 A. 93=41 I.A. 76=26 M.L.J. 153=18 C.W.N. 521 (P.C.). The only function of a Court of facts is to do complete justice between the parties. Court should not reject documents as to the genuineness of which there could possibly be no room for doubt on such technical grounds as that they were produced at a last stage, etc. 10 Pat.L.T. 356=1929 P. 324. See also 1930 P. 105. Courts should refrain from sending for the records in an informal manner for the purpose of looking into documents which had never been legally tendered in evidence. 1930 L. 750. In a case governed by the specific directions contained in Rr. 27 and 28, an order of remand purporting to be passed by the Court in the exercise of its inherent power is vitiated by material irregularity. 133 I.C. 205=1931 M. 791=60 M.L.J. 475. See also 59 B. 430=37 Bom.L.R. 241=1935 B. 222.

RECORD OF REASONS.—Reasons for admitting additional evidence should be recorded. 38 B. 665=16 Bom.L.R. 641=68 I.C. 719; 19 I.C. 572; 50 I.C. 805; 15 I.C. 250=15 O.C. 253; 41 C.L.J. 194=86 I.C. 646=1925 C. 671; 118 I.C. 315; 1931 P.C. 175=35 C.W.N. 925; 9 O.W.N. 379=1932 O. 227; 64 M.L.J. 449=1933 M. 407. An appellate Court admitting fresh evidence is bound by R. 27 (2) of O. 41, to record its reasons for so doing, and under R. 29 must specify the points in which the evidence is to be confined and record on its proceedings the points so specified. 42 P. L. R. 261. See also 48 L. W. 797=1940 Mad. 372=(1940) 1 M. L. J. 50. Omission to record reasons renders the order without jurisdiction and the consent of the parties cannot validate such an order. 49 I.C. 510; 41 Bom.L.R. 841=1939 Bom. 401; (1938) 2 M.L.J. 740=1938 M.W.N. 1080=48 L.W. 546. See contra 51 I.C. 50; 64 I.C. 38; 90 I.C. 756; 5 C.L.T. 32 (record of reasons for admitting further evidence is only directory—not imperative). It is established that when both parties agree that further evidence is necessary and admission of that evidence is made by consent, any failure on the part of the Judge to record in due form the reasons for the admission of that evidence is not a matter which would justify the reversal of the judgment or the rejection of the additional evidence. But it cannot be said that mere absence of objection to the admission of additional evidence in appeal is a bar to the raising of objections to the correctness of the admission or to make it a ground of reversal of the judgment based on that evidence in second appeal. The absence of objection becomes important only when it appears to have been equivalent to a consent. 1940 M.W.N. 511=1940 Mad. 707. See also (1938) 2 M.L.J. 740. The formula admitted 'in the interest of justice' may mean everything or may mean very little. The word 'requires' in R. 27 (1) (b) means 'finds it needful'. 48 L.W. 797=1938 Mad. 372=(1938) 1 M.L.J. 50. Admission without recording reasons is illegal. 32 I.C. 826=3 L. W. 163; 71 I.C. 289=1924 A. 303. Reasons for admission could be recorded in the judgment. 85 I.C. 676 (2)=1925 A. 752. When the reasons are apparent in the judgment, they need not be separately recorded. 22 M. L.J. 14=12 I.C. 673; 5 C.L.T. 32. Non-record of reasons is an irregularity and a fresh trial may be ordered in certain circumstances. 1922 C. 48=77 I.C. 556. But see 98 I.C. 137=1927 C. 126; 14 L.R. 366 (Rev.)=17 R.D. 507. No reasons given—Objections not raised—Effect. 90 I.C. 756=1926 C. 369. The mere examination of the defendant by appellate Court on certain points which are apparently obscure as regards the execution of a receipt does not amount to taking additional evidence specially when the judgment of lower Court is not influenced by such Court; and hence the finding arrived at by lower Court is not vitiated even though no reasons are recorded for taking the additional evidence. 144 I.C. 92 (1)=34 P.L.R. 99=

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1933 L. 328. When appellate Court issued a commission and on the report of the commissioner gave a finding, without recording reasons for admitting additional evidence, the finding is not binding being based on the report of the commission which is inadmissible without record of reasons. 1923 A. 413; 1 L.W. 771=28 I.C. 11; 1927 A. 175. *See contra* 48 I.C. 137=111 P.W.R. 1918. "The peculiar circumstances of the case" is no reason. 19 I.C. 572. Where an appellate Court bases its judgment on an entirely new case, raised for the first time in the appeal, and in support of the case admits and relies on evidence, which is improperly admitted, inasmuch as it does not come under R. 27, its judgment cannot be upheld in second appeal and the Court sitting in second appeal will not take into consideration the new case. 1938 Sind 198.

SUBSTANTIAL CAUSE—WHAT IS.—Additional evidence may be taken on substantial causes, other than those particularly specified and necessary to meet ends of justice. 2 P. 676=50 I.A. 186=45 M.L.J. 578 (P.C.); 1923 L. 584; 30 I.C. 402=38 M. 414; 22 M.L.J. 14=12 I.C. 673; 14 I.C. 140=36 M. 477. What is substantial cause will depend on the facts of each case. 32 I.C. 908. Where on almost every important point there is an inherent *lacuna* on the record and it is not possible for appellate Court to come to a satisfactory finding on the question in issue, the only proper course is to remit the case to trial Court for further enquiry under R. 27, C. P. Code. 35 P.L.R. 779=1934 L. 664 (2). *See also* 14 P. 595=16 P.L.T. 613=1935 P. 178. Discovery of fresh evidence and inability to produce it through no fault or negligence of the party is substantial cause. 28 I.C. 694=28 M.L.J. 334; 47 A. 412=23 A.L.J. 193. *See contra* 86 I.C. 505=1925 N. 284. Discovery of fresh evidence under such circumstances as would warrant an application for review under O. 47, R. 1 may be brought under "any other substantial cause." 88 I.C. 586=1925 A. 808. *See contra* 84 I.C. 74 (2)=1924 B. 227; 61 C.L.J. 373. Additional evidence can be allowed when there has been a wrongful refusal to grant an adjournment by lower Court. 23 Bom.L.R. 769=46 B. 184. Appellate Court can examine any parties if for the sake of doing justice and for the purpose of making sure of facts, it is considered necessary. 42 A. 48=17 A.L.J. 945. Further evidence can be advanced in appeal when a party has been prevented by the action of trial Court from adducing all the evidence he could. 37 M. 455=22 M.L.J. 217; 90 I.C. 630. Where as a result of a misapprehension of the ruling of trial Court as to burden of proof and as to who should lead evidence, a party to the suit refuses or is not permitted to adduce evidence, it is necessary that appellate Court should interfere with the decree and allow the party an opportunity to adduce evidence in support of the case, as that is necessary in the ends of justice. 40 L.W. 848=67 M.L.J. 831. Addi-

tional evidence can be allowed if there has been failure of justice by reason of absence of proof on a technical aspect of the case. 21 L.W. 210=86 I.C. 576=1925 M. 444. Case where sufficient cause was held to exist. 1934 A. 948=153 I.C. 674.

SUBSTANTIAL CAUSE—WHAT IS NOT.—That evidence already adduced is unsatisfactory and insufficient, is not a substantial cause. 39 I.C. 886=25 C.L.J. 473. *See also* 136 I.C. 17=1932 L. 135. Where a party has had plenty of opportunity to examine a person as witness but fails to do so appellate Court may refuse to permit his examination as witness for the first time. 12 P. 359=14 Pat.L.T. (Supp.) 1=1933 P. 306; 1941 O.W.N. 643=1941 O.A. 412. Nor negligence of pleader in not tendering evidence at proper time. 125 I.C. 33; 33 Bom.L.R. 608=125 I.C. 423=1930 B. 272; 32 P.L.R. 813; 1940 A.W.R. (C.C.) 428=1940 O.W.N. 999. As to negligence of guardian, *see* 1929 L. 21. Nor the mere fact that a litigant was not aware of the existence of documentary evidence at the time of trial. 68 I.C. 334. There is no sufficient cause to admit additional evidence when a point is sufficiently covered by an issue and the parties had every opportunity of producing evidence on it. 49 I.C. 115=5 O.L.J. 768; 102 I.C. 27. *See also* 139 I.C. 444=1932 M. 709. The mere fact that plaintiff might have been better advised to supply for a commission at the trial of the suit would not by itself warrant the issuing of a commission by appellate Court. Far less could it be held to justify appellate Court in issuing a general order for the admission of such additional evidence as either of the parties might wish to produce. 148 I.C. 962=15 Pat.L.T. 142=1934 P. 284.

TIME OF ADMISSION.—The legitimate occasion for admitting additional evidence is when on examining records there is an inherent defect. 40 C. 402=17 C.W.N. 615; 10 I.C. 332; 31 B. 381 (P.C.); 66 I.C. 370; 31 M. 114; 42 C. 675=19 C.W.N. 401; 4 Pat. L.T. 418=71 I.C. 881; 53 I.C. 567; 55 I.C. 226. *See also* 58 I.A. 254=10 P. 654=61 M. L.J. 489 (P.C.) and other cases cited in the commencement of the notes under the rule. Ordinarily it is not desirable to hear an application for further evidence until appellate Court has heard the appeal and considered the evidence already on record. 120 I.C. 746=1930 M. 343. *See also* 1931 P.C. 175=134 I.C. 669 (P.C.). A preliminary application to admit fresh evidence before the appeal is heard is not warranted by this rule. 42 C. 675=19 C.W.N. 401. Appellate Court cannot admit documents after arguments are closed without recording reasons therefor. 63 I.C. 423=19 A.L.J. 402; 1924 C. 403; 35 I. C. 698=24 C.L.J. 457; or in the absence of the opposite party. 37 P.L.R. 563.

WHEN ADDITIONAL EVIDENCE COULD BE ADMITTED—ILLUSTRATIVE CASES.—Admitting fresh evidence is not confined to cases where the Court *suo motu* desires to call for fresh evidence. 12 I.C. 332=14 O.C. 327. Whether additional evidence should be admitted

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should be decided when appeal is actually heard. 98 I.C. 129=1927 C. 140. Additional evidence can be admitted when party through no fault of his was unable to produce it at the trial. 12 I.C. 332=14 O.C. 327. Applicant must show exercise of due diligence and care in search for documents. 12 L. 172=1930 L. 1004; 10 Pat.L.T. 10=115 I.C. 674=1929 P. 98. An appellate Court can issue a commission for examining accounts and remedying mistakes and omissions made by the previous Commissioner. 3 L. 382=1923 L. 115. Appellate Court can refer to statements not on record but referred to by trial Court and contained in the record of a connected case. 32 I.C. 312=193 P.L.R. 1915. Where a document proving the final publication of a record-of-rights is admitted in evidence by appellate Court without any objection, the document being simply a report mentioned in an order-sheet of a Revenue Officer exhibited in trial Court—the report not having been put in before trial Court—and appellate Court takes the report as additional evidence in order to enable it to pronounce the judgment in the case, the reception of the additional evidence is not illegal or unwarranted under R. 27. 40 C.W. N. 821. Admission is to be with a view to enable the Court to pass judgment in favour of one party, but it is to be only when the original one is defective. 57 I.C. 843; 47 I.C. 141. Fresh evidence on question of fact not admissible. 95 I.C. 300 (2)=1926 C. 941. An application for being adjudicated an insolvent was dismissed by District Judge on the ground that appellant had failed to prove that he was unable to pay debts and that the squares which were part of his assets were worth much more than what appellant had represented them to be and that he had made no attempt to sell them or to obtain the permission of the Deputy Commissioner. He appealed to High Court and along with the memorandum of appeal filed a copy of a subsequent order of the Deputy Commissioner rejecting his application for permission to sell the squares for a certain price. *Held*, that even if this appeal were to be dismissed as it was competent to the appellant to file a fresh application for adjudication before District Judge, and in the proceedings on that application to prove the fact that the Deputy Commissioner had refused to grant him sanction to sell the squares, this was a fit case in which High Court should exercise its powers under R. 27 and admit the copy of the order of the Deputy Commissioner. 1933 L. 823=147 I.C. 190. Where in a suit for ejectment the defendant pleaded that he held under a written lease which he had lost but the suit was decreed and the lease was subsequently discovered and a review against the decision on the ground of discovery of new and important evidence was also dismissed, on a question as to whether that evidence could be admitted in an appeal against the order of ejectment of the trial Court preferred after the application for re-

view and before its dismissal, it was held that in the circumstances the document should be admitted and that there was no absolute prohibition against the admission of evidence after the failure of such a review application. 1941 R.D. 825=1941 A.W.R. (Rev.) 843.

WHEN EVIDENCE COULD NOT BE ADMITTED—ILLUSTRATIVE CASES.—If evidence, which was either in the possession of parties at the time of the trial or which might with proper diligence have been obtained, is either not produced or has not been procured, and the case is decided adversely to the party to whom such evidence was available, no opportunity for producing or using that evidence in appeal ought to be given to that party. 39 C. W.N. 322. More especially in the absence of special circumstances explaining such non-production at the proper time. 42 L.W. 658=69 M.L.J. 707. And also where he is unable to tell the Court what the documents are or what their relevancy is. 17 Pat.L.T. 709=1936 P. 600. An appellate Court should not, in the absence of sufficient explanation, admit a document as a matter of course in appeal, when no attempt was made to produce it in the trial Court. 1936 O.W.N. 722. Or when there is nothing to show that the trial Court refused to receive the same when tendered, or where there is no inherent lacuna or defect in the evidence as it stands. 39 C. W.N. 668=62 C.L.J. 251; 43 L.W. 722=1936 M. 385=70 M.L.J. 400. Much more so when the party was given an opportunity in the original Court for producing it. 1935 R. 21. In the absence of any lacuna in the evidence as it stands on the record, the appellate Court will be going out of its way if it summons additional evidence in an appeal for the sole purpose of comparison of handwriting and signature in documents. 156 I.C. 253=1935 L. 555.

DISCOVERY OF EVIDENCE.—Original document which was supposed to be lost, of which secondary evidence was given, could be admitted in appeal. 32 I.C. 711. When fresh evidence was available only long after disposal of suit, it can be admitted in appeal. 71 I.C. 453=37 C.L.J. 491. *See contra* 53 I.C. 567. Discovery of fresh evidence is no ground for admission of it. 97 I.C. 369=1927 L. 11 (34 I.A. 115, Foll.).

EXCLUDED EVIDENCE.—Evidence improperly excluded by the trial Court, can be admitted in appeal. 34 C.L.J. 160=26 C.W.N. 1022; 27 I.C. 516. This does not amount to taking additional evidence. 52 I.C. 327. Additional evidence can be admitted when the omission was due to inadvertence or mistake, especially when it consists of documents, the genuineness of which cannot be impeached. 14 P.R. 1916=33 I.C. 813.

SUBSEQUENT EVENTS.—Where pending an appeal from a decree in a rent suit, a decree is passed in favour of the appellant in a title suit, the latter should be admitted in evidence. 64 I.C. 721. *See also* 88 I.C. 553=1925 P. 612. When subsequent events make the relief granted inappropriate, additional evidence can be taken. 48 I.C. 187=111 P.

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W.R. 1918. Public documents coming into existence after the filing of second appeals may be admitted by the High Court, 4 Pat. L.J. 312=50 I.C. 857. *Riwaj-i-am* which was prepared after the appeal was filed was admitted in evidence in appeal. 132 I.C. 6=31 P.L.R. 1012. Statements of witness in proceedings under Lunacy Act commenced after dismissal of suit between same parties were admitted at appellate stage. 1927 P.C. 123=26 L.W. 94=31 C.W.N. 1087 (P.C.).

WAIVER OF OBJECTION.—A party cannot object to a portion of evidence admitted on appeal and at the same time rely on another portion. 1922 N. 119. Where a party fails to object to the reception of additional evidence, at the time of hearing of the appeal, he cannot raise the objection in second appeal. 159 I.C. 460=1936 P. 57 (public documents); 17 Pat.L.T. 709=1936 P. 600 (objection to secondary evidence on ground of irrelevancy and inaccuracy).

CONSENT OF PARTIES FOR ADMISSION OF ADDITIONAL EVIDENCE.—Where by consent of parties the appellate Court admitted additional evidence, and the reasons given by it did not strictly comply with the terms of O. 41, R. 27. *Held*, that the consent of the parties may be treated as an admission by both parties that the grounds for admitting additional evidence existed. Still the Judge is not absolved from the requirement of satisfying himself as to the necessity for this evidence but the consent may to a large extent cover the defects in the record of the reasons for the order. Even if the reasons recorded by the Court are deemed inadequate, the consent of the party to the admission of further evidence precludes him from questioning the admissibility of that evidence in subsequent proceedings. (55 I.C. 226, Not Foll.) 1939 Mad. 54=48 L. W. 546=(1938) 2 M.L.J. 740. *See also* 1940 Mad. 707.

WHAT COULD NOT BE ADMITTED.—Evidence tendered at the time of argument in trial Court and rejected should not be admitted in appeal. 1921 L. 279=4 L.L.J. 371. Appellate Court should not examine an attesting witness who by inadvertence had not been called in first Court. 5 P.L.J. 263=56 I.C. 983; for an exceptional case, *see* 11 A.L.J. 371=21 I.C. 619=35 A. 353.

NEGLIGENCE.—A litigant is not entitled to indulgence of being allowed to adduce additional evidence if he was negligent in the Courts below. 47 C. 662=47 I.A. 11=38 M. L.J. 424 (P.C.); 56 I.C. 983=1 Pat.L.T. 701. Additional evidence cannot be allowed when the party had deliberately declared in the lower Court that he had no evidence. 25 I. C. 587=16 M.L.T. 301.

DISCOVERY OF EVIDENCE.—Evidence could not be admitted in appeal on the ground that it was discovered after the filing of the appeal. 9 I.C. 251=9 M.L.T. 323; 1926 O. 74.

PUBLIC DOCUMENTS.—It is not proper to admit a judgment which is not *inter partes* nor conclusive and is simply an addition of a

disputable point to the already existing evidence. 50 I.C. 119=23 C.W.N. 242. Settlement papers cannot be admitted after first Court's decision. 29 I.C. 219. Documents in possession of a party cannot be allowed in evidence in second appeal. 103 I.C. 215=1927 L. 574. *See also* 39 C.W.N. 322.

EXPERT EVIDENCE.—Where in a suit on a promissory note appellate Court being unable to believe evidence on either side acted upon the report of the thumb impression bureau, to whom it sent the document, *held*, that the procedure was unwarranted by law. 28 I.C. 321. In a suit on a handnote the defendant pleaded alterations in the note. The suit was decreed. In appeal Court obtained a written opinion as to the date of stamp affixed and used it for giving judgment in favour of defendant. *Held*, that the opinion not having been formally proved and the plaintiff not having been given an opportunity of cross-examining the person giving the opinion thereon ought not to have been taken in evidence, and the finding of the Judge based upon the opinion contained in that letter must be discarded. 11 P. 782=1932 P. 352. When no application was made to appellate Court to admit a document excluded by trial Court, appellate Court might refuse to consider the document. 28 I.C. 378=28 M.L.J. 115.

SECOND APPEAL.—High Court in second appeal can admit fresh evidence, if necessary, for the disposal of the appeal. 52 I.C. 625=1919 M.W.N. 455. The production of additional evidence in second appeal is open to strong objection. But an exception can be made in a case where it is necessary to prove what the entries in the revenue papers throughout the years prior to the suit have been. 1941 R.D. 19. Where the additional evidence was within the knowledge of the appellant all along and he has not explained why he did not produce it at the trial, he cannot be allowed in second appeal to fill up gaps in his case by calling such evidence. Obviously O. 41, R. 27 does not apply to such a case. 43 P.L.R. 41. Where a registered document which was held to be inadmissible in evidence on the ground that it had not been properly presented for registration is after the decision of the appeal re-registered under the provisions of S. 23-A of the Registration Act, and the defect on the basis of which it had been held to be inadmissible was removed, the re-registered document can be admitted in evidence on second appeal. 40 P.L.R. 432. Evidence improperly admitted in appeal will not be considered in second appeal. 40 C. 402=17 C. W.N. 615; 129 P.R. 1916=36 I.C. 382; 1930 L. 750 (1921 L. 279, Foll.); 10 Pat.L.T. 10=115 I.C. 674=1929 P. 98. *See also* 16 Pat.L.T. 49; 81 I.C. 999=31 C.L.J. 261=1925 C. 98. Findings based on evidence admitted in appeal will not be interfered with in second appeal. 16 Pat.L.T. 49=1935 P. 105 (2); 40 C.W.N. 821. Waiver of objection, what amounts to. 55 I.C. 226. Effect of waiver of objection to admit evidence. 36 C. 833=13 C.W.N. 830 (P.C.). When judgment of an appellate Court was delivered

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

LOC. AMS.—[ALLAHABAD AND OUDH.] O. 41, r. 27 (1) :—

(1) Insert the following as clause (b) :—

“(b) the evidence sought to be adduced by a party to the appeal, which after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made, or”

(2) Convert the existing clause “(b)” into “(c)”.

¹[MADRAS.] Substitute the following :—

Production of additional evidence in Appellate Court.

“27. (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) the party seeking to adduce additional evidence satisfied the appellate Court that such evidence, notwithstanding the exercise of due diligence, was not within his knowledge or could not be produced by him at or before the time when the decree under appeal was passed, or

LEG. REF.

¹Fort St. George Gazette, Part II, p. 725, dated 19th August, 1941.

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in ignorance of the judgment of High Court delivered the prior day in a connected suit, the judgment of High Court could not be admitted in second appeal, but the proper course would be to apply for review or revision. 51 I.C. 652=29 C.L.J. 313. See *contra* 52 I.C. 625=1919 M.W.N. 455. See also 49 C.L.J. 478=1929 C. 492.

APPEAL.—See 1937 Sind 233. An order by an appellate Court refusing to admit fresh evidence under R. 27 is not appealable. 18 R.D. 665=16 L.R. 135 (Rev.). Where an order for the reception of additional evidence in appeal is made by the appellate Court without giving any reasons therefor, as required by O. 41, R. 27, there is no doubt a substantial error or defect in procedure but where it has not interfered with the decision on the merits the decision cannot be interfered with in second appeal. 1939 A.L.J. 903=1939 All. 663.

REVISION.—The order of the Court permitting additional evidence is discretionary and it could not be set aside in revision. 137 I.C. 513=33 P.L.R. 330. Where the lower appellate Court wrongly remands a case under inherent power without adopting the procedure laid down in R. 27, High Court can interfere in revision. 59 B. 430=37 Bom.L.R. 241=1935 B. 222.

REMAND.—O. 41, R. 27 (1). (b), confers a limited power on an appellate Court to be used where certain definite evidence is required and it does not entitle a Court to allow a plaintiff to add to his case, evidence which he should

have added in the first instance. There cannot be a remand, to allow a plaintiff to produce any additional evidence he wants, on the ground that the evidence on record is not sufficient to prove his case. 1938 A.L.J. 930=1938 All. 621.

REVIEW.—The ordinary way of bringing new and important matter to the notice of the Court which was not within party's knowledge at the time of decree, is by way of review. 47 B. 674=25 Bom.L.R. 310. See also 51 I.C. 652=29 C.L.J. 313; 52 I.C. 625=1919 M.W.N. 455.

O. 41, R. 27 (1) (b) (as altered by Allahabad High Court).—Under the new sub-R. (1) (b) of R. 27 introduced by the Allahabad High Court, the question of admission of new evidence does not depend on the requirements of the appellate Court, and a party has a right if he satisfies the Court that he exercised due diligence and the new evidence was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made. 159 I.C. 202=1936 A. 217.

O. 41, Rr. 27 and 29.—When additional evidence is to be admitted in appeal for the first time, reasons should be given and also the points on which the evidence is to be recorded should also be specified as required by Rr. 27 and 29 of O. 41. These should be recorded in a separate order before the evidence is let in so that the other side would know on what points the additional evidence is going to be led and whether any evidence in rebuttal should be adduced. Omission to follow the procedure laid down by Rr. 27 and 29 of O. 41 is a gross irregularity. 41 Bom.L.R. 841=1939 Bom. 401.

(c) the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the appellate Court may allow such evidence or document to be produced, or witness to be examined."

[PATNA.] O. 41, r. 27 (1).—Insert the following as cl. (b) :—

"(b) the party seeking to adduce additional evidence satisfies the appellate Court that such evidence, notwithstanding exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made, or."

Convert the existing clause "(b)" into cl. "(c)".

28. Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

29. Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

Judgment in appeal.

30. The Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders.

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O. 41, R. 28.—Documents should be exhibited. 38 B. 665. On remand lower appellate Court can appoint Commissioner to examine witnesses. 1925 L. 39. Lower appellate Court calling for revised findings on the ground of evidence being shut out—Trial Court's decree set aside—Validity of order. 106 I.C. 498=1927 M. 1065.

O. 41, R. 29.—The rule in O. 41, R. 29 serves a very useful purpose namely that it ensures that the appellate Court will consider exactly on what points there is a lacuna which requires to be rectified and also that an opportunity will be given to both sides to adduce additional evidence on particular points on which additional evidence is allowed to be taken in appeal. 48 L.W. 797=1938 Mad. 372=(1938) 1 M.L.J. 50. See also 42 P.L.R. 261.

O. 41, R. 30.—An appellate Court is not entitled to dismiss an appeal for want of prosecution merely because the appellant or his pleader is for any reason unable to argue the appeal. The Court, if it thinks fit to refuse an adjournment applied for by the appellant or his pleader on the ground of inability to argue the case, must, after such refusal, proceed in the manner laid down by Rr. 30 and 31. It is bound to decide the appeal before it, to pronounce judgment in open Court containing the points for determination, its decision thereon and the reasons for that decision. 1937 A.L.J. 174=1937 A. 284. See also 1940 A.L.J. 121. A Court is justified in dismissing the appeal for want of prosecution only where a party is bound to do something and has failed to do it. The law gives an absolute right to the appellant to

be heard; this right cannot be converted into a duty. The appellant may or may not avail himself of this right; and merely because he does not avail himself of his right to argue his appeal, he cannot be said to be guilty of "want of prosecution" of his appeal. The dismissal of the appeal in such a case for want of prosecution is not justified and is liable to be set aside. 1937 A. 284. Judgment was not pronounced in open Court and a party had notice of the date of its pronouncement—Limitation for appeal. See 51 I.C. 239=27 P.R. 1919. See also 124 I.C. 346=1930 L. 152. Where an appeal is dismissed under R. 11, the provisions of Rr. 30 and 31 relating to judgment and R. 35 relating to decree have no application and the Court which passed the decree appealed from has jurisdiction to entertain an application for amendment of the decree. 142 I.C. 143=1933 N. 117. There is nothing in O. 41, R. 30 to prevent a Court from deciding a preliminary issue before passing its final judgment, and an order announced in two parts is, therefore, not illegal. 19 Lah.L.T. 31. Where an appellant appears personally, but is not prepared to argue the appeal, the appellate Court can dispose of the appeal under R. 30 and not R. 17 of O. 41. But in such a case it is not necessary for the Court to give a decision on any point or the reasons for the decision, inasmuch as there was in fact no point for determination raised before the Court. It is sufficient for the Court to pass an order of dismissal for default, which does not necessarily mean default of appearance but rather means dismissal for default of proof. I.L.R. (1940) All. 220=1940 A.L.J. 126=1940 All. 248.

Contents, date and signature of judgment.

31. The judgment of the Appellate Court shall be in writing and shall state—

- (a) the points for determination ;
- (b) the decision thereon ;
- (c) the reasons for the decision ; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled ;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

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O. 41, R. 31: SCOPE.—Appellate Court must conform strictly to the provisions of this rule. 31 I.C. 895=9 Bur.L.T. 59; 95 I.C. 925=1927 O. 95=1 Luck. 458. Even if the judgment is delivered on hearing an appeal under O. 41, R. 11, compliance with the provisions of this rule is necessary. 1931 A.L.J. 875=1931 A. 597 (F.B.); 53 A. 528=132 I.C. 200=1931 A. 589. But see 142 I.C. 143=1933 N. 117. But if there is substantial compliance, the judgment is not vitiated. 1931 A.L.J. 875=1931 A. 597 (F.B.). See also 1937 Sind 247. The provisions of this rule are mandatory. 9 I.C. 804; 21 A.L.J. 567=1924 A. 100. But see 59 I.C. 673=14 S.L.R. 132. A judgment which does not comply with the provisions of R. 31 is no judgment in law. 144 I.C. 306 (1)=1933 L. 332. A judgment of an appellate Court, which is merely a judgment of approval, referring to practically no document and to no evidence, and which merely says the trial Court had done very well in deciding the suit is not a proper judgment. (20 Bom.L.R. 461; 108 P.L.R. 1916; 2 O.L.J. 50 and 1928 L. 655, Rel. on.) 1930 L. 152. See also 117 I.C. 471; 112 I.C. 845; 112 I.C. 673; 112 I.C. 698. Appellate Court need not examine trial Court's finding of fact not objected to. 23 A.L.J. 653=89 I.C. 374=1925 A. 585. A suit contesting an alienation ought not to be dismissed on the ground that it referred to a small plot of useless land. 87 P.L.R. 1917=42 I.C. 244. As to the applicability of the rule to a case under S. 476, Cr. P. Code, see 143 I.C. 672=35 C.W.N. 660=1931 C. 454. There is no authority which lays down that the appellate Court before recording a finding of fact should refer to each and every document or piece of evidence on the record while recording its finding. It should be assumed that all the relevant evidence was brought to the notice of the Judge and he had it in his mind when he delivered his judgment. 164 I.C. 252=1936 L. 543. Where, in a single judgment, a Judge disposes of four appeals, each of which raises a question quite distinct from that raised in the other three and the parties are also not the same, and the Judge has not given proper consideration to the points for decision in the appeals, in none of the four appeals can the so-called judgment be regarded as a judgment within the meaning of O. 41, R. 31. 163 I.C. 604=1936 R. 262.

CONTENTS OF JUDGMENT.—A judgment in appeal must set out the evidence on which it

is based. 63 I.C. 436. Appealable judgments must contain findings on all important points. 1925 C. 316. The judgment of the Court of first appeal should always be self-contained and should deal with material points in issue in such a way that the Court of second appeal might be in a position to know whether the first Court of appeal has properly applied its mind to the facts of the case or not. Besides the Court should not indulge in generalization but should confine itself to particular matters before it. 42 P.L.R. J. & K. 52. The judgment of the Court of appeal should be self-contained in every respect and the material points in issue should be properly discussed with reference to the evidence led by the parties. 42 P.L.R. J. & K. 42. The matters in dispute between the parties must be fully set forth with the findings in the judgment. 35 I.C. 237; 65 I.C. 479; 11 I.C. 915=4 Bur.L.T. 201. Judgment must state reasons for decision on all the points for determination, and on independent consideration, and must show that the Judge did not rely *en bloc* on the reasoning of the trial Court. 46 I.C. 161=20 Bom. L.R. 461; 28 I.C. 354; 1923 L. 658. An appellate judgment should contain a statement of the case as would show that the Court has understood the real issues, tried them and considered the evidence. 25 I.C. 596=1 O.L.J. 334. The judgment should be self-contained in every respect so as to give a clear indication to High Court that the Judge has applied his mind to the facts of the case and has arrived at an independent decision on the matters in controversy. This is all the more important as the finding of fact arrived at by lower appellate Court are binding upon High Court in second appeal. To refer merely to trial Court for the facts of the case is a wholly erroneous procedure. 36 P.L.R. 253=1934 L. 1009. All points raised in first Court and not abandoned in second Court must be considered. 26 B. 379=14 Bom.L.R. 418; 42 I.C. 838=3 P.L.J. 701. Where the appellate Court decides the appeal on a preliminary issue it is desirable that it should decide the case on the merits as well so as to obviate an order of remand if the decision should be set aside by High Court in appeal. 34 C.W.N. 836. In a suit for confirmation of possession and declaration of title, the appellate Court's finding merely that title was not proved, is a partial view of the case. 46 I.C. 328. A cursory judgment, not showing that the evidence on record has been fully weighed, is liable to be set aside.

LOC. AMS.—[ALLAHABAD.] O. 41, r. 31.—At the end of the rule *substitute* a semicolon for the fullstop and *add* the following :—

“ Provided that where the presiding judge pronounces his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the judge and shall bear the date of its pronouncement.”

[MADRAS.] *Substitute* the following for O. 41, r. 31 :—

“ 31. The judgment of the Appellate Court shall be in writing and shall state—(a) the points for determination ; (b) the decision thereon ; (c) the reasons for the decision ; (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled ; and shall bear the date on which it is pronounced and shall be signed by the Judge or the Judges concurring therein : Provided that where the presiding Judge is specially empowered by the High Court, to pronounce his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge.”

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27 I.C. 561=36 P.L.R. 1915. But *see* L.R. 3 A. 454. A judgment based on an indefinite conclusion “there is much force in the contention” is not in accordance with law. 54 I.C. 672=1 P.L.T. 27. Lower appellate Court’s judgment containing no points nor decision thereon and no reasons—It is not a valid judgment. 1928 M. 16.

CONTENTS OF AFFIRMING JUDGMENT.—An affirming judgment must show that the mind of the appellate Court has been brought to bear sufficiently upon the aspects of the case requiring his decision. 49 I.C. 504=1919 P. H.C.C. 88. Where the lower Court’s judgment is well written and exhaustive, an appellate Court may simply express concurrence but there should be enough to show that the Court of appeal has considered it fully and formed its own opinion. 13 I.C. 194; 97 I.C. 760=1927 C. 323. Full reasons must be given when affirming lower Court’s decree. 84 I.C. 946=1925 L. 246. Where judgment of first Court was full, and appellate Court appreciated the main facts but has dismissed the appeal in a short judgment, it is not irregular. 1923 C. 113; 91 I.C. 478=1926 C. 545. A general statement that the records were carefully considered, and no reason was found to interfere with trial Court’s conclusion is not a judgment. 46 I.C. 56=21 O.C. 309; 51 I.C. 46; 38 I.C. 509=2 P.L.J. 8; 95 I.C. 925. Where the judgment stated that the findings of lower Court were accepted but without dealing with or stating certain objections against the findings, *held*, it was not a judgment. 16 I.C. 354 and 382; 6 Bur.L.J. 82.

CONTENTS OF REVERSING JUDGMENT.—Law imposes on the Court of appeal an imperative duty and obligation of giving an adequate and satisfactory judgment when reversing a judgment. 43 I.C. 973. Full reasons for reversing a judgment should be given. 56 I.C. 816; 1926 N. 435. The aggrieved party can demand a consideration of the points on which the lower Court relied when a judgment is one of reversal. 34 I.C. 185. A reversing judgment of the appellate Court should discuss the matters fully; but where it fails to do so but has taken into account all evidence in arriving at the conclusion

the second appellate Court will not interfere. 150 I.C. 1137=1934 M. 169=66 M.L.J. 342. It is not necessary that judgment in the form prescribed in O. 41, R. 31 should be given when the appeal is dealt with under O. 41, R. 11. The provisions of R. 31, O. 41 relate only to a judgment pronounced in accordance with the provisions of O. 41, R. 30. 31 S.L.R. 167=1937 Sind 206. Appellate Courts should comply with the mandatory provisions of O. 41, R. 31 (3), and should state clearly the relief to which an appellant is entitled when a decree is reversed or varied. 1941 A.W.R. (Rev.) 101=1941 O.A. (Supp.) 89=1941 R.D. 30. When a Court of appeal allows an appeal in an abatement of rent suit, it is obligatory on the Court to specify the new rent. 1941 A.W.R. (Rev.) 504.

CONSIDERATION OF EVIDENCE ON RECORD.—It is the duty of appellate Court to consider the evidence on record. 51 I.C. 751. The judgment must show that the evidence on record and the grounds of appeal have been considered. 108 P. L. R. 1916=36 I. C. 6; 38 I.C. 814. Failure to weigh all evidence before the appellate Court, vitiates its judgment. 51 I.C. 11; 17 I.C. 898=5 Bur. L. T. 269. Omission to consider an important piece of evidence, vitiates the judgment. 49 I.C. 832. Non-mention of an obviously important document in judgment of an appellate Court is proof that it was not considered. 22 O.C. 312=54 I. C. 353. A Judge should not quote the judgment of another Court as his own, but should show his own appreciation of the evidence on record giving reasons for his findings. 37 I.C. 435=3 O.L.J. 620; 49 I.C. 733. R. 31, O. 41 does not say that if its requirements are not complied with, the judgment shall be a nullity. So starting a result would need clear and precise words. Indeed, the rule does not even state any definite time in which it is to be fulfilled. The time is left to be defined by what is reasonable. The rule from its very nature is not intended to affect the rights of parties to a judgment. It is intended to secure certainty in the ascertainment of what the judgment was. It is a rule which Judges are required to comply with for that object. No doubt in practice Judges do so comply,

32. The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or, if the parties What judgment may direct. to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the Appellate Court may pass a decree or make an order accordingly.

33. The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to Power of Court of Appeal. pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

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as it is their duty to do. But accidents may happen. A Judge may die after giving judgment but before he has had a reasonable opportunity to sign it. The Court must have inherent jurisdiction to supply such a defect. The case of a Judge who has gone on leave before signing judgment may call for more comment, but even so the convenience of the Court and the interest of litigants must prevail. The defect is merely an irregularity not affecting the merits of the case or the jurisdiction of the Court and is no ground for setting aside the decree. 43 C.W.N. 87=1938 P.C. 292 (P.C.).

O. 41, R. 31 and O. 20, R. 4 (2): JUDGMENT OF THE APPELLATE COURT—CONTENTS.—It is not a sufficient judgment within the C.P. Code to state that the Judge is in agreement with the finding of the Court below. He is bound to express his reasons for the finding at which he arrives, and, although he need not, so far as the questions of fact are concerned; deal in detail with the evidence, a definite finding must be arrived at by him in order to comply with the provisions of the Code. 19 Pat.L.T. 362=1938 Pat. 69.

O. 41, Rr. 32 and 33.—Scope—Deficiency in court-fee on plaint—Order for payment by trial Court within fixed time—Appeal—Power of appellate Court to extend such time. See 1937 A.L.J. 1346=1938 A.W.R. 13 (H.C.).

O. 41, R. 33: OBJECT OF RULE.—The object of this rule is, speaking generally, to enable appellate Court where its decision interferes with, modifies or extends the decision of lower Court to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who are not in fact appealing from the decision of trial Court. 4 P. 37=1925 P. 285; 97 I.C. 65; 1928 A. 77. See also 1939 R.D. 8=1939 A.W.R. (B.R.) 102; 16 Pat. 557=321. The words of O. 41, R. 33 are very wide, and the object of the rule is to do complete justice between the parties to the appeal. Where in order to grant relief to an appellant it is essential that some relief should at the same time be granted to the

respondent also the Court has power to grant such relief to the respondent, although the respondent has preferred neither an appeal nor a memorandum of cross-objections against the decree under appeal. 1937 A.L.J. 804. An appellate Court has ample powers under O. 41, R. 33 to correct a purely technical mistake in the judgment of the lower Court, even though the respondent has not appealed against the decree to correct such mistake. 1937 A.L.J. 280=I.L.R. (1937) All. 489=1937 All. 401. The exercise of the powers under O. 41, R. 33 is discretionary and is normally exercised only in cases in which the failure to exercise them would lead to impossible, contradictory and unworkable orders. 170 I.C. 195=1937 Pesh. 69. What is contemplated by R. 33 of O. 41 is that an order may be passed in favour of a person who has not appealed, but not that an order can be passed against a person who is not a party to the appeal and who is not on the record. 171 I.C. 315=1937 Sind 236. See also 31 S.L.R. 486. Power to set matters right. 91 I.C. 519=1926 M. 631. See also 6 O.W.N. 644=119 I.C. 462=1930 O. 13. The rule was intended to further the ends of justice and not to favour one party over another. Relief was refused on the ground that if granted it would defeat the bar of limitation which had accrued. 14 P.L.T. 113; 1934 P. 589; 12 P. 261=1933 P. 224; 18 R.D. 618=16 L.R. 26 (Rev.).

SCOPE OF.—O. 6, R. 7 clearly empowers the Court to grant any relief that it may think just to the same extent as if it had been asked for. Similarly R. 33, O. 41 confers on the appellate Court very wide powers to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require. 158 I.C. 71=1935 L. 378. R. 33 is no doubt expressed in wide terms and must be applied with caution, so as not to enable a litigant to avoid the provisions of other statutes such as the Limitation Act or the Court-Fees Act. A test of its application is whether the questions which arise between the several sets of parties are so connected that one of them ought not to be allowed

¹[Provided that the Appellate Court shall not make any order under section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]

Illustration.

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The Appellate Court decides in favour of X. It has power to pass a decree against Y.

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¹ Proviso added by Act IX of 1922.

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to re-open matters so far as he is concerned without opportunity allowed, in the interests of justice, to another to protect himself by urging his objections, even though they may be directed, not against the appellant but against a co-respondent. But there is nothing to restrict the applicability of the rule to cases where the grounds of the judgment below are left undisturbed. 13 P. 200=15 P.L.T. 42=1934 P. 134. See also 34 A. 32; 1929 M.W.N. 112; 24 I.C. 208; 14 N. L.R. 56; 50 M. 614=52 M.L.J. 612=1927 M. 620; 105 I.C. 600=1927 C. 831; 1926 C. 1042=96 I.C. 474; 97 I.C. 346=1927 M. 974; 1928 M.W.N. 74; 1928 A. 77. Construction of rule. See 113 I.C. 32. O. 41, R. 33 contemplates modification of the decree by the appellate Court at the instance of the appellant. It has no scope where the respondents in effect want to maintain the decree of the lower Court or when the decree under appeal is not modified in appeal. It is not open to a respondent, who has not preferred any memorandum of cross-objections or any appeal, to attack a finding which if reversed would totally or in part destroy the decree made in favour of the appellants. 69 C.L.J. 385=1939 Cal. 582. See also 1939 P. 504. The appellate Court can under R. 33 record the compromise and give a decree in terms of it. 15 L.R. 14 (Rev.). There is no doubt that under O. 41, R. 33, appellate Court has been given very wide powers to do complete justice between the parties. Under the rule the appellate Court enjoys a discretionary power to pass such decree as ought to have been passed by the trial Court. This power however can be exercised only in favour of a party to the suit who was not impleaded in the appeal. It is not permissible under this rule to pass any decree against a party who has not been impleaded as a respondent in the appeal. 1940 A. L. J. 161=1940 All. 225. No Court has jurisdiction to pass a decree against any person who is not a party to the proceeding before it, and an appellate Court has no power under O. 41, R. 33 to pass a decree against a person who is not a party on the record. If a plaintiff whose suit has been dismissed chooses to implead in his appeal only one of two co-defendants against whom an alternative claim was made, he has only himself to blame, if the respondent succeeds in the appeal in shifting the liability on to the defendant who has not

been impleaded in the appeal. 51 L.W. 615=1940 Mad. 609. Although the wording of O. 41, R. 33 gives wide powers to the appellate Court, those powers should not be exercised in such a way as to interfere with the provisions of other enactments, e.g., the Court-Fees Act. 18 Pat. 768=1940 Pat. 137.

APPLICABILITY.—It is applicable to all cases where an appeal is heard under the Act. 34 A. 32; 40 M. 846; 34 M.L.J. 361. Rule applies to all classes of suits including a suit for partition. 49 C. 379=69 I.C. 981. See also 1930 R. 190; 185 I.C. 638 (applicability of r. 33 to second appeals). The provision of this rule should be cautiously applied and only to cases where but for recourse to it the ends of justice would be defeated. 89 I.C. 24; 56 C.L.J. 285. See also 34 A. 32; 51 A. 63; 1929 C. 28; 116 I.C. 824; 1930 R. 190. And where success of the appeal filed would render it just that relief should be granted against a party who had not appealed, (e.g.) where the suit was against two defendants in the alternative. 29 N.L.R. 173=144 I.C. 226=1933 N. 186. Where in a suit for a declaration that certain proceedings taken against plaintiffs were *ultra vires* the Court passed an order of mandamus under S. 45, Specific Relief Act, the appellate Court could pass a decree for declaration as originally prayed for if it was of opinion that no order of mandamus could be granted. 10 R. 412=139 I.C. 566=1932 R. 123 (F.B.). Court will not apply, without strong reasons, this rule in favour of party who has appealed or lodged cross-objections and failed. 1925 L. 2. R. 33 ought not to be applied to cases where there has been a distinct and separate decree against defendants who have not chosen to appeal. 150 I.C. 784=1934 P. 524. Where the decree though in form one single decree, really amounts in effect to two distinct decrees against two different persons on two separate causes of action or transactions, the Court of appeal is not justified in interfering with the part not appealed against, although the questions of fact and law involved in both of them are to some extent the same. 16 P. 45=17 P.L.T. 780=1937 P. 40. The provisions of O. 41, R. 33 ought not to be applied to cases where there has been a distinct and separate decree against those parties who have not chosen to appeal. In such a case, if such parties do not choose to come on record, no order should be passed in their favour in that state of the record, although the Court can bring them on the record under O. 41,

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R. 20, and after proper steps, may pass such order. 18 Pat. 768=1940 Pat. 137. See also 1935 L. 889. Appeal from part of the decree and by some parties only enables the Court to exercise its power under this rule. 1925 P. 40. Appellate Court can in appeal against a portion of decree set aside whole decree in absence of cross-appeal or objections by respondents due to sufficient reasons. 85 I.C. 312=1925 M. 266; 123 I.C. 381. The powers of an appellate Court under O. 41, R. 33 are sufficiently wide to enable it to grant a relief to a plaintiff against a defendant though as against him the plaintiff has not appealed. 17 Pat. 338=1938 Pat. 275. See also 45 C.W.N. 15. O. 41, R. 33 has been enacted to empower the appellate Court to do complete justice between the parties. The appellate Court has power under the rule to vary the decree of the lower Court although the variation may benefit a party who has not appealed, for example, where such party has not been able to find the money for preferring an appeal and the lower Court's judgment is undoubtedly wrong. 47 L.W. 751=1938 Mad. 322=(1938) 1 M. L.J. 154. Some defendants were *ex parte* at the trial. The suit against all the defendants having been based on the document held to be not genuine, it would be illogical and unjust to hold that while the suit had been dismissed against defendants 2 to 6 the decree against defendants 1 and 7 should be allowed to stand. 145 I.C. 289=37 L.W. 798=1933 M. 529=65 M.L.J. 15. See also 1938 P.W.N. 523; 1938 Pat. 323=174 I.C. 452; I.L.R. (1938) Lah. 148=1938 Lah. 188; 1938 Pat. 47; 187 I.C. 634; 1940 All. 225. A mortgage-debt belonging to a Mahomedan mother (A) and her minor daughter (B) was assigned by A in favour of C. C sued to recover the debt and obtained a decree. The property was purchased in execution by D; B brought a suit against C and D for the recovery of her share of the mortgage-debt which had been assigned by A by the sale of the hypotheca in the possession of D and in the alternative for payment to her of the amount by C and D. The suit was dismissed *in toto*; on appeal it was decreed as against D and dismissed as against C. D appealed; B did not appeal or prefer cross-objections against the dismissal of suit as against C. Subsequently B applied to the Court to add C as a co-respondent in the second appeal. *Held*, that the application ought to be granted, the case being covered by the illustration to O. 40, R. 33. 38 L.W. 539=1933 M. 806=65 M.L.J. 548. The provisions of R. 33 are wide enough to justify an appellate Court while dismissing a cross-objection in ordering that the entry in the record of rights should follow the entry in the *khata khewat*. 15 L.R. 69 (Rev.)=18 R. D. 56. In a suit for ejectment under S. 44, Agra Tenancy

Act, if the Board of Revenue finds in second appeal that the defendant is not a "trespasser" liable to ejectment under the section, R. 33 confers wide powers on the Board of Revenue to pass a decree for ejecting him as a non-occupancy tenant, as if the suit has been brought under Ss. 86 and 92 of the Agra Tenancy Act. 18 R.D. 618=16 L.R. 26 (Rev.). Where in a suit by the tenant under S. 106, B.T. Act, a decree is passed and one of the co-sharer landlords prefers an appeal impleading the others as respondents and during the pendency of the appeal one of the respondents and his representatives are not impleaded in time. *Held*, that entire suit abates and that O. 41, R. 33 had no application to the facts. 37 C. W.N. 756=58 C.L.J. 29=1933 C. 787. Court cannot act under this rule impleaded a person against whom appeal had abated. 41 L.W. 111=1935 M.W.N. 398=1935 M. 175; 13 L.L.T. 22. Or against whom it has become barred by limitation. 159 I.C. 186=1935 R. 364 (6 R. 29; 1931 C. 738, Rel. on).

POWER OF COURT.—Under O. 41, R. 33 the appellate Court has power to deal with a case in such a manner as to adjust the rights of all the parties concerned. 59 C.L.J. 318. Power under this rule compared with that under R. 4. 160 I.C. 1005=1936 Pesh. 20. The Court may make any order to meet ends of justice. 38 I.C. 721. See also 13 L.L.T. 22; 18 R.D. 618=16 L.R. 26 (Rev.); 37 P.L.R. 85. Even in the absence of a respondent an appellate Court has the power to vary the decree in his favour. 101 I.C. 255=1926 N. 196; 94 I.C. 315=1926 A. 425. This rule gives the Court power to pass a decree in favour of a person who is not a party before it but was a party in the lower Court. 12 O.L.J. 571. See also 8 M.L.T. 377; 8 I.C. 377; 25 I. C. 273; 91 I.C. 583. Appellate Court is entitled to grant relief to a defendant who could have appealed but has not appealed. (1927 A. 37, Foll.; 34 A. 32, Dist.) 117 I.C. 111 (2)=1929 A. 334. See also 131 I.C. 833=1931 M. 513; 116 I.C. 824; 1929 C. 315; 33 C.W.N. 221; 49 C.L.J. 83=115 I.C. 180=1929 C. 28; 51 A. 63; 1929 C. 123=56 C. 598. Where two appeals were filed against the same decree, one by the plaintiff and the other by the second defendant and the plaintiff having died, his legal representatives came on record in his appeal but were not impleaded in the second defendant's appeal which consequently abated, it was still open to the second defendant who was a respondent in the other appeal to ask the appellate Court to exercise its powers under this rule. 130 I.C. 764=1931 M. 277=60 M.L.J. 267. But see 1935 L. 889. The word "parties" means parties to the suit in which the decree under appeal was made; they are still parties to the suit notwithstanding the *ex parte* decree against them and their consequent inability

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to appear and file objections in the appeal. 145 I.C. 289=1933 M. 529=65 M.L.J.15. The word is intended to connote persons other than those who have been arrayed as appellants or respondents in the appeal. A decree can, therefore, be passed in favour but not against a person who is no party to the appeal. (1928 A. 746, Doubtful); 51 A. 575=27 A.L.J. 344=1929 A. 243; 61 C. 919; 182 I.C. 1005=1939 Rang. 213; 184 I.C. 137=6 B.R. 23; 1939 R.D. 8=1939 A.W.R. (B.R.) 102. But see 1934 L. 684, where a decree was passed for an injunction and some of the defendants alone preferred an appeal, and it was held, that the appellate Court had no jurisdiction to set aside the decree as against the non-appealing defendants. The powers of the Court, however ample they may be, within the ambit of O. 41, Rr. 20 and 33, cannot be used to the detriment or prejudice of the person against whom no appeal had been preferred in the lower appellate Court. 58 C. 923=138 I. C. 177=1931 C. 738. Court can give decree in favour of all plaintiffs when only one of them has appealed. 34 P.L.R. 1912=36 P.W.R. 1912. See also 140 I.C. 22 (L.). Appellate Court's power to pass decree in favour of those not made parties to the appeal—Adjustment of shares. See 20 C.W.N. 872; 1939 Cal. 593. See also 1930 R. 190. Where certain defendants were not parties to an appeal modification of the decree in their favour is not authorised by this rule. 88 I.C. 803; but see also 1939 Rang. 213. O. 41, R. 22 does not enable a respondent as a matter of right to urge cross-objections against another respondent, though the very wide discretion given by R. 33 will entitle the Court, in exceptional case where justice requires it, to entertain objections by one respondent against another. Case-law discussed. 13 P. 200=15 Pat.L.T. 42=1934 P. 134. The discretion allowed to the Judge by O. 7, R. 7 and this rule is wide and covers the granting of a declaratory decree in a suit for possession where alternative relief is claimed. 85 I. C. 94=1923 L. 422. R. 33 gives appellate Court ample power to substitute for the decree granted in favour of respondents such decree as ought to have been granted in their favour. 1931 A.L.J. 601=133 I.C. 536. It is open to an appellate Court to grant to a party relief by way of a perpetual injunction, which has been refused by the trial Court although there is no appeal or cross-objection by that party on the point. 63 C. 1008=63 C.L.J. 210=40 C.W.N. 916. Suit for arrears of annuity charged on land—Decree disallowing charge but directing recovery of arrears against assets of grantor in the hands of defendant—Appeal by defendant alone—Decree exonerating defendant from personal liability—Decree declaring charge—Held, that it was competent to the appellate Court to grant a

decree declaring a charge under O. 41, R. 33, C.P.Code, although the plaintiff had not preferred an appeal or cross-objections against the disallowance of the charge. 40 C.W.N. 1397. In a suit for enhancement of rent, the trial Court allowed to the landlord 25 per cent. of the net profit in one case and 50 per cent. in other cases. The tenants appealed, but the landlord did not file any cross-objections challenging the amount of enhancement granted. The lower appellate Court, however varied the decree by allowing 60 per cent. of the net profit to the landlord. Held, in second appeal that the lower appellate Court had no jurisdiction under R. 33, to award the further enhancement to the landlord in the absence of any appeal or cross-objection by him claiming such enhancement. 39 C.W. N. 420=1935 C. 458. Joint decree for possession—Appeal therefrom—Death of one of the plaintiffs—Respondent's legal representatives were not brought on record in time—Whether they can be brought on record as parties. 90 I.C. 986=30 C.W. N. 45; 1926 L. 564; 1926 C. 335; 1927 P.C. 252 (P.C.). A decree was passed to the effect that certain plots were included in a tenure in which the plaintiffs had a four annas share and the principal defendants a twelve annas share. A second appeal was preferred by those defendants and pending that appeal, another defendant in whose favour there was no decree and who had also been impleaded as a respondent died. An application to bring his legal representatives on record was dismissed as out of time. Held, that the appeal did not abate and that appellate Court was competent to pass a decree in favour of the deceased respondent also. 61 C. 302=151 I.C. 749 (2)=38 C. W.N. 268=1934 C. 488. On reversal of decree for one relief alternative relief should be granted if justice requires it. 1925 L. 155. Suit against a number of co-sharers—Decree against one only—Appeal by the defendant—If decree can be passed against all. See 23 A.L.J. 501=47 A. 597; 52 M.L.J. 135=1927 M. 349; 48 A. 551=24 A.L.J. 586=94 I.C. 347; 6 R. 29=1927 P.C. 252=54 M.L.J. 88 (P. C.). Plaintiffs sued the principal and agent for the price of goods supplied and obtained a decree against the principal. In appeal filed by the latter, impleading the agent also the appellate Court could reverse the decree against him and give a decree against the agent under this rule. 130 I.C. 774=1931 L. 370; 35 C.W.N. 1079; 132 I.C. 459=1931 N. 97. See the illustration to the rule. The worshipper's suit against the shebait, idol, and transferees of debutter property for a declaration that certain immovable property was debutter property of the idol having been decreed the defendants transferees went up in appeal but failed to make the shebait and the idol parties to the appeal: Held, that the shebait and not the

34. Where the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing Dissent to be recorded. the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

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idol had the right to sue and be sued and since the idol was in fact represented in appeal by the plaintiff-respondent the omission to make either the shebait or the idol herself a party to the appeal was at most an error in form and not in substance. 1941 Cal. 248. Appellate Court has power to declare not only that the appeal had abated but also that the suit has abated. (41 A. 283, Dist., 1926 L. 607. Not foll.; 1928 L. 359, Expl. and Not foll.) 118 I. C. 437=1929 L. 256. See also 1935 M. 175. Where a decree is confirmed on appeal any order to amend the decree so as to make it agree with the judgment should be passed by the appellate Court. Omission on the part of party to file a memo. of objections praying for the amendment of the decree when appellate Court has cognizance of the case, will not have the effect of taking away the party's inherent right to have a decree in accordance with the judgment passed in his favour. 1925 M. 735=49 M.L.J. 385. See also 22 L.W. 376=48 M.L.J. 577. Plaintiff's claim decreed in part only—Appeal by defendant only—Plaintiff's suit dismissed *in toto*—Appeal by plaintiff for whole claim sustainable. 4 R. 110=1926 R. 172. See also 49 M. 435=94 I.C. 767=51 M.L.J. 570 (P.C.). As to power of appellate Court to reverse mortgage decree and pass money decree only, see 112 I.C. 893. Power of Court to vary decree in pre-emption suit. 27 A.L.J. 589=1929 A. 398. High Court can increase the rate of alimony payable to a wife even though she has not preferred an appeal to the Court for that purpose. 1929 M.W.N. 831=31 L.W. 97=1930 M. 154; 54 M. 774=1931 P.C. 234=61 M.L.J. 367 (P.C.). See also 32 Bom. L.R. 436 (Execution sale). Appellate Court can give relief to respondent although no cross-objections filed. 49 A. 224=1927 A. 453=97 I.C. 65. (34 A. 32, Foll.) See also 49 C.L.J. 83=115 I.C. 180=1929 C. 28; 53 M. 881=59 M.L.J. 634=1930 M. 801 (F.B.); 1930 R. 237=8 R. 480. This rule does not enable a cross-objection being maintained where the objector-respondent has no community of interest with the appellant and where the cross-objection is nothing more than an old appeal which was dismissed as being out of time. 165 I.C. 936=1936 P. 604. Where a party has a right to invoke the assistance of Court either by filing an appeal or cross-objections and has failed to avail himself of such right, Court will very rarely and then only for very cogent reasons interfere with the decree of trial Court which is attacked by the opposite party by means of an appeal. (50 M. 866; 51 A. 63, Rel. on.) 145 I.C. 432=34 P.

L.R. 844=1933 L. 682. Court of appeal can vary a decree under appeal not only for error, but also on grounds which have come into existence since it was passed. 133 I. C. 244=33 Bom.L.R. 266=1931 B. 280. See also 32 Bom.L.R. 1252; 1927 B. 128=28 Bom.L.R. 627. Where the judgment imposes personal liability for costs on the defendant mortgagor in express terms, but the decree is drawn up in the usual form and nowhere imposes any personal liability on the mortgagor for costs, what is executed is the decree and not the judgment, and unless the decree is brought into conformity with the judgment, it will not be permissible to the decree-holder to realize the costs in suit personally from the mortgagor. O. 41, R. 33 invests an appellate Court with plenary powers and authorizes the Court to pass any decree or order as the case may require and even in favour of any respondent who may not have appealed. Even otherwise under S. 151, the inherent powers of the Court to make such orders as may be necessary for the ends of justice are unlimited. The appellate Court can order the decree to be amended and brought in conformity with the judgment. I.L.R. 1938 Lah. 148=1938 Lah. 188. Where the procedure adopted in the trial Court was wholly irregular and the judgment is pronounced by a Judge who neither heard the evidence nor arguments the proper thing is to remand the case to the trial Judge, with a direction to hear the parties and then record his findings. 1940 A.M.L.J. 67.

O. 41; R. 33 and Letters Patent (Rangoon); Cl. 13: POWERS OF APPELLATE COURT.—It is an error to assume that when leave is granted, the appeal and the terms of the certificate are to be regarded as a reference only. The jurisdiction of the appellate Court is not limited to the consideration of only the point mentioned in the certificate granting leave to appeal. In view of the wide provisions of R. 33 of O. 41, the appellate Court has the right and duty to pass whatever decree should have been passed by the Subordinate Court in all the circumstances of the case, and that means, in all the circumstances which gave rise to the litigation originally and to all the disputes between all the relevant parties in the matter. Per *Blagden, J.*—A Letters Patent appeal is an appeal in a 'case' certified to be fit for appeal. The word 'case' is a very wide word and includes an order for costs made or refused in that case, which is obviously ancillary to the substantive order made in that case. Neither the precise form of the certificate nor any failure of the appellant to file a document which he should have filed under O. 41, R. 1 could deprive

Decree in appeal.

35. (1) The decree of the Appellate Court shall bear date the day on which the judgment was pronounced.

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and a clear specification of the relief granted or other adjudication made.

(3) The decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property, and in what proportions such costs and the costs in the suit are to be paid.

(4) The decree shall be signed and dated by the Judge or Judges who passed it :

Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree.

Judge dissenting from judgment need not sign decree.

LOC. AMS.—[LAHORE.] For the second proviso of sub-r. (4) of r. 35, O. 41, substitute the following:—

"Provided also in the case of the High Court, that the Registrar, or such other officer as may be in charge of the Judicial Department, from time to time, shall sign the decree on behalf of the Judge or Judges who passed it ; but that such Registrar, or such officer, shall not sign such decree on behalf of a dissenting Judge."

[MADRAS.] O. 41, r. 35 (2).—The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, their addresses for service and a clear specification of the relief granted or other adjudication made. *Substituted by B.O.C. No. 3299—B. I of 1930.*

Copies of judgment and decree to be furnished to parties.

36. Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the Appellate Court and at their expense.

37. A copy of the judgment and of the decree, certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits.

LOC. AMS.—[ALLAHABAD.] O. 41, r. 37.—*Delete* the words " and shall be filed with the original proceedings in the suit " in lines 4 and 5 of the rule ; and

Add a new paragraph as follows :—

" Where the appellate Court is the High Court, the copies aforesaid shall be filed with the original proceedings in the suit."

[ALLAHABAD, N.-W.F.P. AND OUDH.] *Add* the following rule to O. 41 :—

" 38. (1) An address for service filed under O. 7, r. 19 or O. 8, r. 11, or subsequently altered under O. 7, r. 24 (in Oudh *read* 26 *for* 24 and in N.-W.F.P. *read* 22 *for* 24) or O. 8, r. 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the appellate Court to such addresses.

(3) Rr. 21, 22, 23 and 24 (in N.-W.F.P. *omit* 23 and 24) of O. 7, shall apply so far as may be, to appellate proceedings."

[BOMBAY AND SIND.] " 38. (1) An address for service filed under O. 7, r. 19, or O. 8, r. 11, subsequently altered under O. 7, r. 24, or O. 8, r. 12, shall hold good during all appellate proceedings arising out of the original suit or petition, subject to any alteration under sub-rule (3).

(2) Every memorandum of appeal shall state the addresses for services given by the opposite parties in the Court below and notices and processes shall issue from the appellate Court to such addresses.

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the Court of its power under R. 33 to pass or make such further or other decree as the case may require. 1940 Rang. L. R. 693.

SECOND APPEAL.—Even if lower appellate Court does not exercise its discretion properly in utilising the rule, High Court will not interfere with its order in second appeal. 130 I.C. 774=1931 L. 370.

SECOND APPEAL—WHO CAN PREFER.—

Where a person was a party in the first Court, but not in appeal, he has no right to prefer a second appeal. To permit such an appeal would really amount in effect to permitting an appeal against the decree of trial Judge. 132 I.C. 205=1931 A.L.J. 271=1931 A. 766.

(3) Rr. 22, 23 and 24 of O. 7 shall apply, so far as may be, to appellate proceedings."

[LAHORE.] Add the following rule :—

"38. (1) An address for service filed under O. 7, r. 19 or O. 8, r. 11, or subsequently altered under O. 7, r. 24, or O. 8, r. 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) The notice of appeal, and other processes connected with proceedings therein, shall issue to the addresses mentioned in cl. (1) above, and service effected at such addresses shall be as effective as if it had been made personally on the appellant or respondent, as the case may be.

(3) Rr. 21, 22, 23, 24 and 25 of O. 7 shall apply so far as may be, to appellate proceedings."

[PATNA.] R. 38. "(1) An address for service filed under O. 7, r. 19, or O. 8, r. 11, or subsequently altered under O. 7, r. 22 or O. 7, r. 12, shall hold good for all notices of appeals and all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the Appellate Court to such addresses.

(3) Rr. 21 and 22 of O. 7 shall apply, so far as may be, to appellate proceedings."

[MADRAS.] Add the following O. 41-A, and O. 41-B :—

"ORDER XLI-A.

Appeal to the High Court from original decrees of subordinate Courts.

1. The rules contained in O. 41 shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this order.

2. (1) The memorandum of appeal shall be accompanied by the prescribed fees for service of notice of appeal and receipt of the accountant of the Court for the sum prescribed by the rules of Court.

(2) Notwithstanding anything contained in r. 22 of O. 41, the period prescribed for entry of appearance by the respondent and filing by him of memorandum of cross-objections, if any, shall, unless otherwise ordered, be thirty days from the service of notice upon him.

3. (1) If the respondent intends to appear and defend the appeal he shall, within the period specified in the notice of appeal, enter an appearance by filing in Court a memorandum of appearance.

(2) If a respondent fails to enter an appearance within the time and in the manner provided by the sub-rule above, he shall not be allowed to translate or print any part of the record :

Provided that a respondent may apply by petition for further time, and the Court may thereupon make such order as it thinks fit. The application shall be supported by evidence to be given on affidavit as to the reason for the applicant's default, and notice thereof shall be given to the appellant and all parties who have entered an appearance. Unless otherwise ordered the applicant shall pay the costs of all parties appearing upon the application.

4. (1) The memorandum of appeal and memorandum of appearance shall state an address for service within the city of Madras at which service of any notice, order or process may be made on the party filing such memorandum.

(2) If a party appears in person, the address for service may be within the local limits of the jurisdiction of the Court from whose decree the appeal is preferred : Provided that if such party subsequently appears by a pleader, he shall state in the vakalat an address for service within the city of Madras, and shall give notice thereof to each party who has appeared.

(3) If a party appears by a pleader, his address for service shall be that of his pleader, and all notices to the party shall be served on his pleader at that address.

5. The Court may direct that service of a notice of appeal or other notice or process shall be made by sending the same in a registered cover prepaid for acknowledgment and addressed to the address for service of the party to be served which has been filed by him in the lower Court : Provided that, after a party has given notice of an address, for service in accordance with r. 4, service of any notice or process shall be made at such address.

6. All notices and process, other than a notice of appeal, shall be sufficiently served if left by a party or his pleader, or by a person employed by the pleader, or by an officer of the Court, between the hours of 11 A.M. and 5 P.M. at the address for service of the party to be served.

7. Notices which may be served by a party or his pleader under r. 6, or which are sent from the office of the Registrar may, unless the Court otherwise directs, be sent by registered post, and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof and the posting thereof shall be a sufficient service.

8. If there are several respondents, and all do not appear by the same pleader, they shall give notice of appearance to such of the other respondents as appear separately.

9. A list of all cases in which notice is to be issued to the respondent shall be affixed to the Court notice-board after the case has been registered.

10. (1) If upon a case being called on for hearing by the Court, it appears that the record has not been translated and printed in accordance with the rules of Court, the Court may hear the appeal or dismiss it, or may adjourn the hearing and direct the party in default to pay costs or may make such orders as it thinks fit.

(2) If the Court proceeds to hear the appeal, it may refuse to read or refer to any part of the record which is not included in the printed papers.

11. When costs are awarded, unless the Court otherwise orders, the costs of a party appearing upon any application before the Registrar or the Court shall be Rs. 15 and the costs of appearing when the appeal is in the daily cause-list for final hearing and is adjourned shall be Rs. 30. At the request of any party the Registrar shall cause the order to be drawn up and the said costs to be inserted therein.

Memorandum of Objections.

12. (1) If the acknowledgment mentioned in r. 22 (3) of O. 41 is not filed, the respondent shall together with the memorandum of objections file so many copies thereof as there are parties affected thereby.

(2) The prescribed fees for service shall be presented together with the memorandum to the Registrar.

13. If any party or the pleader of any party to whom a memorandum of objections has been tendered has refused or neglected for three days from the date of tender to give the acknowledgment mentioned in r. 22 (3) of O. 41, the respondent may file an affidavit stating the facts and the Registrar may dispense with the service of the copies mentioned in r. 12 (1).

14. R. 31 of O. 41 shall not apply to the High Court. If judgment is given orally a shorthand note thereof shall be taken by an officer of the Court and transcript made by him shall be signed or initialled by the Judge or Judges concurring therein after making such corrections as may be considered necessary."

ORDER XLI-B.

"Letters Patent Appeals.

1. The rules of O. 41-A shall apply, so far as may be, to appeals to the High Court of Madras under clause 15 of the Letters Patent of the said Court :

Provided that it shall not be necessary to file copies of the judgment and decree appealed from.

2. Notice of the appeal shall be given in manner prescribed by O. 41-A, r. 6, or if the party to be served has appeared in person, in manner prescribed by r. 5 of the said order."

ORDER XLII.

Appeals from Appellate Decrees.

Procedure. 1. The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees.

LOC. AMS.—[ALLAHABAD.] Revised r. 1 in O. 42 :—

Procedure. "1. The rules of O. 41 shall apply, so far as may be, to appeals from appellate decree, subject to the following provisions :—It should not be necessary for an appellant in a second appeal to produce a copy of the judgment of the Court of first instance or any judgment other than

the judgment on which the decree appealed against may be founded, and the record of the case shall be sent for at the expense of the appellant."

[CALCUTTA.] For r. 1 substitute the following :—

"1. The rules of O. 41, shall apply, so far as may be, to appeals from appellate decrees :

Provided that every memorandum of appeal from an appellate decree shall be accompanied by a copy of the decree appealed from and also (unless the Court sees fit to dispense with any or all of them), by copies of the judgment on which the said decree is founded and of the judgment and decree of the Court of first instance."

[LAHORE.] Add the following as r. 2 :—

"2. In addition to the copies specified in O. 41, r. 1, the memorandum of appeal shall be accompanied by a copy of the judgment of the Court of first instance unless the appellate Court dispenses therewith."

[MADRAS.] Substitute the following for the existing O. 42 :—

"ORDER XLII.

Appeals from Appellate Decrees.

1. The rules of O. 41 and O. 41-A shall apply, so far as may be, to appeals to the High Court of Judicature at Madras from appellate decree with the modifications contained in this order :

NOTES.

O. 42, R. 1.—See 1939 A.L.J. 592. Where High Court in second appeal transposes parties from category of appellant to that of respondent no question of limitation for presenting the appeal arises. 99 I.C. 687=52 M.L.J. 33=1927 M. 204. Under this rule every second appeal must be accompani-

ed by copy of decree of lower appellate Court. 100 I.C. 810. Failure to file copy of first Court judgment along with memorandum of second appeal is fatal. But delay in filing copies of trial Court judgment because copies were supplied only late should be excused under S. 5 of Limitation Act. 7

Provided that in appeals from appellate decrees the memorandum of appeal shall be accompanied by a copy of the decree appealed from, the four printed copies of the judgment on which it is founded, one of them being a certified copy; and also four printed copies of the judgment of the Court of first instance, one of them being a certified copy.

2. (1) The memorandum of appeal shall be printed or typewritten and shall be accompanied by the following papers:—

One certified copy of the decrees of Court of first instance and of the appellate Court; and four printed copies of each of the judgments of the said Courts; one copy of each judgment being a certified copy.

(2) If any ground of appeal is based upon the construction of a document, a printed or typewritten copy of such document shall be presented with the memorandum of appeal: Provided that if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader, to be a correct translation shall be presented.

(3) If the appellant fails to comply with this rule, the appeal may be dismissed."

ORDER XLIII.

Appeals from Orders.

Appeals from orders.

1. An appeal shall lie from the following orders under the provisions of section 104, namely:—

(a) an order under rule 10 of Order VII returning a plaint to be presented to the proper Court;

NOTES.

L. 447=1926 L. 458; 97 I.C. 773=1926 L. 626; 105 I.C. 689 (1). *See also* 161 I.C. 708=1936 Pesh. 77. Where trial Court gave a preliminary judgment on legal issues and the final judgment subsequently, it is enough if the copy of the final judgment was filed in second appeal. 103 I.C. 73=1927 L. 640. High Court has power in second appeal to frame issues and refer them for trial to the first Court. 1934 N. 307. Order for restitution passed under inherent powers of Court—Appealability. 1930 P. 280=9 P. 185=11 P.L.T. 156. As to whether appeals under S. 12 (2), Oudh Courts Act, are "appeals from appellate decrees". *See* 1935 O.W.N. 8=1935 O. 88.

O. 43, R. 1.—Orders appealable under R. 1 are not decrees, though coming under S. 47 or under the definition of 'decree' in S. 2. 17 I.C. 884=8 N.L.R. 177. Appeal—Formalities of—Revenue Court. 34 I.C. 706=3 O.L.J. 209. *See also* 41 Bom.L.R. 1170. (Order by Court refusing to amend decree under S. 151.) Decree for specific performance—Power of Courts to extend time—Order extending time whether appealable. 1927 R. 311=5 R. 615. An order directing the drawing up of a final decree in a mortgage suit is not a decree nor appealable order within the meaning of O. 43. 57 M. 437=1934 M. 198=66 M.L.J. 178. Order on application under S. 34, Trusts Act, if appeal lies against. 11 O.W.N. 1533=1935 O. 72. The right of appeal is a creature of statute, and when no such right is expressly conferred by the statute, there is no right of appeal. The right of appeal against decrees and orders in rent suits for agricultural lands has been conferred by the provision of the Code, and S. 153 of the Bengal Tenancy Act restricts that rights so conferred by the Code in certain cases. 63 C.L.J. 277=40 C.W.N. 992=1936 C. 485.

Clause (a).—A plaintiff is not precluded from prosecuting his appeal against the order returning his plaint for presentation to proper Court, if in compliance with that order he presents the plaint to another Court in order to save limitation in case his appeal is dismissed. 40 P.L.R. 975. An order of appellate Court returning a plaint for want of jurisdiction in the Court in which the suit is brought is appealable. 19 A.L.J. 305=62 I.C. 399; 125 I.C. 581. *See also* 1931 A.L.J. 893=1931 A. 192; 1938 Sind 124. No appeal lies from an order of appellate Court returning a memorandum of appeal to be presented to proper Court. 31 Punj.L.R. 536=1930 L. 832. *See also* 12 A.L.J. 21=36 A. 58; 52 I.C. 801=46 C. 738; 16 A.L.J. 633=40 A. 659; 42 P.L.R. 364 (but revision lies). But *see also* 56 I.C. 865. Nor against an appellate order confirming the order of trial Court returning a plaint for presentation to proper Court. 46 I.C. 99=16 A.L.J. 535; 27 Bom.L.R. 635=1925 B. 431. The fact that, in the exercise of his jurisdiction, Judge commits an error does not give any right of revision of the order. 46 I.C. 99. The word "plaint" in R. 1 (a) does not include a memo. of appeal. 56 I.C. 865. Order returning or rejecting application for leave to sue *in forma pauperis* on ground of want of jurisdiction does not come under this clause, and is not appealable. 42 L.W. 647=1935 M. 1043. Plaintiff does not lose his right to appeal against order of a Munsif returning the plaint, by electing to file the plaint in the Court to which he is directed. 34 M.L.J. 397=41 M. 721; 53 I.C. 1001=23 C.W.N. 942. An order rejecting a plaint under O. 7, R. 11 is not appealable when such order is based on a question of valuation pure and simple. 49 I.C. 442=4 P.L.J. 57.

O. 43, R. 1 (a) (All.).—Under this clause as amended by the Allahabad High

(b) an order under rule 10 of Order VIII pronouncing judgment against a party ;

(c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ;

(d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte* ;

(e) an order under rule 4 of Order X pronouncing judgment against a party ;

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Court only those orders are appealable where the entire case has been transferred from the appellate to the trial Court and not where only certain issues have been remitted. Hence no appeal lies from an order by which the appellate Court has framed certain issues and referred them for trial to the first Court. 147 I.C. 437=1934 A. 455. R. 1 is applicable *only in part* to cases under Agra Tenancy Act. 53 A. 516=1931 A.L.J. 854=1931 A. 533.

Clause (b).—See 31 P.L.R. 946; 1930 O. 366. R. 1 (b) merely gives a right of appeal if a judgment has been pronounced against a party. Where no judgment is pronounced there is no right of appeal. 131 I.C. 129=1931 L. 77.

Clause (c): CASES WHERE APPEAL LIES.—Appeal lies from order of dismissal of application under O. 9, R. 9 on ground of previous dismissal under O. 17, R. 3. 4 P.L.T. 46=73 I.C. 373=1923 P. 223. See also 20 C.W.N. 1203; 20 C.W.N. 594=43 C. 857; 168 I.C. 47=1937 O.W.N. 372=1937 Oudh 344. An appeal lies against an order of dismissal of an application for restoration of the application dismissed in default. 19 N.L.R. 119=75 I.C. 589; 168 I.C. 47=1937 O.W.N. 372. See also 1936 A.L.J. 305. But see *contra* 58 M. 814=1935 M. 609=69 M.L.J. 99, where it was held that no appeal lay under O. 43, R. 1 (c) and that S. 141, did not avail to confer a right of appeal, as it dealt only with procedure, while a right of appeal was substantive right, and that S. 104 conferred a right of appeal only in respect of orders specified in that section or in O. 43, R. 1. A dismissal of suit for default is under O. 9, R. 8 and the dismissal of application for restoration is appealable under O. 43, R. 1 (c). 57 I.C. 245. Although an order rejecting an application under O. 9, R. 9, is open to appeal under O. 43, R. 1 (c), an order allowing such an application is not open to appeal. An order of the latter class should be sparingly interfered with. 152 I.C. 110=11 O.W.N. 1373=1934 O. 491. See also (1940) 2 M.L.J. 374. Where an application for restoration is returned for presentation to proper Court owing to want of jurisdiction the order is one rejecting the application and is appealable. 16 I.C. 34=10 A.L.J. 41. An order setting aside an *ex parte* decree passed in a resumption suit, although not appealable under R. 1 is however appealable in view of the provisions of

the Oudh Rent Act. 3 O.L.J. 229=34 I. C. 702.

CASES WHERE NO APPEAL LIES.—Where Court dismissed an application for execution for want of prosecution and subsequently refused to restore the application, there is no appeal from the order refusing to restore the application. 45 A. 148=21 A.L.J. 135; 100 I.C. 343=45 C.L.J. 60; 31 C. 207. An order of appellate Court setting aside the order of first Court dismissing the suit for default of appearance of parties is not appealable. 11 A.L.J. 615=35 A. 427. See also 139 I.C. 296=1932 N. 101. Application to set aside dismissal for default—No appeal lies. 36 C.L.J. 184=1922 C. 572; 43 I.C. 54=2 P.L.J. 720. See also 139 I.C. 296=1932 N. 101. Nor from an order rejecting an application to restore a suit dismissed for default of both parties. 19 I.C. 97=9 N.L.R. 33. See also 139 I.C. 296=1932 N. 101. Nor against an order dismissing for default an application under O. 21, R. 90. 97 I.C. 704=45 C.L.J. 557.

Clause (d).—The words of O. 43, R. 1 (d) are perfectly general. The words "in a case open to appeal" have no reference to the appeal against the decree actually passed. If there could be no appeal against a decree that could be passed in the suit or proceeding under any circumstances, there would be no appeal against an order refusing to set aside an *ex parte* decree passed in such a suit or proceeding. A case is not open to appeal within the meaning of O. 43, R. 1 (d) when no appeal would lie against a decree under any circumstances. 40 C.W.N. 992=63 C.L.J. 277=1936 C. 485. See also 1941 A.L.J. 516=1941 O.W.N. 1010. An appeal against a decree in a simple rent suit (when the proviso to S. 153, B. T. Act, does not come into play) valued at Rs. 50 or less would be incompetent only under one circumstance, namely, when the Munsif trying the suit has been vested with final jurisdiction, and would lie under all other circumstances. 40 C.W.N. 992. Order granting an application under O. 9, R. 13 is not appealable. 52 I.C. 901=17 A.L.J. 1052; 14 A.L.J. 332=38 A. 297. Nor an order purporting to be made under O. 9, R. 13 dismissing an application for restoration of an application to set aside an *ex parte* decree. 49 I.C. 745; 48 A. 175=1925 A. 610. But see 6 P. 474=101 I.C. 753=1927 P. 240. See also 149 I.C. 777=1934 R. 202; 10 P.L.T. 211. An order dismissing

- (f) an order under rule 21 of Order XI;
- (g) an order under rule 10 of Order XVI for the attachment of property;
- (h) an order under rule 20 of Order XVI pronouncing judgment against a party;
- (i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;
- (j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale;

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for default an application to set aside an *ex parte* decree is appealable. 30 I.C. 798; 30 I.C. 45=21 C.L.J. 628. See also 56 C. 21; 10 Pat.L.T. 589. The words "rejecting an application" signify an immediate rejection and not a conditional or prospective rejection. 6 L.W. 757=43 I.C. 1. No appeal lies against an order refusing to set aside a dismissal of a suit under O. 9, R. 4. 43 I.C. 374=27 C.L.J. 117. Nor against an order rejecting an application under O. 9, R. 9 for revival of an application for reversal of a sale, which had been dismissed for default of appearance of the judgment-debtor. 27 I.C. 492=19 C.W.N. 25. Order dismissing application to set aside *ex parte* decree because the conditions which were lawfully imposed on the defendants were not complied with—Appeal lies. 1927 B. 1=28 Bom.L.R. 1246=51 B. 67. But see 28 Bom.L.R. 578=50 B. 326=96 I.C. 321.

Clause (f).—An order refusing to strike out a defence is one under O. 11, R. 21 and that it is appealable under O. 43, R. 1 (f). 34 C.W.N. 220=1930 C. 426.

Cl. (j).—Scope of cl. (j).—See 11 Lah.L.J. 546; 7 Pat. 107=1938 Pat. 240. An order confirming the sale amounts to a refusal to set aside the sale and hence is appealable. 141 I.C. 421=34 P.L.R. 233=1933 L. 210. An order refusing leave to a decree-holder to bid under O. 21, R. 72 is not appealable. 38 C. 717=15 C.W.N. 862 (P.C.). An appeal does not lie when no objection has been specifically allowed or dismissed by executing Court. 1929 A. 671. If an order is itself appealable, an appeal will lie from that part of the order which relates to costs. 44 A. 209=20 A.L.J. 11. An appeal lies against an order on an application under O. 21, R. 90 to set aside a sale, which is dismissed for default. 38 I. C. 598=25 C.L.J. 163; 104 I.C. 759=55 C. 616. See also 56 C. 969=33 C.W.N. 392; 7 R. 37=117 I.C. 253=1929 R. 148. But no appeal lies against an order under S. 90 dismissing an application to set aside the dismissal. 7 R. 37. But see 38 I.C. 63. An auction-purchaser can appeal against an order setting aside the sale on the ground of irregularity even if decree-holder has compromised his claim with judgment-debtor. 13 C.L.J. 535=15 C.W.N. 685. As to second appeal, see 3 L.L.J. 463; 1929 L. 778; 1939 Sind 62. There is no second appeal against an order setting aside a sale on the ground of fraud under O. 21, R. 92.

168 P.R. 1919=54 I.C. 941. An order confirming the sale amounts to a refusal to set aside the sale and hence is appealable. 141 I.C. 421=1933 L. 210. An appeal lies against an order passed by an executing Court refusing to receive the amount of decree and costs from a mortgagee under O. 21, R. 89. 12 I.C. 733=178 P.W.R. 1911. If the Court refuses to dispense with cash deposit and to accept landed property as security and then dismisses the application for failure to make the deposit, the latter order is appealable under O. 43, R. (1) (j), though the order refusing to accept security is not appealable. 17 Pat. 107=19 Pat.L.T. 402=1938 Pat. 24. An appeal lies from order in execution of small cause decree transferred to the original side for execution. 10 L.W. 556=53 I.C. 958. An appeal lies from an order refusing to set aside a sale under O. 21, R. 89 whether the purchaser is the decree-holder or stranger. 14 I.C. 326=1912 M.W.N. 756. See also 131 I.C. 533=1933 P. 97; 18 Pat.L.T. 799=1937 Pat. 672. Decree-holder purchaser failing to deposit 25 per cent. of purchase price—Order setting aside sale—Appeal. See 1939 L. 46. So far as applications under Order 21, Rule 90 are concerned, there is no distinction between an order on the application and an order declining to entertain the application. A rejection of the application to have a sale set aside is not any the less a refusal to set aside the sale within the meaning of O. 43, R. 1 (j), although the order may have been passed even before the petition is admitted. An order rejecting the petition on the ground that the petitioner tenders a draft bond offering immovable property as security instead of depositing the sale amount in cash as ordered by the Court is an order refusing to set aside the sale and is therefore appealable. I.L.R. (1939) Mad. 349=1939 Mad. 482=(1939) 2 M.L.J. 132. Joint application by judgment-debtor and decree-holder purchaser for setting aside sale, on payment of certain amount on a particular date, and for confirmation on default—Order on application, if appealable. 17 Pat.L.T. 940 (S.B.). No appeal lies from an order under O. 21, R. 101. Such an order may, however, be the subject of revision. 16 R. D. 160. In an appeal from an order refusing to set aside sale, the auction-purchaser is a necessary party. 35 P.L.R. 658=1934 L. 592 (2). Order setting aside sale under S. 227, Orissa Tenancy Act—Whether appeal lies. 15 P. 375. An order dis-

(k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;

(l) an order under rule 10 of Order XXIII giving or refusing to give leave;

(m) an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction;

NOTES.

missing an application to set aside a sale under O. 21, R. 90, being itself an order refusing to set aside the sale, an appeal under O. 43, R. 1 (j) would lie against it and not against the order of confirmation of the sale passed later on. Therefore, limitation for the appeal would run from the date of the order dismissing the application and not from the date confirming the sale. 43 C.W.N. 352.

Cl. (k).—"Suit" does not include "appeal". 33 C.W.N. 881=49 C.L.J. 538=1929 C. 532; 121 I.C. 564; 20 Pat.L.T. 715=1939 Pat. 623. The word "suit" in O. 43, R. 1 (k) includes an appeal and an appeal therefore lies against an order refusing to set aside the abatement of an appeal. 52 L.W. 476=1941 Mad. 51=(1940) 2 M.L.J. 562. There is no provision in O. 43 laying down that the word 'suit' in Cl. (k) of R. 1 of that order should be taken to include an appeal. Hence an order refusing to set aside the abatement of an appeal under Cl. (d) of R. 1 of O. 43 is not appealable. 1941 A.L.J. 516=1941 O.W.N. 1010 (2). See also 1941 Mad. 51=(1940) 2 M.L.J. 562. An order refusing to set aside an abatement of an appeal is appealable under O. 43, R. 1 (k); the word "suit," in the rule also covers an appeal. O. 43, R. 1 (k) has to be read with reference to O. 22, R. 11, which applies to R. 9 of O. 22. 17 Pat. 84=18 Pat.L.T. 1014=1938 Pat. 125. O. 22, R. 10 does not apply to an application to add a certain person as party. Consequently an order on such an application is not appealable, though the application purports to be made under that rule. 42 C.W.N. 1183. An order declaring that the suit had abated because the legal representative of the deceased defendant had not been brought on the record in time is a decree and appealable as such though no formal decree dismissing the suit had been drawn up. 10 P. 471=133 I.C. 767=1931 P. 353. An application to bring on the record the legal representatives of a deceased party after the expiry of the time fixed for this purpose must be deemed to be an application to set aside the abatement and an order refusing to set aside an abatement is appealable. 147 I.C. 699 (1)=1934 L. 315. When no application to bring the representatives of a deceased plaintiff is made within time the suit abates; and an application for substitution made afterwards ought necessarily to be considered on an application under O. 22, R. 9 (2), to set aside the abatement. 74 I.C. 17=1924 L. 424. Appeal lies from a finding that a suit has abated; but such an appeal is one against the decree in the suit.

26 S.L.R. 81. Though no *second appeal* lies from an order of abatement, it may be questioned in second appeal if it "affects the decision of the case". 1933 A. 294=144 I.C. 133=1933 A.L.J. 561. No appeal lies if there has been no application to set aside an abatement. An order of abatement cannot be interfered with in revision if a person fails to set it aside. 95 P.R. 1911=13 I.C. 963. No appeal lies from an order adding legal representative. 39 M. 488=28 M.L.J. 491. An order under O. 22, R. 3 is not open to appeal. 73 I.C. 230=1924 O. 114; 44 I.C. 145. Refusal to set aside abatement of appeal—Appealable. 1925 P. 162=85 I.C. 1010.

Cl. (l).—An application by a mortgagee to be added as a party to a partition suit is an application under O. 22, R. 10 and an order granting or refusing it is appealable. 134 I.C. 307=35 C.W.N. 296=1931 C. 594. (49 I.A. 220, Expl.) Court of Wards assuming superintendence of plaintiff's estate during pendency of suit—Order granting leave to Deputy Commissioner to continue suit—Right of plaintiffs to appeal. 156 I.C. 990=1935 O. 486. Insolvency of plaintiff—Receiver neglecting to continue suit—Application by assignee from receiver for leave to continue suit—Rejection—Appeal. 157 I.C. 900. Whether second appeal lies from order of appellate Court under this clause. See 156 I.C. 152=1935 M. 423. See also 43 Bom.L.R. 719. Death of defendant after passing of preliminary decree—Plaintiff and others applying for being appointed as legal representative—Plaintiff appointed as legal representative—Application of other persons dismissed as time-barred—Appeal by such persons—If competent. 1937 Lah. 615.

Cl. (m).—Order recording compromise—Appeal, if barred by S. 96 (3). 1936 S. 59. This clause does not contain any restrictive words; and hence an appeal would not be incompetent even when there has been no dispute as to the factum of compromise. 43 L.W. 386=1936 M. 347=70 M.L.J. 471. The remedy of a party dissatisfied with the order of a Court refusing to record a petition of compromise is to appeal from the order so refusing, not from the judgment given by Court on the merits. 42 I.C. 192; 104 I.C. 561. Order refusing to record compromise on the ground of its invalidity is appealable. 103 I.C. 80=1927 L. 546 (2). Also when refused on ground that no compromise has been made. 1936 A.L.J. 336=1936 A. 433; 189 I.C. 232=1940 Pat. 629. Where there has been a compromise in which a minor is concerned, if the Court refuses its consent to such a compromise, it should

(n) an order under rule 2 of Order XXV rejecting an application (in case open to appeal) for an order to set aside the dismissal of a suit ;

(o) an order ¹[under rule 2, rule 4 or rule 7] of Order XXXIV refusing to extend the time for the payment of mortgage-money ;

(p) orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXV ;

(q) an order under rule 2, rule 3 or rule 6 of Order XXXVIII ;

LEG. REF.

¹ Substituted by Act XVI of 1930.

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be appealed against at once without waiting for final orders, as by that time the remedy under O. 43, R. 1 (m) would become time-barred. 1938 A.W.R. (B.R.) 288=1938 R.D. 477. An appeal from an order under O. 23, R. 3 is competent even though before the appeal is presented a decree has been passed in terms of the compromise. 36 C. W.N. 1013. See also 1941 Rang. 316. It is not necessary for the aggrieved party to appeal both from the decree and the order. 36 C.W.N. 1013 (29 C.W.N. 928, Cons.) ; 40 P.L.R. 664=1938 Lah. 766 ; 141 I.C. 732 ; 40 P.L.R. 138=1938 Lah. 350. A consent decree passed without order for recording a compromise is liable to be set aside on appeal notwithstanding the bar under S. 96 (3). 33 I.C. 769=43 C. 85. Order holding no compromise has been proved is not appealable. 73 I.C. 177=1924 L. 248. An order allowing the plaintiffs to withdraw their suit as against certain of the defendants is not appealable. 1930 A. 863=128 I.C. 827. See also 137 I.C. 804=33 P.L.R. 391. The right of appeal under this rule against an order recording a compromise under O. 23, R. 3, is not lost because the decree involved in the order is not appealed against. It would be more correct to appeal against the decree, but if the order is set aside on appeal, the decree must go with it. 61 C. 910=59 C.L.J. 421=1934 C. 846 ; 43 L.W. 722=1936 M. 385=70 M.L.J. 400. Appeal lies even though at the time when the compromise was recorded there was no contest before the Court, and though the order recording the compromise has ripened into a decree and no appeal has been preferred against the decree itself. 70 M.L.J. 400. No separate order recording compromise—Appeal from decree—Plea of no compromise—No finding given by appellate Court—Revision. 1936 L. 963.

RIGHT OF SUIT.—Where a pleader enters into a compromise on behalf of his client without authority, and the client is not present when the compromise is drawn up and filed, the client cannot be regarded as a party to the compromise, and a decree passed on the basis of that compromise is wholly incompetent. A separate suit to set aside the compromise and decree will lie, and R. 1 (m) is no bar to the suit. 150 I.C. 838=11 O.W.N. 1030=1934 O. 417.

Cl. (o).—Where the Judge on the original

side directed that the Registrar might be at liberty to sell the mortgaged properties without reserve, *held*, that the order was not appealable. 60 C. 506=145 I.C. 318=1933 C. 534.

Cl. (q).—When an application for attachment before judgment is dismissed by Court of first instance after hearing defendants, no appeal lies against that order. 33 I.C. 689=23 C.L.J. 392. Nor against an order rejecting an application for attachment under O. 38, R. 6, when there has been no conditional order of attachment under R. 5 (3) of O. 38. 14 P. 1=16 Pat.L.T. 291=1935 P. 219. Where in response to a notice issued to the defendant under O. 38, R. 5, defendant appears in Court, and shows cause why no order for furnishing security for costs should be passed against him and why no order should be passed directing the attachment of this property, the order of the Court accepting the contention of defendant is an order which falls under O. 38, R. 6 (2) and from such an order an appeal lies. 140 I.C. 95=1932 A.L.J. 228=1932 A. 269. See also I.L.R. (1941) Kar. 362=1941 Sind 178. Application for attachment before judgment—Court ordering application closed on respondent undertaking not to alienate properties—Order is *oe* under O. 38, R. 6—Appealability from the order. 1928 M.W.N. 125. An order under R. 5 of O. 38 is not appealable while an order under R. 6 is appealable. Where the Court passed an unconditional order of attachment before judgment purporting to act under R. 5 of O. 38, the order is appealable. 107 I.C. 276 (L.).

Cls. (q) and (r).—Both injunction and attachment are intended to give prompt relief from immediate or impending danger of injury which will be irreparable ; and Court ought not to admit appeals from orders refusing injunction or attachment, except in cases of serious misdirection in law or fact, when special directions might be given for expedition. Such orders are discretionary and appellate Court ought not to interfere with the exercise of a Judge's discretion unless satisfied that it was not judicially exercised, *i.e.*, that the Judge acted on wrong principles. The mere fact that appellate Court might take a different view is not a sufficient ground for interference. If lower Court rightly appreciate the facts, and applies to those facts the true principles, that is a sound exercise of judicial discretion. 61 C. 814=38 C.W.N. 771=1934 C. 694.

- (r) an order under rule 1, rule 2, rule 4 or rule 10 of Order XXXIX ;
- (s) an order under rule 1 or rule 4 of Order XL ;
- (t) an order of refusal under rule 19 of Order XLI to re-admit, or under rule 21 of Order XLI to re-hear, an appeal ;

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Cl. (r).—An appeal lies from an order granting as well as from an order refusing to grant an injunction under O. 39, R. 1. 11 A.L.J. 613=35 A. 425. *See also* 1937 Rang. 150. Also from an order refusing to discharge an injunction issued under O. 39, R. 2. 1933 L. 203=34 P.L.R. 975=14 L. 330. An order for the issue of an injunction subject to a condition is appealable, but there is only one appeal against it. 66 I.C. 509=1922 A. 441. An order of Court refusing to attach property for disobedience of an interim injunction is open to appeal. (27 I.C. 131, F.); 66 I.C. 9=1922 L. 347. The appellate Court has jurisdiction to pass an order of imprisonment in appeal. 27 I.C. 131. Disobedience of an injunction order is an act independent of the suit and calls for a separate punishment. 27 I.C. 131. Breach of undertaking not to alienate property pending suit—Contempt of Court—Order refusing to commit for such contempt is appealable. 33 Bom.L.R. 1109=134 I.C. 1165=1931 B. 509. An appeal lies from the refusal of a Judge of the original side of the High Court to grant an interim injunction, but what the Court of appeal has to consider is simply whether or not the Judge who dealt with the matter properly exercised the discretion which he undoubtedly possessed. 152 I.C. 563=1934 C. 713.

Cl. (s).—*See* 1938 Nag. 540. An order for the appointment of a receiver without actually appointing any one to that office is appealable. 18 A.L.J. 212=44 A. 227 (40 M. 18, Diss.; 13 A.L.J. 79; 13 C.L.J. 157; 17 Bom.L.R. 510, F.) But *see* 1932 P. 360 *contra*; 67 C.L.J. 107; 174 I.C. 148; 31 S.L.R. 28 (Order for receiver in suit under S. 9, Sp. Rel. Act). An order merely declaring that a receiver should be appointed is appealable, though nobody is named as receiver. 13 Pat.L.T. 525=1932 P. 360. Order appointing receiver provisionally if open to appeal. 27 I.C. 646=13 A.L.J. 79. Appeal lies against *ad interim* appointment of receiver. 1936 L. 102. Order declaring that receiver should be appointed is open to appeal. 69 I.C. 929=1 P. 625. An order removing a receiver is one falling under R. 1 (a) and is appealable. 92 I.C. 940=53 C. 319=1926 C. 593. But *see* 1931 A.L.J. 13=1931 A. 72=134 I.C. 454, *contra* (1903 A. W.N. 67, Foll.; 53 C. 319, Diss. from); 1938 Rang. 387 (order dismissing application for removal of receiver). An order refusing to appoint a receiver is an order under O. 40 and is appealable. 1926 C. 1006=95 I.C. 632. An interlocutory order for the appointment of a receiver in the terms "the property in suit will be better

managed if a receiver is appointed" is not appealable. It is only the final order that is appealable. 9 I.C. 582=13 C.L.J. 157. *See also* 148 I.C. 184=1934 N. 64. Order appointing receiver subject to security being furnished—Security not furnished—Appeal does not lie till security is furnished and appointment finally approved. 100 I.C. 140=1927 C. 253. But *see also* 40 M. 18. An order merely directing that a proper person should be appointed as a receiver is not appealable. (9 I.C. 582, Foll.); 29 I.C. 504=17 Bom.L.R. 510. Nor orders of Court in passing receiver's accounts. 12 I.C. 780=14 C.L.J. 445. *See also* 69 I.C. 203=43 M.L.J. 707. Where a receiver is appointed but he refuses to act, an appeal on the point whether a receiver should or should not be appointed can be entertained. 176 I.C. 919=1938 Lah. 10. An order of Court directing receiver appointed in the suit to pay money to a person pending disposal of the suit is appealable. 14 I.C. 277=11 M.L.T. 383. Receiver ordered to pay damages—No appeal lies from such order. 92 I.C. 631=1925 R. 266. Order directing receiver to pay into Court amount lost by his negligence is appealable. 62 M.L.J. 199=1931 M. 760. Order granting leave to sue a receiver is not appealable. 22 Bom. L.R. 1126=45 B. 99. Dispossession by receiver of third part—Appeal lies. 16 L.W. 833=69 I.C. 393. *See also* 1941 Rang.L.R. 300 (Order against person not party to suit). Where a receiver is appointed in execution of a mortgage decree overruling the objections of a third party, the latter has no right of appeal but he can prefer a revision to High Court. 4 P.L.W. 414=45 I.C. 177. An order construing an order of appointment does not fall under either R. 1 or R. 4 of O. 40 and is not appealable. 5 P.L.J. 97. Order removing a receiver is appealable at the instance of the parties but not at the instance of the receiver himself. 36 C. W.N. 903=1933 C. 52=60 C. 162.

LETTERS PATENT.—The Code does not control the provisions of the Letters Patent. The judgment of a single Judge of the High Court in an appeal under O. 43, R. 1 (s) is appealable under Cl. 15 of the Letters Patent. (22 M. 68 and 13 M.L.J. 497, Foll.) 56 M. 915=1933 M. 770=65 M. L.J. 222 (F.B.).

Cd. (t).—An appeal does not lie against order refusing to restore application to set aside an appellate decree dismissed for default. But where there has been a serious miscarriage of justice, revision lies. 40 I.C. 336. An appeal lies to High Court from order refusing to re-hear an appeal dismissed for default. 28 C.L.J. 155=45 C. 638. "Suit" includes the appellate stage

(u) an order under rule 23 of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court ;

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and also includes the execution proceedings and an application to re-hear an appeal heard *ex parte* is an application in the suit. 19 C. L.J. 310=19 C.W.N. 359. An order of lower appellate Court rejecting an application for review of an appeal dismissed for default and a memo. of cross-objections allowed *ex parte*, is not appealable. 53 I.C. 333. An order rejecting an appeal for failure to furnish security for costs is not appealable. 9 I.C. 748=14 O.C. 40. On this sub-clause, *see also* 1929 P. 609=10 P. L.T. 589; 120 I.C. 791=1930 L. 112; 1936 R. 109.

Cl. (u): GENERAL.—When an appeal is remanded without any provision of law being stated, the presumption is that the order is made under O. 41, R. 23. 20 A.L.J. 321=44 A. 492; 87 I.C. 575=1925 C. 1157. The power of remand should be exercised with very great caution. 3 P.L.J. 253=43 I.C. 959; 12 L.W. 667=39 M.L.J. 536. On this point, *see also* 60 M.L.J. 713. An appeal under R. 1 is one from the order granting an application for review and not one from the final decree in the suit. 60 I.C. 259.

CASES WHERE APPEAL LIES.—An appeal to the Chief Court against the order of remand is competent under R. 1 (u) if it involves point of law. 8 P.R. 1915=28 I.C. 441. *See also* 1935 P. 49. An appeal lies from an order of remand in a case where if the appellate Court, which passed that order, had passed instead a decree reversing that of the lower Court, an appeal would lie from such decree. 23 I.C. 817=85 P.R. 1914; 3 L. 218=1922 L. 178 (F.B.); 2 L.L.J. 587. Where a question affecting the final result of the case has been decided against a party and the suit is remanded, the order of remand is appealable. 20 I.C. 788=279 P.L.R. 1913. *See also* 1930 N. 295; 1930 M.W.N. 1021; 1934 L. 907; 38 C.W.N. 1202; 4 A.W.R. 1120; 145 I.C. 183=37 C.W.N. 190=1933 C. 496; 10 O.W.N. 664=1933 O. 350; 14 L.R. 501 (Rev.)=17 R. D. 605. An order of remand passed initially under O. 41, R. 23 but by a clerical mistake purporting to be under O. 41, R. 25 is appealable. 9 I.C. 431. An order of an appellate Court setting aside an order rejecting a plaint is not appealable. 131 I.C. 750=1931 L. 497. *See also* 152 I. C. 241=1931 Pesh. 88. When an order dismissing an application to set aside an *ex parte* decree is set aside and Court of first instance is directed to proceed with the suit, the order is not an order of 'remand' within the meaning of R. 1 (u) and the order of the appellate Court is not appealable. 53 A. 519.

CASES WHERE NO APPEAL LIES.—No appeal lies against an order passed by an appellate Court remanding a case otherwise than under O. 41, R. 23. 31 C.L.J. 357=23 C.W.N. 1049. *See also* 59 I.C. 909; 6 P. 381; I.L. R. (1940) Nag. 538=1940 N. L. J. 350=1940 Nag. 349; 14 Luck. 447=1939 O.W.N.

181=1939 Oudh 102 (Order of remand under the inherent powers of Court); 31 C.W.N. 878; 1925 R. 320; 100 I.C. 135=1927 M. 335=52 M. L. J. 90; 103 I. C. 670; 6 P. 160; 37 C. W. N. 190; 132 I. C. 311=1931 M. 1=60 M.L.J. 713. Remand—Suit as originally framed entirely disposed of—Amendment of plaint not allowed—Suit cannot be said to be disposed of on a preliminary point. (*Ibid.*) (45 M. 900, Dist.) There is no appeal against an order of remand passed by a special Judge under the provisions of the Bengal Tenancy Act. 72 I.C. 1013=37 C.L.J. 314. There is no appeal for an order of remand under the inherent powers of an appellate Court, and not falling under O. 41, R. 23 and under O. 43, R. 1 (a). 69 I.C. 826=16 L.W. 515; 97 I.C. 105=1926 P. 457. *See also* 1935 P. 49. No appeal lies where the order of remand is made under O. 41, R. 25. 37 C.W.N. 190; 1935 O.W.N. 352=154 I.C. 676=1935 O. 333. *See also* 1937 A.L.J. 797=1937 All. 580. An order under O. 41, R. 27 is not an order of remand and therefore not appealable. The mere use of the word 'remand' does not give the order the character that it does not possess. 171 I.C. 258=1937 Sind 233. Where a party has himself asked for a remand and obtained an order of remand, he cannot appeal merely because the ground covered by the order of remand is not so wide as that which he himself desired. 116 I.C. 55=1929 O. 398. Remand for fresh trial with the addition of a necessary party—No appeal lies against the order. 3 R. 490. O. 41, R. 23 does not contemplate a case decided upon the whole evidence and upon all the issues which were raised. 55 I.C. 484=1 Pat.L.T. 500. An appeal does not lie against the order of appellate Court setting aside an order of Court of first instance rejecting a plaint under O. 7, R. 11, and directing the trial Court to proceed with the trial of the suit. Such order is not an order under O. 41, R. 23 and is not appealable under O. 43, R. 1 (u). 39 P.L.R. 720=1937 Lah. 380. *See also* 1941 N.L.J. 410. Where the appellate Court decides the main point in a case and remands the case for disposal of remaining issues, the order is not appealable. 60 I.C. 609. A general order of remand by the lower appellate Court on the ground of mishandling of the trial in the First Court is not appealable. 63 I.C. 858; 1927 M. 385. An appellate Court has inherent power under S. 151 to remand a case for retrial. No appeal lies against such an order. 3 P.L.J. 253=43 I.C. 959; 39 M.L.J. 536=12 L.W. 667; 1939 Oudh 102. *See also* 44 A. 176=19 A.L.J. 971; 25 L.W. 198=52 M.L.J. 90. An order of remand made on an appeal from an order setting aside or refusing to set aside an execution sale is final under S. 104 and no appeal lies therefrom. 50 I.C. 610=29 P.L.R. 1919. *See*

(*n*) an order made by any Court other than a High Court refusing the grant of a certificate under rule 6 of Order XLV;

(*w*) an order under rule 4 of Order XLVII granting an application for review.

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also 182 I.C. 896=1939 Lah. 65. Findings of fact cannot be disturbed in an appeal against an order remanding a case under O. 41, R. 23. 48 I.C. 379=109 P.R. 1918.

PARTIAL AND TOTAL REMAND—NO DISTINCTION BETWEEN.—No distinction seems to be recognized in R. 1 (*u*), between a partial and a total remand of the case. Hence an appeal is competent from an order remanding a case even though the whole of the remand order is not challenged but only certain findings which have gone against the appellant. 146 I.C. 939=1933 L. 615.

SECOND APPEAL.—Where there is no second appeal from the decree of the appellate Court, there is also no second appeal from the order of remand. 19 A.L.J. 72=43 A. 403. There is no second appeal in a suit of a small cause nature of the value below Rs. 500 and an order of remand in such a suit is not open to appeal. 18 A.L.J. 167=42 A. 200; 21 I.C. 638=11 A.L.J. 599.

REVIEW.—See 1935 C. 153.

PRACTICE AND PROCEDURE.—On an appeal from an order of remand, High Court is bound by the finding of fact of the lower appellate Court. 65 I.C. 376=8 O.L.J. 624; 2 L. 25=59 I.C. 715.

COURT-FEE.—Where an appeal is directed against the order of remand it should be filed as a miscellaneous appeal under R. 1 (*u*), and a Court-fee of Rs. 2 is payable as on a Civil Miscellaneous Appeal. 144 I.C. 967=10 O.W.N. 143=1933 O. 191. An appeal against the order of remand by the lower appellate Court not made under O. 41, R. 23 is a second appeal and *ad valorem* Court-fee should be paid thereon. 50 I.C. 367.

Clause (v).—S. 75 of the Provincial Insolvency Act does not govern or regulate appeals to the Privy Council. Where a District Judge grants a certificate of leave to appeal to the Privy Council against his decision in an appeal from a Subordinate Judge under S. 75, Provincial Insolvency Act, no appeal lies to the High Court against the grant of the certificate. O. 43, R. 1 (*v*) only provides for an appeal against an order under O. 45, R. 6, but no appeal is provided for against an order under O. 45, R. 3. 46 L.W. 416=1937 Mad. 930.

Clause (w).—Cl. (*w*) has to be read along with O. 47, R. 7. 8 L. 617=1927 L. 435 (2); 146 I.C. 530=37 C.W.N. 705=1933 C. 727; 131 I.C. 518=1931 A. 329; 1937 Nag. 385; 1937 O.W.N. 978=1937 Oudh 513; 8 O.W.N. 1267; 140 I.C. 409=1932 N. 177 (see also Notes under O. 47, R. 7, *infra*); 35 Bom.L.R. 280=1933 B. 183. Appeal lies from order granting

review. 41 I.C. 886=15 A.L.J. 505; 66 I.C. 909=25 C.W.N. 884; 52 I.C. 29=30 C.L.J. 250; 47 I.C. 850; 112 I.C. 518; 117 I.C. 849; 116 I.C. 221=1929 L. 26. See also 9 I.C. 238=250 P.W.R. 1911; 94 I.C. 591=1926 B. 121. [N.B.—As to law in Bombay, see 31 Bom.L.R. 137.] A right of appeal against an order granting a review is restricted in its scope by O. 47, R. 7. 45 C. 60=21 C.W.N. 1076; 25 I.C. 903=41 C. 746; 22 I.C. 773; 49 I.C. 57; 31 M.L.J. 827=38 I.C. 373; 37 I.C. 229=21 M.L.T. 297; 24 M.L.J. 93=18 I.C. 549; 42 A. 626=18 A.L.J. 838; 47 A. 881. See also 148 I.C. 1126=1934 L. 617; 1940 Pat. 7. Although an appeal lies against an order granting a review application that appeal can only be entertained on one of the grounds set forth in R. 7, O. 47. 7 R. 187=118 I.C. 120=1929 R. 105. See also 179 I.C. 946=1939 Rang. 59; 18 Pat. 777=1939 P.W.N. 719; 25 N.L.R. 104=116 I.C. 645=1929 N. 73; 122 I.C. 184=1930 A. 126. An appeal against an order granting review lies only in the cases mentioned in O. 47, R. 7. O. 47 contains rules specifically framed to govern procedure in regard to applications for review, and it modifies the provisions of O. 43. (1926 B. 121, Ref.; 1926 A. 492 and 1920 A. 112, Rel. on.) 146 I.C. 231=1933 A. 778. If the net result of an order granting review is the determination of a question relating to the execution of a decree, the order itself is a "decree" within the meaning of S. 2 (2). Therefore an appeal lies from it as from a decree and consequently it can be attacked upon any ground which the appellant chooses to take, and not merely on the limited grounds mentioned in O. 47, R. 7. 69 C.L.J. 573=43 C.W.N. 913=1939 Cal. 628. An appeal against a decree passed on an application for review of judgment is appealable on the ground that the Court which admitted the application for review had no jurisdiction to do so. 11 I.C. 343=14 O. C. 108. See also 11 O.W.N. 1287=1934 O. 445. There can be no appeal against an order granting a review merely for sufficient grounds. 35 I.C. 15=1 P.L.J. 193. Where trial Court granted review and decreed party's claim and appellate Court, finding that there was not "other sufficient reason" (O. 47, R. 1), for admitting the application for review, dismissed the plaintiff's suit. Held, that the order was clearly wrong for the "other sufficient reason" could not be questioned in appeal under O. 47, Rr. 4 and 7. (1929 R. 105 and 27 A. 695); 1935 R. 501. There is no second appeal against an order granting a review. 64 I.C. 568=1922 B. 292. Application for final decree in mortgage suit—Dismissal for default—Subsequent application after limi-

LOC. AMS.—[ALLAHABAD AND OUDH.] For the present r. 1 (u), *substitute* the following :—

“an order under r. 23 of O. XLI remanding a case where an appeal would lie from the decree of the Appellate Court.”

[BOMBAY.] R. 1 (w) of O. XLIII shall be *deleted*.

[CALCUTTA.] *Insert* the following *after* clause (i) of r. 1, O. XLIII :—

“(ii) an order under r. 57 of O. XXI, directing that an attachment shall cease or directing or omitting to direct that an attachment shall continue.”

[MADRAS.] *Substitute* the following *for* r. 1 (d) of O. XLIII of the Code of Civil Procedure :—

“(d) an order under r. 13 or r. 15 of O. IX rejecting an application (in a case open to appeal) for an order to set aside a decree or order passed *ex parte*.”

(*Fort St. George Gazette*, Part II, p. 313, dated 14th March, 1933.)

Substitute the following *for* sub-r. (s) of r. 1, O. XLIII :—

“(s) An order under r. 1 of O. XL, except an order under the proviso to sub-r. (2) of r. 4.”

[PATNA.] O. XLIII, r. 1.

Add the following to r. 1 as cl. (ii) *after* cl. (i) :—

“(ii) an order in garnishee proceedings other than an order referred to in r. 63-H (1) of O. XXI.”

[RANGOON.] *Add* the following clause *after* cl. (i), r. (1) :—

“(ii) a garnishee order under r. 63-C or r. 63-E, and an order as to costs in garnishee proceedings under r. 63-G of O. XXI.”

[SIND.] In r. 1 (u) *for* the words “an order under r. 23 of O. XLI” *read* “any order.”

Procedure.

2. The rules of Order XLI shall apply, so far as may be, to appeals from orders.

LOC. AMS.—[MADRAS.] (1) In O. 43, *substitute* the following *for* r. 2 :—

“2. The Rules of O. 41, and of O. 41-A shall apply, so far as may be, to appeals from the orders specified in r. 1 and other orders of any Civil Court from which an appeal to the High Court is allowed under any provision of law :

Provided that in the case of appeals against interlocutory orders made prior to decree, the Court which passed the order appealed from shall not send the records of the case unless an order has been made for stay of further proceedings in that Court.”

(2) *Add* the following as r. 3 of O. 43 :—

“3. (1) The provisions of O. 42 shall apply, so far as may be, to appeals from appellate orders.

(2) A memorandum of appeal from an appellate Court order shall be accompanied by a certified copy of the judgment and of the order of the Court of first instance, and by a certified copy of the judgment and of the order of the appellate Court.

(3) If any ground of appeal is based upon the construction of a document, a printed or type-written copy of such document shall be presented with the memorandum of appeal :

Provided that, if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader to be a correct translation shall be presented.”

[OUDH.] *Add* the following as r. 3 of O. 43 :—

“3. In every appeal under r. 1, in every miscellaneous case, and in every suit dismissed for default, a formal order shall be drawn up stating clearly the determination of the appeal, or case, the costs incurred, and the parties, if any, by whom such costs are to be paid.”

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tation—Order reviving prior application—Appealability. 18 N.L.J. 72. No appeal lies to the District Court against the order of a Revenue Court granting a review in a summary suit. 26 I.C. 831=2 L.W. 62. Where an order of the Assistant Collector reviewing an order passed by him under S. 111 (1) (c) of the U. P. Land Revenue Act is appealed against, the appeal must fail if it is not based on any of the grounds mentioned in O. 47, R. 7 (1), C. P. Code. 1936 O.W.N. 836=1936 O. 409. Effect of deletion of clause in Bombay High Court Rules. 29 Bom.L.R. 1355; 31 Bom.L.R. 131.

COURT-FEE.—Where once a Judge has granted the application for review, on whatever grounds he has granted it, the appeal against it can only be made under the conditions laid down in O. 47, R. 7 and as the

question of the application for review being insufficiently stamped is not one of the grounds mentioned in O. 47, R. 7 as being a proper ground for an objection, the appellate Court cannot go into the question of whether the Court-fee paid was sufficient or not. 35 Bom.L.R. 280=1933 B. 183=148 I.C. 728.

MISCELLANEOUS.—An order dismissing an application under S. 34, Trusts Act, is not appealable. There is no provision in the Trust Act for an appeal. Nor is the order a “decree” under S. 2 (2), or an order appealable under O. 43, R. 1. 11 O.W.N. 1533.

O. 43, R. 2.—Second appeal—Order on preliminary issues not filed along with main judgment—No valid presentation. 105 I.C. 593 (1)=28 Punj.L.R. 537. On this rule, see also 1930 S. 252; 41 L.W. 192.

ORDER XLIV.

Pauper Appeals.

1. Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject, in all matters, including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable :

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O. 44, R. 1.—A person can file a petition to appeal *in forma pauperis* only against a decree as a whole, and not against any order which is not a decree and which does not dispose of a case finally. 163 I.C. 366=38 P.L.R. 1119=1936 L. 406. Under R. 1 it is unnecessary for appellate Court to arrive at a definite and final conclusion that the decree complained against is contrary to law or is otherwise erroneous or unjust, before granting leave to appeal *in forma pauperis*; it is enough if Court finds that the appeal raises a substantial question of law and that the appellant has a *prima facie* good case. 53 M. 245=31 L.W. 76=58 M.L.J. 195. But see 56 M. 323 *contra* cited *infra*. The order is mandatory and only contemplates a perusal of the application, the judgment and the decree and nothing else; and unless in the opinion of Court the decree is contrary to law or otherwise erroneous or unjust, Court is bound to dismiss the application. R. 1 does not say that if the appeal raises a substantial question of law or the appellant has *prima facie* a good case the application should be allowed. 56 M. 323=64 M.L.J. 433=1933 M. 519. (53 M. 245, Diss. from.) There is a difference between an application for leave to sue as a pauper and an application for leave to appeal as a pauper. In the former case, apart from the question of pauperism, the only test applied is whether there is a cause of action shown; but when the appellate stage is reached, a more severe test has to be applied. 56 M. 323=64 M.L.J. 433. When leave to appeal *in forma pauperis* is granted, the reasons of the Court for granting such leave should be briefly stated. 56 M. 323. Ordinarily where an appellant has been allowed to appeal as a pauper there should be reasons other than poverty justifying an order being made upon him to furnish security and the fact that leave has been granted to him to appeal *in forma pauperis* should of itself be sufficient to show that the judgment appealed against upon a perusal of it appears to be contrary to law or otherwise erroneous or unjust. On the question of security where leave to appeal has been granted, it is permissible for Court to peruse the judgment appealed against and to see whether there are circumstances which would justify an order for security for costs. And the chance of the appellant's success is such a circumstance. 56 M. 323=64 M.L.J. 433. Upon hearing of the rule under R. 1 after notice to the opposite party

and the Government pleader, the question of whether the judgment is contrary to law or not can be considered by Court. Notwithstanding the fact that Court while dealing with the application *ex parte* did not think that any one of the grounds mentioned in the rule existed for rejecting the application, that does not debar Court from reopening the question when the other side appears after notice, and the opposite party is entitled to show that the judgment and decree appealed from are not contrary to law or to some usage having the force of law. The enquiry by Court is not confined to pauperism of the applicant. 10 P. 606=132 I.C. 361=1931 P. 183. See also 54 A. 394; 140 I.C. 439=1932 L. 654; 1933 L. 256=141 I.C. 649=34 P.L.R. 516; 133 I.C. 125. When once notice has been issued Court may enquire into the question of pauperism of applicant but it cannot fall back on the proviso to R. 1 which relates only to summary rejection upon a perusal of the judgment and decree appealed from. 54 A. 394. It is open to an appellate Court even after an application for leave to appeal *in forma pauperis* has been admitted and it has ordered notice to be served on the other party to consider whether the decree is contrary to law or some usage having the force of law or is otherwise erroneous or unjust. 140 I.C. 439=1932 L. 645. When notice has been ordered to the respondent and the Government on an application under R. 1, the respondent is expected to appear and show cause against whole application. It is open to Court to consider the question whether the decree appealed from is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust, and Court is not precluded from determining such question merely because notices to the respondent and the Government Advocate have been issued previously. 1934 A.L.J. 961=1934 A. 1004 (F.B.). See also 98 I.C. 624; I.L.R. (1937) Nag. 463=1937 Nag. 150. Court need not issue notice to the respondent before granting leave. The practice of the Madras High Court has been not to issue such notice. 55 M. 982=1932 M. 523=63 M.L.J. 28. There is no reason why every ground should be discussed in an order rejecting an application to file appeal *in forma pauperis*. 1935 Pesh. 22. Persons who do not pay the costs of their appeal are entitled to be heard only if the Judge after reading the judgment and decree is of opinion that on the face of it the judgment is wrong. Where Judge after reading

Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

Procedure on application for admission of appeal.

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the judgment refuses the application to file an appeal *in forma pauperis* the mere fact that his order was brief does not constitute any material irregularity. 1932 A.L.J. 860=1932 A. 712. Court must reject an application for leave to appeal *in forma pauperis* where the appellant has entered into any agreement with reference to the subject-matter of the appeal under which any other person has obtained an interest in such subject-matter, even though such agreement was entered into after the commencement of the suit. 122 I.C. 831. Order refusing leave to appeal *in forma pauperis* can be revised. 120 I.C. 413=1920 N. 53 (1924 N. 44, Rel. on). But High Court has no power to interfere on the merits of the order refusing leave to appeal *in forma pauperis*. 120 I.C. 413=1930 N. 53. Order 44, R. 1 does not require reasons for rejecting leave to appeal *in forma pauperis* to be stated and the absence of them does not vitiate the trial. 120 I.C. 413=1930 N. 53. Held, that having regard to the fact that the appellant was a pardanashin lady and was living with her parents in a different province there was sufficient cause for not filing her appeal by presenting it in person within the period allowed by law and that the representation of the papers by the appellant in person after the expiry of the period was sufficient. 11 L.L.J. 226. "Authorised agent", meaning of—Pardanashin lady—Husband presenting appeal on behalf of—Validity. 10 Pat.L.T. 46=114 I.C. 210=1929 P. 27. Under R. 1, a respondent is not precluded from attacking an *ex parte* order granting leave to appeal *in forma pauperis* and showing that the case does not fulfil the requirements of the law as enacted by the rule. It is competent for the Court to consider the question whether the condition laid down by R. 1 has been satisfied. 114 I.C. 325=1929 L. 514. Leave to appeal *in forma pauperis*—Refund of—Applicant if entitled to prosecute appeal for payment of Court-fee. 40 A. 381=16 A.L.J. 309. Appeal *in forma pauperis*—Limitation Act, Art. 170. See 29 I.C. 1003=13 A.L.J. 635. High Court cannot grant leave to prosecute an appeal to Privy Council *in forma pauperis*. The petitioner must apply in England. 18 I.C. 129=17 C.L.J. 381; 42 M. 32=35 M. L.J. 258. See also 44 I.C. 731=3 Pat. L.J. 179; 161 I.C. 192=1936 Pesh. 36. When the subject-matter is of the value of Rs. 10,000 or upwards, it is advisable to apply for leave to appeal as a pauper to Bench of two Judges under S. 8 (c) of the Oudh Courts Act. 38 I.C. 541. Leave to appeal *in forma pauperis*—Dismissal of

application does not involve dismissal of appeal. 3 L. 35=65 I.C. 741. But where application for leave and memorandum of appeal are not accompanied by copies of decree and judgment, the rejection of the application puts an end to the whole proceeding. 157 I.C. 347=1935 A.L.J. 681=1935 A. 620 (2) (F.B.). Appeal filed along with application for leave to appeal as pauper—Rejection of application—Subsequent payment of Court-fee—Appeal whether presented in time—C.P. Code, S. 149. 115 I.C. 678. Appeal when to be continued *in forma pauperis*. 38 M.L.J. 146=54 I.C. 761. Dismissal of application for leave to appeal as pauper—Effect on memo. of appeal. 31 M.L.J. 269=40 M. 687; 1926 O. 13. An applicant applying for permission to appeal as a pauper is not entitled as of right to be heard either in person or by pleader before Court exercises its power to allow or reject the application. 28 I.C. 957. Application for leave to appeal *in forma pauperis*—Notice ordered—Effect. 1924 P. 791=8 Pat.L.T. 119. There is no provision in the C.P. Code relating to the filing of cross-objections *in forma pauperis*, but when a respondent files cross-objections, he is in fact filing a cross-appeal, and the same principle as in O. 44, R. 1 must be applied. The conditions prescribed by that rule must be satisfied before leave, to file an appeal or cross-objections *in forma pauperis* can be granted. 54 L.W. 171=(1941) 2 M.L.J. 187.

PROVISO.—The proviso to R. 1 is mandatory and appellate Court has no option except to reject the application, unless it is satisfied that the decree sought to be appealed against is contrary to law or otherwise erroneous or unjust. 114 I.C. 80=1929 L. 539. There must be some material, either upon the application or upon the judgment and decree from which Court could reasonably form the opinion that the case falls within the proviso. 9 R. 92=132 I.C. 707=1931 R. 131. All that an appellate Court is required to do under O. 44, R. 1 Proviso is that it should peruse the application for leave to appeal as a pauper and the judgment and decree appealed from. It cannot be held that an appellate Court must hear arguments in support of an application for leave to appeal *in forma pauperis*, for to hold so would be to add something to the law on the subject and not to interpret it. 1938 O.W. N. 1246. Any order which has been passed behind the back of the party should not operate to the prejudice of that party. Where therefore the order issuing notices is passed in the absence of the respondents they cannot be precluded, as a result of the order,

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from arguing before Court that the decree sought to be appealed against was not contrary to law or to some usage having the force of law nor was otherwise erroneous or unjust. 15 L. 132=152 I.C. 171=1934 L. 72; 1937 N. 150; 1937 O.W.N. 14=1937 O. 222 (F.B.). Application for leave to appeal *in forma pauperis*—Issue of notice—Effect—Presumption as to conditions of notice being satisfied. 10 Pat.L.T. 46=114 I.C. 210=1929 P. 27. Even after issue of notice it is still open to the Court under the proviso to that rule to reject the application unless, upon a perusal thereof, and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. 1937 O.W.N. 14=1937 O. 222 (F.B.) noted *supra*. (165 I.C. 276=1936 O.W.N. 875, Overr.; 1933 A. 11; 6 P. 687 and 7 P. 825, Not Foll.) Memorandum of cross-objections filed in pauper appeals—Notice ordered—Presumption as to conditions being satisfied. 10 Pat.L.T. 387=119 I.C. 900=1929 P. 31. See also on this rule. 4 P. 67; 7 L.L.J. 214=1925 L. 391. Admission of an application for permission to file an appeal *in forma pauperis* is not a final disposal of the application and such admission does not preclude the opposite party from contesting the application. [7 P. 825, held overruled by 10 P. 606 (F.B.).] 141 I.C. 649=1933 L. 256.

ASSETS—SUBJECT-MATTER OF APPEAL TO BE EXCLUDED.—A decree for partition and separate possession obtained by a pauper plaintiff, subject to his liability for debts, against which he seeks to appeal as a pauper, contesting his liability for the debts, should be excluded in considering his application for leave to appeal as pauper. In considering whether a person is "pauper" the subject-matter of the suit should be excluded. 40 L.W. 783=1934 M. 653 (1)=67 M.L.J. 581. Where a pauper plaintiff who has partially succeeded wishes to appeal against the decree as a pauper, the property decreed in his favour by the trial Court cannot be taken into account in determining the sufficiency or otherwise of the plaintiff's means to enable him to pay the Court-fee. That decree could be appealed against by the defendants and till that becomes final, it cannot be said that the plaintiff appellant can exercise effective control or dominion over the decreed property and therefore he cannot be held to be possessed of sufficient means to pay the Court-fee. 1941 Oudh 113=1940 O.W.N. 1188. In a suit for enforcement of a mortgage at the instance of a mortgagee, the equity of redemption which is in the mortgagor or defendant is not the subject-matter of the suit, and for the purpose of deciding the question as to whether the mortgagor is a pauper or not, the value of the equity of redemption cannot be excluded by the Court from its consid-

eration. The mortgagor is, therefore, bound to state the valuation of the equity of redemption on oath in his affidavit in support of his application under O. 44, R. 1 for leave to file an appeal *in forma pauperis* against the mortgage decree. If he does not do so, his application is defective and is liable to be dismissed. 45 C.W.N. 426.

NOTICE TO GOVERNMENT PLEADER—DUTY OF COURT.—On receipt of an application to appeal as a pauper, Court has first to consider whether *prima facie* there is any ground for its rejection. If it is rejected, the matter ends. But if it is not rejected, a notice though not compulsory should be issued to the Government Pleader and the respondent and on hearing them, Court has to decide whether the applicant is in a position to pay Court-fees and further whether the decree is one which is contrary to law or is otherwise erroneous or unjust. Refusal to hear Government Pleader is revisable. 148 I.C. 624=1934 A.L.J. 827=1934 A. 421. See also 1934 A.L.J. 961=1934 A. 1004 (F.B.).

APPEAL FROM DECREE OF COURT IN AGENCY TRACTS.—R. 1 applies to appeals sought to be preferred *in forma pauperis* from decrees of Court in the Agency tracts, although there is no corresponding provision in the Agency Rules. Though many of the provisions of O. 33 and O. 44 are not reproduced in the Agency Rules, it does not follow that an appeal must be admitted as a matter of course without leave of the Court. 58 M. 298=40 L.W. 862=1935 M. 51=68 M.L.J. 51.

COURT-FEE.—An application for leave to appeal *in forma pauperis* accompanied with a memorandum of appeal was filed on 4th April. The application was rejected on 11th April. On 20th July the Court-fee stamp was paid. Between the two dates, the scale of Court-fees had been increased. Held, that the Court-fee payable was only according to the scale in force when the memorandum of appeal was filed, *viz.*, 4th April. 140 I.C. 190=1932 O. 343. See also 1933 A. 308=1933 A.L.J. 585=144 I.C. 79. Application under this rule—Court ordering Court-fees to be paid by certain date and rejecting appeal on default—If *ultra vires*. 1936 Pesh. 69. On rejecting an application to appeal *in forma pauperis* the Court is not bound to give time for the payment of Court-fee on the appeal. 154 I.C. 943=1935 Pesh. 22; 13 R. 50=159 I.C. 468=1935 R. 336. (1922 L. 225; 40 I.C. 611=32 M.L.J. 434 Diss.) The High Court can, after rejecting a petition for revision against an order of the District Judge rejecting an application to appeal as a pauper, extend the time fixed by the District Judge for paying the requisite Court-fees, even though such time had already expired and the appeal had been dismissed. 38 P.L.R. 374=1936 L. 909.

PRACTICE AND PROCEDURE.—Admission of an application for permission to file an appeal *in forma pauperis* is not a final dis-

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posals of the application and such admission does not preclude the opposite party from contesting the application. [7 P. 825, held overruled by 10 P. 606 (F.B.)] 141 I.C. 649=34 P.L.R. 516=1933 L. 256. Where the appellate Court issues notice to parties after a perusal of the application and the judgment and decree appealed from, it becomes *functus officio* as regards a summary dismissal of the application. The Court is bound to hear the parties before it does anything further. (54 A. 394, Ref.) 1933 A.L.J. 1467=1933 A. 925. On an application for leave to appeal as a pauper notice should not go as a matter of routine to the respondent. The practice of the Madras High Court is that when such an application is presented, as a condition precedent to the issue of notice, the Court has to have reason to think that the decree is contrary to law, etc. If the Court, after a perusal of the judgment, has not got reason to think so, then the Court is bound to reject the application; and it is only when that condition is satisfied that any notice goes at all to the respondent, and that is the notice on the question of pauperism and upon nothing else. Unless the order directing notice to go is qualified by some observations showing that the respondent is to be heard on the question of law, the ordinary rule is that the issue of notice means nothing more than that the question of pauperism is to be gone into, the Court being satisfied that on the face of the record it does satisfy the requirements of the proviso to O. 44, R. 1. 163 I.C. 755=1936 M. 661. When a Judge without considering this question issues notice to the respondent to show cause why the appellant should not be allowed to appeal *in forma pauperis*, he is entitled to correct the error and rescind his previous order issuing the notice and then consider whether there is any substance in the appeal. 44 L. W. 425=1936 M. 842=71 M.L.J. 497. Application under—If to be verified as a plaint. 1937 N. 108. There is no reason why every ground should be discussed in an order rejecting an application to file appeal *in forma pauperis*. 154 I.C. 943=1935 Pesh. 22. An appellate Court cannot be said to act illegally if it disposes of an application for leave to appeal *in forma pauperis* in chambers in a summary manner without hearing the applicant and without giving time for payment of the deficient Court-fee. Though the procedure is contrary to the prevailing practice, it is not illegal, for the usual practice is not sufficient to make it law. 159 I.C. 718=42 L.W. 831=69 M.L.J. 731. The respondent has no right to be heard on application for leave to appeal *in forma pauperis* under R. 1. But the Court is always justified in hearing the respondent or his pleader and there is nothing wrong in the Court hearing the respondent. 44 L. W. 425=1936 M. 842=71 M.L.J. 497. An application for leave to appeal *in forma pauperis* cannot be rejected without hearing

the applicant or giving him an opportunity of being heard. The reference in the rule to a "perusal" by the Court of the documents specified is not sufficient to justify a departure from the ordinary *cursus curiae*. 52 L.W. 514=1941 Mad. 49=(1940) 2 M. L.J. 570. Court will not be justified in issuing notice in order to make up its mind whether so to reject the application. Where a Judge dealing with the application directs the issue of notice he may be taken to have decided not to reject the application. It is not open to his successor to reconsider the matter and come to a contrary conclusion; he should take up the application at the stage where it had been dropped by his predecessor and continue the proceeding. 145 I.C. 831=1933 M. 658=65 M.L.J. 362.

LIMITATION.—An application for leave to appeal *in forma pauperis* was rejected as not being presented within the time prescribed by Art. 170, Limitation Act. The applicant put in an application under S. 5, Limitation Act. *Held*, that the order rejecting the application was an order rejecting a motion to present an application passed at a preliminary stage and not an order rejecting the application itself after judicially considering it under R. 1, that with the rejection of the application there was no appeal pending before the Court and as such application under S. 5, Limitation Act, was not maintainable. *Held, further*, that the order of rejection had no effect whatever on the question of whether appeal can be successfully presented or not and that an appeal may be presented with the proper Court-fee paid accompanied by an application under S. 5, Limitation Act. 144 I.C. 79=1933 A.L.J. 585=1933 A. 308. A single Judge of the High Court has no jurisdiction to dismiss an application for leave to appeal *in forma pauperis* on the ground that it is barred by limitation, if the valuation of the appeal is such that it is beyond his pecuniary jurisdiction. 1935 A.L.J. 681=1935 A. 620 (2) (F.B.).

APPEAL.—See 8 Luck. 477=144 I.C. 978=1933 O. 207.

REVISION.—Unless a lower appellate Court acts with illegality or irregularity its order rejecting an application for leave to appeal as a pauper cannot be revised by the High Court. 30 I.C. 86. In appropriate cases revision would be allowed. 9 R. 92=132 I.C. 707=1931 R. 131. (32 A. 623, Diss.)

O. 44, R. 1 (Allahabad amendment).—The respondent has no right whatever to be heard on the merits of the appeal at any stage of the proceedings under O. 44, R. 1. He can only be heard as to the pauperism of the appellant. 1939 A. L. J. 996=1939 All. 715=I.L.R. (1939) All. 917.

O. 44, Rr. 1 and 2.—The correct procedure on the presentation of an application for leave to appeal as a pauper is, if the Court does not see fit to reject the application on hearing the applicant only, to issue notices (without calling for the records), in Form No. 11 of Appendix G, C. P. Code,

LOC. AMS.—[ALLAHABAD AND OUDH.] O. 44, r. 1. To r. 1 add another proviso as follows :—

“ Provided further that no application under this rule shall be allowed unless a notice of the application has been given to the proposed respondents.”

2. The inquiry into the pauperism of the applicant may be made either by the Appellate Court or under the Orders of the Appellate Court by the Court from whose decision the appeal is preferred :

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court from whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be necessary, unless the Appellate Court sees cause to direct such inquiry.

LOC. AM.—[MADRAS.] O. 44, r. 2.

“ Provided that if the applicant was allowed to sue or appeal as a pauper in the court from whose decree the appeal is preferred, no further enquiry in respect of his pauperism shall be necessary, unless the appellate court, after hearing the Government Pleader, sees cause to direct such enquiry.”

ORDER XLV.

Appeals to the King in Council.

1. In this order, unless there is something repugnant in the subject or context, the expression “decree” shall include a final order.

Application to Court whose decree complained of.

2. Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of.

3. (1) Every petition shall state the grounds of appeal and pray for a certi-

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to the respondent and the Government Pleader, and then to hear all parties in regard to the question raised by the proviso to R. 1 of O. 44 and come to a decision thereon, and also to decide the question of pauperism if that falls to be decided under R. 2. If an application for leave to appeal *in forma pauperis* is admitted in the absence of the respondent, and without notice to him it is open to him at the final hearing of the Rule to show that the case does not satisfy the proviso to R. 1 of O. 44; 1938 Rang. L. R. 651. See also 186 I.C. 170.

O. 44, R. 1 and O. 33, R. 1.—An applicant under the U. P. Encumbered Estates Act, who has considerable properties is not a pauper because of the prohibition under S. 7 of the Act against dealing with such property. An applicant, if he desires to appeal against a decision of the Special Judge, cannot claim that he is a pauper because he has not been able to find a buyer. He has to seek the means to get over the difficulty arising out of S. 7 and not claim benefit as a pauper. 15 Luck. 397=1940 Oudh 208. The word ‘person’ in O. 33, R. 1 and so the word ‘person’ in O. 44, R. 1, C. P. Code, does not include a limited company incorporated under the Indian Companies Act. Consequently, an application by a limited company for leave to appeal *in forma pauperis* under the provisions of O. 44, R. 1 is not competent.

Per *Costello, J.*—It is doubtful whether it is even right to say that the word ‘person’ includes a liquidator of a limited company in liquidation. 42 C.W.N. 1164=1938 Cal. 745.

O. 44, R. 2.—The appeal is said to be filed on the day on which application for leave to appeal as pauper is made though Court-fee is paid before the end of inquiry. [2 A. 241 (P.C.), Foll.] 32 I.C. 630=9 Bur.L.T. 69.

O. 45, R. 1.—High Court has no power under O. 45 to add parties pending appeal to the Privy Council. 3 R. 474; 92 I.C. 122=1926 R. 9. Application for leave to appeal to Privy Council—Review petition successful—Reversal in appeal—Effect on original application. 4 L. 445=77 I.C. 869. “Final order”—Meaning of—Order of remand in appeal directing admission of document excluded by lower Court from evidence—Appeal to Privy Council. 154 I.C. 942.

O. 45, Rr. 2 and 17.—Procedure—Dismissal of civil revision petition by single Judge of High Court—Certificate as to substantial question of interpretation of Government of India Act granted—Application for leave to appeal to Federal Court—Certificate—If to be applied for or granted—Court—If bound to consider whether substantial question of interpretation arises. See (1940) 2 M.L.J. 170.

O. 45, R. 3.—A certificate issued under O. 45 must clearly show whether it fulfils the conditions of S. 110 or is otherwise a case fit for appeal to Privy Council under S. 109. 44 M. 293=48 I.A. 31=40 M.L.J. 229 (P.C.). Where many important and wide-reaching questions of law are involved in a decision sought to be appealed against, the case is “otherwise a fit one for appeal to His Majesty in Council” within R. 3. 22 I.C. 390; 1914 M.W.N. 162. See also 6 O.W.N. 211=1929 O. 243. Where

Certificate as to value or fitness.

Council.

ificate either that, as regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to His Majesty in

(2) Upon receipt of such petition, the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

LOC. AMS.—[BOMBAY.] In sub-rule (2) of r. 3 of O. 45, *after* the words "to show cause why the said certificate should not be granted" the following words shall be *inserted*, namely:— "unless it thinks fit to refuse the certificate."

[NAGPUR.] For sub-r. (2) of r. 3, O. 45, the following sub-rules shall be *substituted*, namely:—

"(2) Upon receipt of such petition, the Court, after sending for the record, and after fixing a day for hearing the applicant or his pleader and hearing him accordingly if he appears on that day, may dismiss the petition.

(3) Unless the Court dismisses the petition under sub-r. (2), it shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted."

4. For the purposes of pecuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated; but suits decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same questions for determination.

5. In the event of any dispute arising between the parties as to the amount or value of the subject-matter of the suit in the Court of first instance, or as to the amount or value of the subject-matter in dispute on appeal to His Majesty in Council, the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last-mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made.

NOTES.

the applicant for leave to appeal to Privy Council, knowing full well that the requirements of S. 110, are not fulfilled, omits to say and is unwilling to say explicitly how his case is a fit one for appeal, the petition deserves to be summarily dismissed on that sole ground. 1936 R.D. 120.

O. 45, Rr. 3 and 4.—There is no provision of law authorising one application for leave to appeal in two separate suits and appeals. Where one such application is filed it is not open to the party to file another application out of time. It is however open to him to amend the application by confining the prayer for certificate to one of the cases. 140 I.C. 70=1932 L. 441.

O. 45, R. 4.—O. 45, R. 4, C. P. Code, requires that the questions for determination in the several suits sought to be consolidated shall substantially be the same. The fact that there is one common question does not entitle an applicant to an order for consolidation when there are other questions which are not common. The basis of an order for consolidation must be that the several suits involve substantially the same questions. 1939 Mad. 734=(1939) 1 M.L.J. 610=49 L.W. 470=I.L.R. (1939) Mad. 593. Under R. 4 consolidation for purposes of valuation for leave to appeal to the Privy Council is admissible only when the suits in question involve substantially the same questions for determination and have been decided by

the same judgment. 44 M.L.J. 424=1923 M. 602. R. 4 allows consolidation but only to make good a defect of pecuniary valuation and not a defect of any other kind. 69 I.C. 525=1923 N. 198; 70 I.C. 782; 6 P.L.J. 97=2 P.L.T. 157; 3 P.L.J. 446=45 I.C. 551; 50 B. 753. *See also* 169 I.C. 926=1937 Pesh. 61. The word "judgment" refers to the judgment appealed against (i.e., the judgment of High Court) and not the judgment of the Court below. Even where the judgments delivered were separate, if one is merely a copy of the other except for a few alterations, the two should be regarded as the same judgment. 34 L.W. 817=61 M.L.J. 692 (50 B. 753, Foll.). The Court under the rule has a discretion to consolidate or not and is not bound to grant an order of consolidation as of course. I.L.R. (1939) Mad. 593=1939 Mad. 734=(1939) 1 M.L.J. 610. R. 7 of the Schedule to the Rules of the Indian Order in Council (9th February, 1920), regarding appeals to the Privy Council invests the High Court with power to allow consolidation of appeals for the purpose of giving security in cases not falling directly within the scope of O. 45, R. 4. 40 P.L.R. 658=1938 Lah. 207.

O. 45, R. 5.—A defendant who had consistently acquiesced in a finding as to valuation and Court-fee cannot re-open it to enable him to prefer an appeal to Privy Council. 42 B. 609=20 Bom.L.R. 418; 30 I.C. 204

Effect of refusal of certificate. 6. Where such certificate is refused, the petition shall be dismissed.

7. (1) Where the certificate is granted, the applicant shall, within ¹[ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow] from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,—

(a) furnish security ²[in cash or in Government securities] for the costs of the respondent, and

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¹ Substituted for "six months" by Act XXVI of 1920.

² These words were inserted by S. 3 (ii), *ibid.*

NOTES.

=2 O.L.J. 208. When a reference is made under this order to a Court of first instance, the Court must carry it out itself; it should not remit the investigation to some other officer. 34 I.C. 203=43 C. 225. Where an application for leave to appeal to Privy Council against an *order of High Court dismissing on appeal his petition for adjudication of the respondent* states that he has no information as to the assets and liabilities of the respondent, High Court will decline to refer the question of the value of the subject-matter of the appeal to the Court of first instance under R. 5. 12 R. 355=1934 R. 292.

O. 45, R. 7: TIME FOR FURNISHING SECURITY—POWER OF COURT TO EXTEND TIME—CONFLICT OF RULINGS.—Under O. 45, R. 7 (1), C. P. Code, as amended by Act XXIV of 1920, the printing costs have normally to be deposited within ninety days. An extension of time may be granted for deposit of printing charges after the expiry of 90 days upon cause being shown, but such extension of time cannot exceed 60 days, and if this further period of 60 days has elapsed, the Court has no power under the rule as it stands to grant further time. The words are mandatory and limit the discretion of the Court. So far as appeals to His Majesty in Council are concerned in view of the language of R. 9 of the Order in Council of 9th February, 1920, the High Court has power in proper cases to extend time for making deposits of printing costs beyond the limits fixed by O. 45, R. 7 of the Code of Civil Procedure. But such power should be exercised with great caution and only where there are cogent reasons. In other words, it is only when the justice of the case demands that the Courts should extend time or that such extension should be given. 19 Pat. 123=20 Pat.L.T. 905=1938 Pat. 667. See also 1939 Rang. L. R. 668. The High Court has power under R. 9 of the Privy Council Rules to extend the period allowed for furnishing the security and making the deposit required by O. 45, R. 7, beyond the periods mentioned therein. The provisions of R. 9 are wide and general in their terms.

The discretion conferred should be exercised only in exceptional circumstances and where an extension is clearly supported by considerations of justice and equity. I.L.R. (1939) All. 549=1939 All. 299 (F.B.). The discretion given to the Court under R. 9 of the Privy Council Rules is a general one, which does, if the justice of the case requires it, enable the Court to extend the time for lodging security to any extent; but in exercising that discretion, the Court must have regard to the fact that under O. 45, R. 7, the extension of time is strictly limited, and it would require a strong case to induce the Court to hold that justice requires an extension of time beyond the limit specified in that rule. I.L.R. (1939) Bom. 556=41 Bom.L.R. 947=1939 Bom. 483.

Per King, J. (*Obiter*).—In order to avoid a conflict between R. 7 and S. 148, it must be held that R. 7 must prevail, both on the principle "*generalia specialibus non derogant*" and on the principle that the general discretion given by S. 148 is a judicial discretion which can only be exercised according to law and not in contravention of law. 1933 A.L.J. 207=1933 A. 241=55 A. 432 (F.B.). See also 1937 A.L.J. 1362=1938 All. 131.

Per Mukerji, Ag. C. J. and King, J. (*Niamatullah, J.*, dissenting).—Court has no discretion to extend the time beyond 150 days from the date of decree or order appealed against as the language of Privy Council Rules, R. 9, even though very wide, cannot override O. 45, R. 7. R. 9 was never intended to sanction the allowance of any further period; and O. 45, R. 7 and the Privy Council Rule should be taken as parts of the same legislative scheme and should be construed so as to avoid any inconsistency. 1933 A.L.J. 207=1933 A. 241=55 A. 432 (F.B.). (55 M. 835, Foll.; 51 B. 430, Diss.) 39 C.W.N. 651; 159 I.C. 232=1935 L. 733; 40 P.L.R. 712=1938 Lah. 725. There is no inconsistency between the provisions of O. 45, R. 7 and R. 9 of the Privy Council Rules. The latter does not refer to orders which may be passed by the Court previous to the cancellation of the certificate but is intended to cover merely incidental orders necessitated by the cancellation of the certificate. 159 I.C. 232=1935 L. 733. See also 185 I.C. 819=1940 Rang. 12 (F.B.); 1938 O.W.N. 1121=1938 A. W. R. (c. c.) 113. In an appeal to His Majesty in

(b) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except—

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Council the High Court has power under R. 9 of the Privy Council rules to extend the period allowed for furnishing the security and the making of the deposit required by O. 45, R. 7, beyond the period mentioned therein, but the power should not be exercised without cogent reason. 48 L.W. 35=1938 Mad. 796=(1938) 2 M.L.J. 128 (F.B.). Time for furnishing security and deposit cannot be extended by more than six weeks. 44 A. 216=20 A.L.J. 13; 44 A. 242=20 A.L.J. 51; 4 R. 216=1927 R. 20. See also 1940 Rang. 12 (F.B.); 1939 Bom. 483; 40 P.L.R. 658=1938 Lah. 207; 1939 Rang.L.R. 668 (F.B.). Period of six weeks from date of certificate cannot be extended. 105 I.C. 585=1927 P. 330; 1929 P. 431. If the time for the furnishing of the security under O. 45, R. 7 expires on a day when the Court is closed for the vacation, compliance with the order of security can be deferred until the day when the Court reopens. 40 P.L.R. 712=1938 Lah. 725. Decree amended on review—Leave to appeal to Privy Council—Limitation. 4 L. 185=75 I.C. 520. The High Court has no power to extend time or excuse delay in the matter of furnishing security for the costs of the respondents in an appeal to His Majesty in Council beyond the period given by S. 1 of Act XXVI of 1920. 18 L.W. 29=74 I.C. 703 (1)=1924 M. 44; 44 C.W. N. 920; 70 I.C. 937=25 O.C. 254. See also 55 M. 835=138 I.C. 663=1932 M. 484=62 M.L.J. 665 [18 L.W. 29, Foll.; 51 B. 430 (F.B.), Diss.]; 1939 Rang.L.R. 668 (F.B.); 7 Luck. 528=136 I.C. 336; 132 I.C. 438=33 Bom.L.R. 487=1931 B. 278. Both under this rule and under R. 9 of the Privy Council Rules, the Court has the power not only to extend the time for making the deposit and for furnishing the security, but also to change the form of the security. [51 B. 430 (F.B.), Rel. on.] 132 I.C. 438=33 Bom.L.R. 487=1931 B. 278. See also 1937 A.L.J. 1362=1938 All. 131. The mere inability of a party to raise the requisite funds is not a sufficient ground to justify an extension of time for furnishing security. 55 M. 835=1932 M. 484=62 M.L.J. 665. But see next case *contra*. The High Court can extend time for furnishing security but it should not do so without cogent reasons. 6 O.L.J. 149=50 I.C. 907; 65 I.C. 450; 49 I.C. 892; 10 C. 67; 1926 R. 44=94 I.C. 590; 103 I.C. 213 (1)=1927 P. 332; 51 B. 430=1927 B. 217 (P.C.). See also 1929 P. 431. In a case to which O. 45, R. 4 does not in terms apply as when the appeals arise out of one and the same suit and not out of two separate suits, the High Court has no inherent power for consolidating appeals to the Privy Council for the purpose of security for costs. 1936

A.L.J. 1025=1936 A. 832. When two appeals are consolidated for valuation, and a joint certificate is granted, both the appeals will be stayed if security for costs is not deposited in any of them. Security has to be furnished in respect of each appeal though consolidated. 4 P.L.J. 198. Security must be in cash or Government security. 66 I.C. 548. Application to furnish security in form other than cash or Government security must be made at the time of granting the certificate. 1929 P. 431. A deposit of Government Promissory Notes by way of security within the time allowed by the Court is valid even though the endorsement in favour of the Registrar was made beyond the time prescribed for furnishing security. The Allahabad High Court Rules do not say that the notes should be endorsed, though no doubt the endorsement is the proper form of furnishing security. 1933 A.L.J. 276=1933 A. 410. Where the applicant was asked to furnish security for costs of the respondent and also to deposit the translation and printing charges, the deposit of the costs only and not the translation and printing charges is not valid. 1933 A.L.J. 207=1933 A. 241=55 A. 432 (F.B.) The circumstance that the appellant had a serious illness which incapacitated him from attending to any work would amount to cogent reasons for extension of time. So also, where there is misunderstanding as to what business would be transacted in the office of the Court during the vacation, and where the appellant is under the impression that it would be enough if the money is deposited on the reopening day although the period expires during the vacation, it must be held that there are cogent reasons for extending time. 19 Pat. 123=20 Pat.L.T. 905=1939 Pat. 667 (F.B.). See also 1939 Rang.L.R. 668. A deposit made by an appellant to the Privy Council under O. 45, R. 7 is merely by way of security for any liability for costs of the respondent which might arise in case the appeal failed. When such liability arises and is discharged by appropriation of amounts already received in respect of the decree as provided for in S. 19 of the Madras Act IV of 1938, the decree-holder or respondent can no longer claim any payment under his decree for costs, and the deposit has to be returned to the appellant judgment-debtor. 54 L.W. 107=(1941) 2 M.L.J. 125.

O. 45, R. 7 (1) (b).—Where judgment-debtor appealed to the Privy Council and deposited necessary sum and decree-holder made an application to attach so much of the deposit as would eventually be found not to be required for the purpose for which it was entrusted to Court but did not put any figures to suggest that there was any likelihood of there being any surplus, the appli-

(1) formal documents directed to be excluded by any order of His Majesty in Council in force for the time being ;

(2) papers which the parties agree to exclude ;

(3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included ; and

(4) such other documents as the High Court may direct to be excluded.

¹[Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished :

Provided further, that no adjournment shall be granted to an opposite party to contest the nature of such security.]

(2) Where the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also within the time mentioned in sub-rule (1), deposit the amount required to defray the expense of printing such copy.

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¹ This proviso was added by S. 3 (iii), by Act XXVI of 1920.

NOTES.

cation has absolutely no substance and even if the application contains such figures it would be wholly premature. 119 I.C. 5=1929 A. 794. Security for costs furnished by insolvent—Attachment subject to appeal—Permissibility. See 9 Pat.L.T. 969. Judgment-debtor appealed to the Privy Council and deposited a sum for the costs of the Privy Council and for printing charges. Decree-holder applied to attach the amount in execution of the decree which he had obtained from High Court. The idea underlying the application was that the decree-holder would attach and obtain the amount deposited and would then claim to be in a position to contend that the judgment-debtor had not in deposit the money he was required to deposit and to ask that the appeal should be therefore dismissed. *Held*, that the manoeuvre was grossly improper and an offence to the Court and the nature of the application was such as to make it desirable to consider whether the Court has inherent power in suitable case to make counsel pay the costs of litigation. 119 I.C. 5=1929 A. 794. Under O. 45, R. 7 an application for permission to furnish security otherwise than in cash or in Government securities must be made at the time of the grant of the certificate. The proviso to the rule precludes the Court from granting an application of this nature at a later stage. 49 L.W. 716= (1939) 2 M.L.J. 521. An application that immovable property may be accepted as security should be made at or before the making of an order granting the certificate. 48 M. 559=48 M.L.J. 134. Proprietary interest of surety is not extinguished. Per *Sulaiman, Banerji and Sen, JJ.*—When either immovable or movable property is offered as security the proprietary interest of the surety is not automatically extinguished and merely a first charge is created on the security which will have to be available in the first instance for the purpose for which it has been offered. Although the

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depositor cannot defeat that purpose, his power of disposal of his security subject to that charge will subsist, and his interest in the surplus which may remain over is both transferable and attachable. It is not only permissible to a decree-holder to attach the security but he has a right to do so subject always of course to the first charge created and the Court has no discretion to refuse his prayer. The only condition which the Court issuing an order for attachment must impose is that the previous charge created in the property is no way to be affected. O. 21 R. 52, is specially applicable to attachment of property in the custody of any Court or public officer. 1930 A.L.J. 402=1930 A. 225 (F.B.). See also 148 I.C. 864=1934 O. 139=9 Luck. 534. Application by solicitor of successful respondent for payment of deposit towards fees due from respondent—High Court has power to order. See 41 Bom.L.R. 410=I.L.R. (1939) Bom. 307=1939 Bom. 250.

O. 45, R. 7 (1) (As applied to Federal Court appeals)—"DATE OF THE DECREE"—MEANING OF.—The phrase "date of the decree" in O. 45, R. 7 (1), C.P. Code, as applicable to Federal Court appeals, means the date which the decree bears or the date upon which the judgment was pronounced. The starting point of time in the rule is undoubtedly the date which the decree bears and not the date when the decree was actually signed. 1939 P.W.N. 807=20 Pat.L.T. 905=1939 Pat. 667 (F.B.).

O. 45, Rr. 7 and 17.—*Gwyer, C.J.*—The Federal Court has no power to entertain any appeal from an order of the High Court refusing to extend the time for receiving the deposit of printing cost in respect of an appeal to the Federal Court, and even if it has, it should be slow to interfere with the exercise of the High Court of its discretion in a matter of this kind. *Sulaiman, J.*—There is no revisional power for interference with the order. And even if there is an appeal the Federal Court should not interfere with the non-exercise of a mere discretion by the High Court, unless some questions of principle are involved. I.L.R. (1940) Kar. (F.C.) 1=187 I.C. 670=21

LOC. AMS.—[ALLAHABAD AND OUDH.] In r. 7 (1) (a) *between* the words "the respondent" and the word "and" *insert* the following words:—

"except when the Secretary of State for India in Council is the applicant."

[BOMBAY, NAGPUR AND SIND.] After r. 7 of O. 45, the following rule shall be *inserted*, namely:—

"7-A. No such security as is mentioned in r. 7 (1), cl. (a), shall be required from the Secretary of State for India in Council or, where the Local Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity."

[MADRAS.] *Re-number* the present sub-r. (2) of r. 7 of O. 45, as sub-r. (3) and *insert* the following as sub-r. (2):—

No such security as is mentioned in r. 7 (1), (cl. (a)) shall be required from the Secretary of State for India in Council or, where the Local Government has undertaken the defence of the suit, from any public officer sued in respect of an act, purporting to be done by him in his official capacity."

8. Where such security has been furnished and deposit made to the satisfaction of the Court, the Court shall—

Admission of appeal and procedure thereon.

(a) declare the appeal admitted,

(b) give notice thereof to the respondent,

(c) transmit to His Majesty in Council under the seal of the Court a correct copy of the said record, except as aforesaid, and

(d) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them.

9. At any time before the admission of the appeal the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon.

NOTES.

Pat.L.T. 309=71 C.L.J. 327=1940 (F.C.) 26.

O. 45, R. 8.—A deposit made out of time is not one made to the satisfaction of Court within R. 8. The periods both for security and deposit are identical. 1923 A. 572=84 I.C. 535. Omission to give notice to the respondents of the admission of an appeal to Privy Council is no sufficient ground for rehearing provided the respondents in fact knew of the admission. 22 Bom.L.R. 550=59 I.C. 7 (P.C.).

O. 45, R. 8 (as applied to Federal Court). SCOPE OF—DECLARATION OF ADMISSION OF APPEAL—IF CONDITION PRECEDENT TO JURISDICTION OF FEDERAL COURT.—(Obiter.) Sulaiman, J.—Under O. 45, R. 8, C.P. Code, as applied to the Federal Court, the High Court after the deposit has been made to its satisfaction, has to declare the appeal admitted, and then give notice to the respondent, and to transmit the record to the Federal Court. After the certificate required by S. 205 of the Government of India Act has been granted, the admission of the appeal by the High Court under O. 45, R. 8 is its final judicial act. The declaration that the appeal is admitted is not a mere ministerial or administrative act, but a judicial act. An appellant cannot come to the Federal Court without his appeal having been admitted by the High Court. Varadachariar, J.—Though the scheme of O. 45 implies that till the High Court makes the order under R. 8, it still retains a measure of control over the proceedings, it cannot be said that such an order is a condition prece-

dent to the exercise of jurisdiction by the Federal Court. When the Federal Court has power to dispense with or give special directions as to printing and production of the records before it, it would be illogical to insist that the High Court must pass an order under O. 45, R. 8 (a), which can be passed only on compliance with the directions originally given by the High Court, which *ex hypothesi* have become inoperative because of the Federal Court's discretion in the matter. 1941 M.W.N. 136=22 Pat. L.T. 119=1941 (F.C.) 5.

O. 45, Rr. 8 and 17: Per Gwyer, C.J.—The absence of any admission by the High Court of an appeal to the Federal Court is not a statutory bar to the prosecution of the appeal before the Federal Court. The provisions of O. 45, C.P. Code, are procedural provisions only, and the non-compliance with R. 7 of that order relating to the deposit of printing costs does not necessarily oust the jurisdiction of the Federal Court, if a certificate under S. 205 (1) of the Constitution Act has once been given. I.L.R. (1940) Kar. (F.C.) 1=187 I.C. 670=21 Pat.L.T. 309=1940 (F.C.) 26.

O. 45, R. 9: ACCEPTANCE OF SECURITY—WHEN MAY BE REVOKED.—Under O. 45, R. 9, C.P. Code, the Court has power to revoke the acceptance of the security furnished under R. 7 only before the admission of the appeal under R. 8 and not at any subsequent stage. 40 P.L.R. 712=1938 Lah. 725.

O. 45, Rr. 9 and 10.—An application for the enhancement of the amount of security for costs furnished by an appellant to the Privy Council can, after the admission of

¹[9-A. Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court :

Power to dispense with notices in case of deceased parties.

Provided that notices under sub-rule (2) of rule 3 and under rule 8 shall be given by affixing the same in some conspicuous place in the Court-house of the Judge of the District in which the suit was originally brought, and by publication in such newspapers as the Court may direct.]

LOC. AM.—[RANGOON.] *Substitute* the following for r. 9-A:—

"9-A. Nothing in these rules requiring any notice to be served on or given to opposite party or respondent shall be deemed to require any notice to be served on or given to an opposite party or respondent who did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court, or on or to the legal representative of any such opposite party or respondent if deceased :

Provided that notices under sub-r. (2) of r. 3 and under r. 8 shall be given by affixing the same in some conspicuous place in the Court-house of the Judge of the District in which the suit was originally brought, and by publication in such newspapers as the Court may direct."

10. Where at any time after the admission of an appeal but before the transmission of the copy of the record, except as aforesaid, to His Majesty in Council, such security appears inadequate,

Power to order further security or payment.

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid,

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment.

Effect of failure to comply with order.

11. Where the appellant fails to comply with such order, the proceedings shall be stayed,

and the appeal shall not proceed without an order in this behalf of His Majesty in Council,

and in the meantime execution of the decree appealed from shall not be stayed.

12. When the copy of the record, except as aforesaid, has been transmitted to His Majesty in Council the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under rule 7.

13. (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs.

Powers of Court pending appeal.

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¹ Inserted by Act XXVI of 1920.

NOTES.

the appeal, be made under R. 10 only and not under R. 9. 49 I.C. 893.

O. 45, R. 13.—High Court has power to stay execution of a decree notwithstanding that an appeal from such decree has been admitted by special leave of His Majesty in Council. 38 C. 335=13 C.L.J. 529=38 I.A. 74 (P.C.); 57 I.C. 382=24 C.W.N. 265. High Court has *inherent power* to stay execution in view of an intended appeal to Privy Council. 40 C. 955=16 C.L.J. 508. *See also* 150 I.C. 446=1934 A.L.J. 1191=1934 A. 585. Apart from R. 13, under

which High Court has powers to stay further proceedings in the suit, as distinguished from proceedings in execution, it is well settled that High Court has abundant inherent power to stay such proceedings in a suitable case, pending appeal to Privy Council. 59 C.L.J. 440=38 C.W.N. 795=1934 C. 823. Stay of execution—Grounds for. 15 I.C. 187=234 P.L.R. 1912. A subordinate Judge has no jurisdiction to stay execution of a decree of the High Court. The only Court which can stay execution is the High Court. 3 P.L.J. 40=42 I.C. 835. Decree of High Court executed—Appeal thereafter to Privy Council—High Court has power to demand security from the respondent. 96 I.C. 245 (2)=50 B. 453=1925 B. 425. The

(2) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—

(a) impound any movable property in dispute or any part thereof, or

(b) allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal, or

(c) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which His Majesty in Council may make on the appeal, or

(d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise.

14. (1) Where at any time during the pendency of the appeal the security furnished by either party appears inadequate, the Court may, on the application of the other party, require further security.

Increase of security found inadequate.

(2) In default of such further security being furnished as required by the Court,—

(a) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed from as if the appellant had furnished no such security ;

NOTES.

word "Court" in the first para. of R. 13 means a High Court. 50 B. 453. An application for stay of execution under R. 13 cannot be entertained by the Court till the certificate for appeal to the Privy Council is granted. The presentation of a petition under O. 45, Rr. 2 and 3 is not an appeal. 16 I.C. 845; 18 A.L.J. 142=54 I.C. 561=42 A. 170. O. 45, R. 13 has no application where the party applied for the stay of proceedings in the Court below as distinct from the stay of execution of a decree. 150 I.C. 446=1934 A.L.J. 1191=1934 A. 585. Appeal to Privy Council from mortgage decree—Stay of execution on security and appointment of receiver—Dismissal of appeal—Liability of sureties—Extent of. 150 I.C. 177=1934 P. 176.

O. 45, R. 13 (2) (d).—O. 45, R. 13 (2). (d) enables the High Court in a proper case, even though no appeal has been filed against the final decree and the appeal pending before the Privy Council, as in this case, is only with respect to the preliminary decree, to pass necessary orders in order to safeguard the rights of an applicant when he asks for stay of execution of the final decree. 48 L.W. 689=(1938) 2 M.L.J. 764. It is competent to the High Court to appoint a receiver to an estate which is the subject-matter of an appeal for which special leave has been granted by the Privy Council. (38 C. 335, Foll.; 10 C.L.J. 326 and 27 C. 1, Ref.) 52 I.C. 407=4 P.L.J. 482. See also 150 I.C. 177=1934 P. 176. Suit for enhancement of maintenance—Trial Court holding suit to be maintainable—Appellate Court refusing to entertain appeal—Appeal to Privy Council—Stay of suit refused. 30 Bom.L.R. 126. Where

a mortgage suit was directed to be re-heard by the High Court and during the pendency of an appeal to the Privy Council against that order one of the parties applied for stay, *held*, that High Court had power under R. 13 to stay the proceeding pending disposal of the appeal. 34 C.W.N. 631=1931 C. 79.

INHERENT POWER.—Under O. 45, R. 13 (2) (d), the High Court can, after an application for leave to appeal to His Majesty in Council has been filed, make an order for the preservation of the subject-matter of the appeal. A sum of money representing the fruits and profits of the decretal property accruing after the decree was passed, which was deposited in the High Court under its orders pending the disposal of the appeal to it, forms part of the subject-matter of the appeal to the Privy Council, as an adjudication of title in respect of the property one way or the other would directly affect its ownership. *Prima facie*, therefore, the High Court will have the power under that clause to make an order for the preservation of this sum of money, if in its discretion it thinks fit to do so. Even if Cl. (d) does not cover this case, the High Court will have the inherent power to make an order concerning this sum of money. Pending the filing of an application for leave to appeal to His Majesty in Council, the High Court has the auxiliary power, the inherent power to make an *interim* order touching this sum of money maintaining the *status quo* till such time within which the application for leave to appeal may be made and for such further period as within which an order may be obtained from the Court dealing with Privy Council matters. 45 C.W.N. 1023.

(b) if the original security was furnished by the respondent, the Court shall, so far as may be practicable stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit.

15. (1) Whoever desires to obtain execution of any order of His Majesty in Council shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the Court from which the appeal to His Majesty was preferred.

(2) Such Court shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His

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O. 45, R. 15.—The provisions of R. 15 are mandatory. Where a decree for pre-emption passed by the Chief Court on appeal was reversed by the Privy Council, and the trial Court passed, at the request of the pre-emptor, an order by way of restitution directing payment to his creditors out of the pre-emption money deposited by him, before the order of His Majesty in Council had been transmitted to it from the Chief Court under R. 15, the order of the trial Court made in violation of its provisions is quite irregular if not altogether without jurisdiction. 160 I.C. 814=1936 O.W.N. 262=1936 O. 185. When an application under O. 45, R. 15, prays that the memo of costs be prepared, it includes also a prayer for transmission of the order to the Court concerned. The usual practice adopted by the Chief Court of Oudh with reference to such applications is to send them to the office for necessary action. It is the office that then prepares the memo of costs and transmits it to the Court concerned without any further directions or orders of the Court. 1938 O.W.N. 1045=1938 Oudh 250. When an order of His Majesty in Council is transmitted for execution under O. 45, R. 15 (2) it is not necessary to give any further directions and particularly so, when they are not asked for. 1938 O.W.N. 1045=1938 Oudh 250. "Execution" meaning of. 37 A. 567=13 A.L.J. 769; 64 I.C. 152. O. 45, R. 15 is not applicable to an application for restitution under S. 144, C.P. Code; such an application is not one in execution. When a successful appellant before His Majesty in Council applies for restitution, it is not necessary for him to apply under O. 45, R. 15. He has a right to approach the Court which passed the decree and claim restitution, and the Court of first instance has an inherent power to order restitution. There is no law compelling such person to apply first to the High Court under R. 15 of O. 45. Nor has the High Court any power to decide on an application under O. 45, R. 15 to which Court an application for restitution has to be made. If the High Court decides that and directs the application to be presented in a particular Court, that is not final or conclusive; and the respondent to an application for restitution can raise the plea that the Court in which it is made

pursuant to the direction of the High Court has no jurisdiction to decide the restitution application. 1937 A.L.J. 588=I. L. R. (1937) All. 670=1937 All. 510. Right of person not a party to Privy Council appeal to apply for restitution. 32 M.L.T. 249 (H.C.); 75 I.C. 219=1924 M. 95. R. 15 should not be construed as restricting the only possible evidence of an order in Council to the certified copy. It is intended to ensure that proper information on the subject of an order in Council should be supplied to the Courts in India. 33 M.L.J. 300=41 I.C. 629. High Court when it acts under R. 15 cannot consider or discuss the effect of the order in Council. 31 P.L.R. 182=123 I.C. 277. Order of His Majesty in Council—Transmission of—Power to impose conditions. 66 I.C. 982=1922 O. 34. Where the order of the Privy Council has been transmitted to the lower Court at the instance of one of the successful parties it is not necessary that any person interested in the execution of the decree should obtain a separate transmission order. 55 M. 856=1932 M. 440=62 M.L.J. 698. Under O. 21, R. 15 some of the decree-holders who have obtained permission under O. 45, R. 15 can execute the Privy Council decree on behalf of all the decree-holders though some were dead at the time of the Privy Council decree. 58 I.C. 212=1 P.L.T. 426. Where the appellants had obtained leave to appeal to the Privy Council but before the transcript record had been sent to England the parties settled their disputes by a compromise and applied to the High Court for amendment of the decree in accordance with the terms of the compromise, *held*, that the decree could be so amended and that O. 45, R. 13 was not bar to the same. 116 I. C. 459 (1)=1929 L. 427. The High Court at Patna has no jurisdiction to execute an order in Council passed in an appeal from the Calcutta High Court on appeal from a Subordinate Court in Behar. An application for the execution of such an order should be to the High Court at Calcutta. 2 P.L.J. 684=43 I.C. 457. Where party with order in Council is delaying or refusing to lodge the order, opponent can move High Court with certified copy. 5 P. 461=51 M. L.J. 586=1926 P.C. 31 (P.C.). Applicability of rule to proceedings under S. 144, C. P. Code. See 6 P. 252.

Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same ; and the Court to which the said order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees.

(3) When any monies expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed at the date of the making of the order¹ * * * * * for the adjustment of financial transactions between the Imperial and the Indian Governments.

²[(4) Unless His Majesty in Council is pleased otherwise to direct, no order of His Majesty in Council shall be inoperative on the ground that no notice has been served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree was complained of or at any proceedings subsequent to the decree of that Court, but such order shall have the same force and effect as if it had been made before the death took place.]

LOC. AMS.—[ALLAHABAD.] R. 15 (1). *Substitute the following rule :—*

(1) Whoever desires to obtain—

(a) execution of any order of His Majesty in Council, or

(b) where an appeal has been dismissed by His Majesty in Council for want of prosecution, an order of the Court from which the appeal to His Majesty was preferred terminating proceedings and determining the costs, shall apply to the said Court by a petition, accompanied by a certified copy of decree passed or order made by His Majesty in Council of which execution is desired, or to which effect is to be given and a memorandum of all costs incurred in India that are claimed in pursuance thereof.

[BOMBAY.] *For sub-r. (1), substitute the following :—*

“(1) Whoever desires to obtain execution of any order of His Majesty in Council shall apply by petition, accompanied by the original decree passed or order made in appeal and sought to be executed to the Court from which the appeal to His Majesty was preferred, provided that the Court may in its discretion, if for special reasons it thinks fit to do so, act on a certified copy of the decree passed or order made in appeal.”

16. The orders made by the Court which executes the order of His Majesty in Council, relating to such execution shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees.

³[17. Where a certificate has been given under section 205 (1) of the Government of India Act, 1935, the provisions of this Order shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council and references in this Order to His Majesty in Council and to any Order of His Majesty in Council shall be construed as references to the Federal Court and the rules of the Federal Court :]

LEG. RRF.

¹ The words “by the Secretary of State for India in Council” with the concurrence of the Lords Commissioners of His Majesty’s Treasury” were omitted by A.O., 1937.

² Added by Act XXVI of 1920.

³ Added by A.O., 1937.

NOTES.

O. 45, R. 15, sub-R. (2).—The mandamus of R. 15, sub-R. (2) is clear and obligatory on a Sub-Court. The Court is bound to execute the decree of the Privy Council and neither the Sub-Court nor even the High Court has the power to stay execution or adjourn an application for execution on the ground that an application for revision of the Privy Council decree sought to be executed was pending before the Privy Council. 12 Pat.L.T. 145=132 I.C. 359=1931 P. 203. Where Privy Council directs that the

costs, incurred by the successful appellant in the Judicial Commissioner’s Court, should be paid by the respondent, such costs include the printing charges and other expenses incurred by the appellant in the Judicial Commissioner’s Court for presentation of the appeal to the Privy Council, and the appellant is also entitled to the costs of the execution. 167 I.C. 879=1937 Pesh. 3.

O. 45, R. 17.—[See also under O. 45, Rr. 2, 7 and 8, *supra*.] Rule 17 which has been added to O. 45, C. P. Code, by the Government of India (Adaptation of Indian Laws) Order, 1937, assumes that a certificate under S. 205 of the Constitution Act has already been given, and an application to the High Court, under O. 45 is, therefore, irregular where no such certificate has been granted. 52 L.W. 122=72 C.L.J. 142=44 C.W.N. (F.R.) 29=1940 F.C. 25 =(1940) 1 M.L.J. (Supp.) 28. An ap-

Provided that—

(a) rule 3 of this Order shall have effect as if at the end of sub-rule (1) thereof there were inserted the words “apart from any question of law as to the interpretation of the Government of India Act, 1935, or any Order in Council made thereunder”;

(b) where the only ground of appeal stated in the petition is that any question of law as to the interpretation of the Government of India Act, 1935, or any Order in Council made thereunder has been wrongly decided, the petition need not pray for such a certificate as is mentioned in rule 3, and the like proceedings shall be had thereon as if such a certificate had been given except that no security shall be required for the costs of the respondent.] *Omitted by the Federal Courts Act (XXI of 1941).*

ORDER XLVI.

Reference.

1. Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution, of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.

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Appeal lies to the Federal Court from a final order of a single Judge of a High Court when a certificate has been granted under S. 205 (1) of the Government of India Act of 1935. The provisions of S. 111-A and O. 45, R. 17, do not preclude the admission of the appeal. When matters have proceeded as far as R. 8 of O. 45, a formal order of admission by the High Court is not necessary, but if all the requirements of the law, up to that stage have been complied with, it would be improper for the High Court not to declare the appeal admitted. When the certificate under S. 205 (1) of the Government of India Act has been given, no further certificate, is necessary, and the person aggrieved, is entitled to go to the Federal Court provided he complies with so much of R. 7 of O. 45 as is incumbent upon him. 54 L.W. 295=(1941) 2 M.L.J. 514.

O. 46, R. 1.—No reference lies to the High Court of the N.-W. Provinces where the question involved is one of fact and not of law. 11 I.C. 671. Under R. 1, a reference to the High Court on a question of law is only permissible when the Court trying the suit or appeal or executing the decree entertains a reasonable doubt; but where the Court had no doubt about the matter but was faced with the problem of having to decide between law and equity, it is for the Court to decide the question for itself and a reference is incompetent. 141 I.C. 572=1933 L. 402. The words “any such decree” in O. 46, R. 1, must mean either (a) a decree in a suit where no appeal is provided against the decree, or (b) a decree in an appeal where no further appeal is provided. 43 Bom.L.R. 733. The words ‘not subject

to appeal in O. 46, R. 1, must mean that the law provides no appeal in any circumstances. They do not mean that no appeal has in fact been made. If in the case of a decree of a High Court, there might have been an appeal, it cannot be said that the decree is not such to appeal, although it is very unlikely that such an appeal would have been made or that the High Court would have granted leave to appeal to the Privy Council. If there might have been an appeal, the decree is subject to appeal, and no reference can be made under O. 46, R. 1 in such a case. 43 Bom.L.R. 733. A reference is incompetent where the order or decree is appealable. 10 P. 471=133 I.C. 766=1931 P. 253. O. 46, R. 1, cannot apply except in cases where there is a pending suit or appeal in which the decree is not subject to appeal. 42 Bom.L.R. 1093. In order that a Court shall have jurisdiction to make a reference under O. 46, R. 1, in connection with a question of law arising during the execution of a decree, it must be shown that the decree itself was not subject to appeal. A second condition necessary to give a Court jurisdiction to make such a reference is that the Court itself shall entertain reasonable doubt on the question to be referred. If it has come to a definite decision on the question, it has no jurisdiction to make a reference. 44 C.W.N. 1067=72 C.L.J. 522. It is not the object of R. 1 that subordinate Courts should be enabled to relieve themselves of the necessity of deciding difficult questions arising before them and to make a reference to High Court calling upon it to do what could have been done by the subordinate Courts. 55 A. 648=1933 A.L.J. 1468=1933 A. 597. Reference—Distinction between right of

2. The Court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or make an order contingent upon the decision of the High Court on the point referred ;

but no decree or order shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference.

3. The High Court, after hearing the parties if they appear and desire to be heard, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the reference was made ; and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court.

4. The costs (if any) consequent on a reference for the decision of the High Court shall be costs in the case.

5. Where a case is referred to the High Court under rule 1, the High Court

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reference and right of appeal—Reference to be limited to cases of reasonable doubts as to question of law. 50 A. 839=115 I. C. 630. An error of law is included in the second category of R. 1 but the error must be apparent on the face of the record. There cannot be such an error where the question is highly difficult and controversial and the Court has arrived at a decision after consideration of all the points. Where, however, the judgment was delivered without notice to the parties and by reason of the fact that the Judge ceased to hold office subsequently, the aggrieved person lost a right to apply for leave to appeal under cl. (13) of the Letters Patent, *held*, that there was an error of procedure apparent on the face of the record and that it was a fit case for reversing the entire judgment on that ground. 6 R. 794=114 I.C. 687=1929 R. 70. Section 113 read with R. 1 permits reference to High Court of only such cases as do not admit of further appeal. 130 P. R. 1916=37 I.C. 227. Subordinate Courts in the Punjab are bound to follow the decisions of Chief Court and cannot make a reference on a question of law, already decided by Chief Court, unless such decision is questioned by a judgment of the Privy Council. 20 I.C. 194=8 P.R. 1914. Where no appeal lies to an appellate Court, Court has no jurisdiction to make a reference to High Court under R. 1. 18 I.C. 314=61 P.R. 1913. No reference can under R. 1 be made in suits or appeals in which the decrees are subject to an appeal. 54 M.L. J. 66. Where the referring Court has no reasonable doubt on the question of law referred, no reference can be made. 54 M. L.J. 66. The word "Court" means Court of Civil Judicature. 54 I.C. 564=22 O.C. 319. The functions of a Collector in execution of a decree do not make him such a Court as to empower him to make a refer-

ence. (*Ibid.*) Reference cannot be made to High Court on the mere ground that there are conflicting rulings on any particular matter of law. 18 I.C. 977=15 O.C. 380. Where a Court entertains a reasonable doubt regarding a question of law a reference to High Court can be made. 48 A. 188=93 I.C. 24=1926 A. 204; 50 A. 839=115 I.C. 630. O. 46, R. 1 contemplates a pending proceeding. If a Court gives its decision in a matter, it becomes *functus officio* and is not competent to refer the matter thereafter under the rule. Where after the Court gives its decision on a certain point a Government letter expressing a view contrary to that held by the Court is brought to its notice, and the Court refuses to act upon that view, even assuming the Court is not *functus officio*, the fact that the Government letter expresses a contrary view is not sufficient for the Court to say that it entertains a "reasonable doubt" on the point and a reference by it in such circumstances is therefore incompetent. 44 C. W. N. 446. A reference can only be made in a suit or an appeal and not in proceedings under S. 93 of the Bengal Tenancy Act which are in the nature of an application. 151 I.C. 721 (1)=38 C.W.N. 499=1934 C. 566. The condition precedent to a reference under O. 46, R. 1 is that the Court which refers is either hearing a suit or an appeal in which the decree is not subject to an appeal, or is hearing proceedings in execution of any such decree. An application to execute an award made under the provisions of the Bombay Co-operative Societies Act, 1925, is not a suit or the execution of a decree in a suit; so that, O. 46, R. 1 can have no application. I.L.R. (1940) Kar. 411=1940 Sind 111. O. 46, R. 5.—Rule 5 is wide enough to enable High Court to quash the order of reference made by a Subordinate Judge under R. 1. 30 Bom.L.R. 1627; 118 I.C. 692; 1929 B. 30. When High Court hears

Power to alter, etc., decree of Court making reference.

out of which the reference arose, and make such order as it thinks fit.

Power to refer to High Court questions as to jurisdiction in small causes.

6. (1) Where at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit.

(2) On receiving the record and statement, the High Court may order the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit.

7. (1) Where it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the District Court may, and if required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous.

(2) On receiving the record and statement the High Court may make such order in the case as it thinks fit.

(3) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this rule, the High Court may make such order as in the circumstances appears to it to be just and proper.

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this rule.

LOC. AM.—[ALLAHABAD BOMBAY, OUDH AND SIND.] Add after r. 7 to O. 46 :—

8. R. 38 of O. 41 shall apply so far as may be to proceedings under this Order.

ORDER XLVII.

Review.

Application for review of judgment.

1. (1) Any person considering himself aggrieved—

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a reference, it acts like a Court of Appeal quite as much as it undoubtedly does when it hears an application for revision. 25 C. W.N. 81=32 C.L.J. 433. But a power of reference is not a modified form of appellate jurisdiction. A Court to which a reference can be made is not necessarily authorised to hear appeals from the Court making a reference. 47 A. 513=23 A.L.J. 385=1925 A. 380 (F.B.).

O. 46, Rr. 6 and 7.—See 21 C.W.N. 784=27 C.L.J. 96.

O. 46, R. 7.—Under R. 7, District Judge is bound, if required by a party to submit the record to High Court with a statement of his reasons. For that purpose, it is immaterial whether the order forming the subject-matter is that of a Small Cause Court or a Sub-Judge. 28 N.L.R. 54=137 I.C. 88=1932 N. 70. When two Courts, namely, a Sub-Court and a Court of Small Causes, make contradictory orders as to jurisdiction to receive a plaint, it is the duty

of the appellate Court to make a reference to High Court whether the party asks for it or not. 17 N.L.J. 169=1934 N. 257. A plaint was filed in Court of the Second Class Subordinate Judge. That Court considered that the case was cognizable by the Court of Small Causes and returned the plaint for presentation to appropriate Court. The latter Court however held that the suit was not triable by it and returned the plaint to the applicant. The applicant applied in revision asking High Court to determine which Court had jurisdiction to entertain the suit. Held, that the correct procedure would have been to make an application to the District Judge under the provisions of R. 7. (1932 N. 70, Ref.) 145 I.C. 261=1933 N. 221.

O. 47: APPLICABILITY.—Recourse to inherent powers of Court is not permissible to justify the Court in granting a review which is specifically provided for by R. 1. 141 I.C. 188=1933 L. 169. See also I.L.R. (1939) Kar. 330. The provisions of O. 47 are applicable to an insolvency Court. 1927

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred ;

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M. 175=94 I.C. 351=51 M.L.J. 60; 1940 M.W.N. 420. As to whether R. 1 controls S. 8 (1) of the Presidency Towns Insolvency Act, see 7 R. 201. *Obiter*.—The Company law does not affect the power of review which is otherwise vested in the Judge especially when by S. 141, the provisions of that Code are to be followed in all proceedings in any Court of civil jurisdiction. 1937 L. 82. The provisions of O. 47 would apply to review applications in appeals preferred under Letters Patent. 29 Bom.L.R. 371=101 I.C. 766=1927 B. 232. In order to set aside a consent decree on the ground of fraud, a separate suit should be instituted. The decree cannot be set aside under O. 47. 144 I.C. 82. Time for review application. 115 I.C. 314=1929 S. 38. Order disallowing review application is revisable. 115 I.C. 314=1929 S. 38. The discretionary powers of revision vested in High Court by S. 115 are not in any way controlled by the provisions of O. 47; such powers are intended to apply even to orders disallowing a review application. (26 A. 572, Diss. from; 29 A. 468 and 31 A. 610, Rel. on.) 115 I.C. 314=1929 S. 38. An application for review of an order under R. 1, if found to be barred by limitation, may under appropriate circumstances be treated as an application under S. 151 if the Court is satisfied that there has been a flagrant abuse of its own process and it is also open to the appellate Court under similar circumstances to treat a barred application for review, made to the first Court, as one made under S. 151 in order to remove an apparent injustice done to the applicant and to prevent an abuse of the process of the Court. 116 I.C. 427=1929 N. 185. Execution case dismissed for default—Review or application to restore under S. 151—Remedy. 1935 R.D. 318. Non-service of notice of proceedings—Aggrieved party—Remedy, if by review or appeal. 1936 R. D. 449. Judgment of Small Cause Court—Revision dismissed—Subsequent application for review is maintainable. 1935 A.L.J. 436=1935 A. 435. As to application for refund of Court-fee, in view of appellate decree, see 1935 A.W.R. 368=1935 A. 455.

O. 47, R. 1: GROUNDS FOR REVIEW.—The grounds on which a review is competent are different from those on which an appeal under Cl. 10 of the Letters Patent (Lahore) will lie. Consequently, when a petition for leave to appeal under Cl. 10 is refused, it cannot be treated as an application for review of judgment. 16 L. 602=1935 L. 330 (1). A Court can correct arithmetical or clerical errors under S. 152. But it has no power to review and modify its judgment when neither party has applied for review under O. 47, R. 1. 43 P.L.R. 88. Under R. 1 a party has a right to apply for a re-

view of judgment to the Court that has decided the case before an appeal has been preferred. The grounds on which such an application may be made are specifically set forth in R. 1. 2 P. 676=50 I.A. 183=45 M.L.J. 578 (P.C.). In a review application, Court should confine only to the matter for which it has been filed; and where Court does so decide about other matters, there is an illegality or material irregularity in the proceedings. 145 I.C. 158=1933 R. 151. S. 114 has to be read with R. 1 which prescribes the grounds upon which an application for review may be made; and unless the case can be shown to be within the terms of this rule, a review ought not to be granted. R. 1 must be read as in itself definitive of the limits within which review is permitted and the words "any other sufficient reason" may be taken as meaning a reason sufficient on grounds at least analogous to those specified immediately previously. (49 I.A. 144, Foll.) 151 I.C. 41=1934 P.C. 213=67 M.L.J. 608 (P.C.). Accordingly no review lies against an order dismissing a suit for default. 1935 O.W.N. 446=1935 O. 405. So also in the case of appeal dismissed for default. 21 A.L.J. 416=74 I.C. 528; 101 I.C. 766=1927 B. 232=29 Bom.L.R. 371. No application for review lies against a decision in appeal under the Letters Patent. 134 I.C. 630=12 Pat.L.T. 652. (1931 A. L.J. 187 and 40 M. 651, Foll.) Though a petition for review of the Board's order may be admitted to hearing on the ground that there is an order from another appellate Court which is not in harmony with the decision of the Board, yet there is no case for review, where the appellate order in question was passed some months before the Board's order and where the very basis of that appellate order had been negatived by the Board in the order sought to be reviewed. 1938 A. W. R. (B.R.) 256=1938 R.D. 560. A Commissioner in order to take accounts may in his discretion and on proper grounds reopen the enquiry into any one or more of the items before his report is made. Until then he decides nothing that is final and conclusive. 47 B. 593=25 Bom.L.R. 280. Revenue Court has no power to review a judgment. 138 I.C. 465=1932 A.L.J. 437. Review under Agra Tenancy Act—Change of law subsequent to decision, if sufficient reason. 18 R.D. 658; 1940 R.D. 193. See also 1937 A.W.R. 268=1937 R.D. 103 (Applicability of O. 47, R. 1 to proceedings under U.P. Encumbered Estates Act. See further, 1940 A.L.J. 632=1940 All. 519). Where an order under S. 44, Presidency Towns Insolvency Act, was made by Registrar in Insolvency, an application for review of his order must be made to the Registrar and not to the Court. Larger powers are conferred on the insolvency

(b) by a decree or order from which no appeal is allowed : or
 (c) by a decision on a reference from a Court of Small Causes,
 and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

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Court under S. 8 (1) of Presidency Town Insolvency Act in reviewing, rescinding or varying its orders than in proceedings which fall exclusively under R. 1. That the order was made without jurisdiction is sufficient reason for reviewing the order. 139 I.C. 587=34 Bom.L.R. 1175=1932 B. 569; 27 C.W.N. 916=1924 C. 83. Misapprehension by both parties and the Judge as to the nature of the jurisdiction exercised by Court is a sufficient ground for review. (46 M. 955, Ref.) 14 L. 543=142 I.C. 640=34 P. L.R. 400=1933 L. 476. The mere failure of a Counsel to lay apposite law before the Court is by itself no ground for a review under O. 47, R. 1. 41 P.L.R. (J. and K.) 89. If owing to a misapprehension the counsel for the respondent to an appeal does not urge all his arguments in support of the finding of the trial Court in favour of his client, and an erroneous impression is created in the mind of the judge that counsel had no arguments to urge to meet all the points raised by the appellant's counsel, that would be analogous enough to an error apparent on the face of the record to be a sufficient reason for review under O. 47, R. 1. There is a power of review in cases of mistake of counsel or mistake of the Judge leading to errors in the judgment though not apparent on the face of the record. 1940 M. 17=50 L.W. 568= (1939) 2 M.L.J. 809. Where the decision is based on an obvious misapprehension of the nature of attachment it is sufficient reason for review. 163 I.C. 374=1936 L. 486. Fraud practised upon a party in connection with a petition of compromise upon which a decree was made, is a good ground for review. A remedy by suit is an alternative and a more appropriate remedy. 64 I.C. 259. Power of making interlocutory orders is not a suitable subject for review. 55 I.A. 131=54 M.L.J. 423=1928 P.C. 49 (P.C.). Interlocutory orders made in chambers—Inherent jurisdiction to review. 32 Bom.L.R. 665. Recourse to the inherent powers of Court is not permissible to justify Court in granting a review which is specifically provided for by R. 1. 141 I.C. 188=34 P.L.R. 88=1933 L. 169. See also 1936 P. 506. If the party to the appeal presents his case to the Court of Appeal by way of cross-objections or otherwise, it is manifest that an application for review by him is incompetent. 35 I.C. 529. An

applicant in a review application must confine himself to the grounds on which the application is admitted. 73 P.R. 1911=11 I.C. 427. The ground for review must be something which existed at the date of the decree. 43 M.L.J. 33=70 I.C. 741=1922 M. 227. See also 73 I.C. 4=1923 N. 70; 1926 N. 10 (1). Point not raised at trial cannot be raised in review. 47 A. 881. Where lower Court had decided a case following the decision of High Court in a connected case which was subsequently reversed on appeal by Privy Council the reversal of High Court's judgment is not a ground for review of lower Court's judgment. 43 M.L.J. 33=70 I.C. 741=1922 M. 227. See also 11 O.W.N. 1287=1934 O. 445; 73 I.C. 4=1923 N. 70; 161 I.C. 324=1936 S. 34. It is not competent under O. 47 to obtain a review of a consent decree on the ground that the consent decree was obtained by fraud. (4 P.L.J. 205, Foll.) 33 C.W.N. 833=1929 C. 470=57 C. 154. Also 26 S. L.R. 395. Consent decree can be set aside only by means of a separate suit. (1922 P.C. 112, Foll.; 1929 C. 470. Rel. on.) 164 I.C. 785 (2)=1936 R. 389. See also 1941 P.W.N. 385=194 I.C. 551. Decree on the basis of agreement between parties as to abiding by decision in another suit. Decision in another suit subsequently set aside—Original decree can be reviewed. 5 R. 261=103 I.C. 258=1927 R. 189; 138 I.C. 121=1932 M. 223. But see 104 I.C. 136=31 C.W.N. 822. Plaintiff can apply for review when his suit has been dismissed for default under O. 9, R. 8 and he has not applied under O. 9, R. 9 to set the order aside. Where a plaint is rejected for non-compliance with the order for payment of Court-fee a review of that order is permissible and the Court has discretion to restore the suit. 17 Pat.L.T. 766=1936 P. 310. See also 62 C. 61=1938 A.W.R. (B.R.) 115=1938 R.D. 184, but not where plaintiff was granted time therefor again and again, and he failed to pay in spite of that. 59 M. 975=1936 M. 503=70 M.L.J. 491. If at all review is granted in such a case it is necessary to give the defendant notice and an opportunity at the earliest possible moment of contesting the propriety of the review. (Ibid.) 50 I.C. 327=37 M.L.J. 59; 56 C. 21. Where the order is an *ex parte* order issued without hearing the opposite party, it cannot operate as *res judicata* and can be reviewed by the successor of the

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Judge who made such *ex parte* order. 116 I.C. 101=1929 S. 110. *See also* 1939 A.W.R. (B.R.) 210; 1939 A.W.R. (B.R.) 42; 1939 A.W.R. (B.R.) 210 (correction of name of party wrongly given in appeal). An inferior Court has no power of review unless such power is granted by statute. 34 I.C. 503. It is not a sufficient reason for granting a review that if another opportunity is given to the applicant he would satisfy the Court that its previous order was wrong. 57 I.C. 145. Where the question decided is one of right between the parties and when the matter is one of general importance review is justified. 1926 M. 764=50 M.L.J. 493. A wrong decision on a question of law, is not a sufficient ground for review. 24 O.C. 154=63 I.C. 344. *See also* 141 I.C. 188=1933 L. 169; 38 L.W. 604=1933 M. 667=65 M.L.J. 387; 113 I.C. 896; 112 I.C. 277; 112 I.C. 653=1929 N. 58; 1937 Rang. 59. It is not a sufficient ground to order a review that the decision of the Court was based on a view of the law which had been overruled by a Full Bench decision. 3 P. 134=5 Pat.L.T. 52. Exposition of law by a superior Court contrary to that applied after the judgment is no ground for review. 19 S.L.R. 30=1927 S. 53. Because there is a subsequent decision of superior Court of binding authority on a question of law, the prior judgment passed on a different view of law is not liable as a matter of course to be reviewed. 1930 M. 579. *See also* 18 R.D. 658. High Court in dismissing an appeal on the ground of limitation, remarked that in case the view of law taken by the High Court were overruled by the Privy Council in an appeal then pending before that tribunal, the appellant might apply for a review of judgment. Subsequently Privy Council reversed the view of High Court in that appeal and thereupon they applied for a review. *Held*, that the application should be granted, because the decision of the Privy Council subsequent to the dismissal of the appeal should, in the special circumstances of the case, be treated as a sufficient reason *ejusdem generis* with the discovery of new and important matter, which should be deemed to be a ground which was in contemplation at the date of the decree. 11 O.W.N. 1287=1934 O. 445. *See also* 184 I.C. 689=2 Fed.L.J. 112. A mistake or error is hardly apparent if, in order to discover it, it is necessary to have recourse to the pleadings and the evidence. Reliance on a wrong authority that had been overruled is no ground for review. 141 I.C. 427=34 P.L.R. 254=1933 L. 223. *See also* 145 I.C. 810=1933 P. 433; 1929 N. 251 (F.B.); 1922 P.C. 112; 1925 N. 206. Where a Court by taking too stringent a view of the title of the suit and its prayer overlooks the substantial rights of the party in its judgment which were sufficiently made clear in the pleadings and evidence, there is a good ground for review. 1930 R. 162. An erroneous view of evidence

or of law is no ground for review. Also, grounds, which might be good grounds for appeal, would not support an application for review. 34 C.W.N. 696. *See also* 41 P.L.R. (J. and K.) 51. The mere omission to raise a point of law, which had it been raised might and probably would have brought about a different result, is not necessarily a "mistake or error apparent on the face of the record" for which a review can be claimed. 13 C. 62; 20 C.W.N. 1099; 1 P.L.J. 625=57 I.C. 11. Wrongly applying law is no ground for review. 102 I.C. 6=1927 N. 252. Judge failing to consider a decision—No review is permissible. 1927 M. 998=106 I.C. 514. A Court can review an order as to costs if the order is not a proper one. 6 Pat.L.J. 284=3 P.L.T. 67. The production of an authority which was not brought to the notice of the judge at the first hearing and which lays down a view of the law contrary to that taken by the Judge is not a sufficient ground for granting a review. 57 I.C. 147=1 P.L.T. 561. The Court has no jurisdiction to grant a review on a reconsideration of the case on exactly the same materials. 37 P.L.R. 387. A Court has jurisdiction to review its own order erroneously made directing delivery of possession and the High Court has no power to interfere in revision. 3 P.L.J. 571=48 I.C. 129. New case not to be set up on review. 38 I.C. 196. Point not raised at the hearing, cannot be raised, subsequently in an application for review. 100 I.C. 429=13 O.L.J. 507. The mere fact that another Judge is inclined to take a different view of the case is no ground for review. 4 U.B.R. (1921) 27=64 I.C. 895. *See also* 175 I.C. 649=1938 Nag. 221. A wrong interpretation of certain ruling by the predecessor cannot be considered an error of law apparent on the face of the record, so as to justify a review. 1937 Lah. 791. A Court hearing an application for review of decree on appeal has no jurisdiction to order a review because it is of opinion that a different conclusion of law should have been arrived at. 7 O.W.N. 741=126 I.C. 677=1930 O. 392; 32 Bom.L.R. 610=1930 B. 317. Omission to raise a point of law is not sufficient ground for a review. I.L.R. (1937) Nag. 392.

MISTAKE OR ERROR.—A decree can be reviewed on such grounds only as if tenable, would justify an alteration or cancellation of the decree. 36 A. 277=12 A.L.J. 382. *See also* 10 L. 184=112 I.C. 540. As to "error apparent on the face of the record", *see* 118 I.C. 396=1929 L. 424; 117 I.C. 712=1929 M. 209; 4 Luck. 76; 113 I.C. 483; 116 I.C. 427=1929 N. 185. Error of fact apparent on face of the record. 36 C.W.N. 40=1932 C. 171. Where High Court gave two inconsistent judgments in the same case one before and another after remand, and the error was apparent on the face of it a review lies. 13 I.C. 646. An application for review of a decree based on an award, on the ground of an evident mistake

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in the award, is maintainable. 52 I.C. 696. A mere mistake of law is not, in itself a sufficient mistake or error apparent on the face of the record so as to form a ground for review of judgment. 44 I.C. 161. See also 1932 M.W.N. 153 (F.B.); 141 I.C. 188=1933 L. 169; 133 I.C. 206=1931 M. 608. Where it is alleged that the defendant's advocate thought that the Court had formed a certain opinion of the plaintiff's evidence and because of this belief he abandoned a certain contention which was one of the contentions to be put before the Court, this is not sufficient reason for allowing review. 189 I.C. 570=1940 Rang. 144. Where the mistake arises from the negligent conduct of the applicant for review the mistake cannot even be pleaded. 44 I.C. 161. It is doubtful whether an erroneous admission of fact made by Counsel can be considered to be a good ground for review. 161 I.C. 444=1936 L. 48. It is wrong procedure for a lower Court to review its former order merely on the ground that a ruling of the High Court had not been brought to its notice on the previous occasion. 132 I.C. 815=1931 A.L.J. 889. As to want of jurisdiction, see 21 C.W.N. 1109=27 C.L.J. 594; 14 L. 453=1933 L. 476. Where there is an error of law, which obviously and without research into the rulings involves a lack of jurisdiction to pass the order of which review is sought, is eminently a case in which the error, though technically an error of law, is apparent on the face of the record and should be corrected at the earliest possible time without driving the parties to the expense of an appeal or revision petition to which there would be no answer. (45 M.L.J. 309; 46 Mad. 955 and 1935 Cal. 153, Foll.) 49 L. W. 147=1939 Mad. 293=(1939) 1 M.L.J. 120. R. 1 of O. 47, is definitive of the limits within which review is permitted. A mistake of law is not in itself a sufficient mistake or error apparent on the face of the record to warrant a review. The fact that a judgment proceeds upon an incorrect exposition of the law is not sufficient to found a review. It makes no difference whether that mistake is due to inadvertence, forgetfulness, ignorance, or other error, unless that mistake or error is apparent on the face of the record, that is to say, unless it amounts to an error which can be disclosed without referring to anything beyond the record. There is no difference between a real blunder and a debatable point. An error *de hors* the record is not analogous to an error apparent on the face of the record. Nor would an omission to raise a point of law amount to a mistake or error on the face of the record. I.L.R. (1938) Nag. 151=1938 N.L.J. 48=1938 Nag. 145. An order under O. 45 rejecting an application to grant leave to appeal may be reviewed by the Court which made the order. 39 C. 1037=16 C.W.N. 1089. Erroneous view as to cognizability of a suit by a Court is a

sufficient cause for review. 11 I.C. 15=195 P.L.R. 1911. Where a Court passes a personal decree where it ought not to have done so, and the same is found out by the party aggrieved only when it is sought to be executed, his remedy is not by way of amendment but by way of review. 18 L.W. 876=76 I.C. 786=1924 M. 225. See also 11 P. 519=132 I.C. 533=1932 P. 275. The mere fact that an application to set aside the decree is headed as made under S. 151 (which is clearly inapplicable to the case) does not preclude the Court from dealing with the application as one for review. 43 M.L.J. 290=70 I.C. 425=1922 M. 446. The Court has jurisdiction to review its judgment on the ground that the previous finding was wrong. 9 I.C. 273=9 M.L.T. 361; 36 I.C. 83=3 O.L.J. 267; 1 P.L.T. 561=57 I.C. 147. Where there is no mistake in computing the period of notice but only an error in law, there is no sufficient ground for review. 1922 P. 308. Error of law apparent on the face of judgment—Review lies. 105 I.C. 710=5 R. 610. See also 1935 R. 32; 930 A. 621; 28 N.L.R. 295.

O. 47, R. 1: "ERROR APPARENT ON FACE OF RECORD"—MEANING.—See 1939 Pat. 678 (F.B.); 18 Pat. 777=20 Pat.L.T. 859; 40 Bom. L. R. 952 (decree passed on an unregistered award without noticing that it is compulsorily registrable. An error apparent on the face of the record may be an error of law. It cannot of course be held that whenever a Judge have overlooked a ruling he has a power to review his decision; nor can it be held that whenever, after a judgment has been pronounced, a subsequent ruling changes the accepted view of the law, that subsequent ruling can be a ground for review. But when there is a legal position clearly established by a well-known authority and by some unfortunate oversight the Judge has gone palpably wrong by the omission to draw his attention to the authority, it may in a proper case be a ground for review, coming within the category of an error apparent on the face of the record under O. 47, R. 1. 54 L.W. 263=(1941) 2 M. L.J. 390. The meaning of "an error apparent on the face of the record" is an error which can be seen by a mere perusal of the record without reference to any other matter. A failure to consider a precedent bearing upon the case and binding upon Court is not a mistake or an error apparent on face of the record, but is really discovery of a new and important matter by the party who ought to have brought this precedent to the notice of Court, and therefore he cannot apply for review of judgment and decree on this ground unless he can show that his failure to bring it to notice was excusable. 13 R. 220=154 I.C. 590=1935 R. 32. See also 1934 N. 111=148 I.C. 718; 1937 O.W.N. 342 (Omission to mention and discuss a certain decision with judgment not an error). See also 1938 Nag. 145; 1939 Sind 137; 1941

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Rang.L.R. 382. The error has got to be patent, and an ordinary error of law, a mere failure to interpret the law correctly when the point of law is complicated, is not necessarily an error of law apparent on the face of the judgment. 167 I.C. 449=1937 R. 56. That the meaning of proviso to O. 44, R. 1 is not as understood by the Court is no ground for review of an order rejecting the application to appeal *in forma pauperis*. 1935 Pesh. 22. Where the sole ground upon which the judgment proceeded is found to be untenable in view of certain provisions of law to which the attention of the Court was not drawn, the Court is empowered under O. 47, R. 1 (1), to review its judgment and to correct the error which is apparent on the face of the record. 1937 O.W.N. 496. Where the evidence of the peon who effected the service is found to be untrustworthy, the case should be restored and retried on the merits. 1939 A. W.R. (B.R.) 68. An error of law which could be established only after argument and reference to authorities is not one "apparent on the face of the record" so as to justify an application for review. [3 L. 127 (P. C.), Foll.] 1933 A.L.J. 75=55 A. 196=146 I.C. 756=1933 A. 274. Where the utmost that could be said is that a different view on certain questions of law is possible, and where the so-called error of law is not apparent on the face of the record, there is hardly any ground for review. 1939 A.L.J. 555=1939 All. 619. An erroneous view of the law on a debatable point or a wrong exposition of the law or a wrong application of the law cannot be considered a mistake or error on the face of the record, and as such cannot be a ground for review. 175 I.C. 586=1938 All. 308; 1941 R.D. 880. A clerical error not affecting the decision of the case is not an error apparent on the face of the record which will justify a review; nor can there be an error apparent on the face of the record when considerable research would be necessary to establish them if at all. 19 N.L.J. 276. See also 1941 Rang.L.R. 382; 31 N.L.R. 372=1935 N. 245. In order that a mistake can be corrected in review it must be apparent on the face of the record. But an order alleged to be based upon a mistaken impression of an admission by a party is not such an order as could be modified in review. 1940 O.W.N. 1074. There will be no finality to the decision of a Court if, after judgment is pronounced, the parties or advocates are allowed to come forward and say that a certain argument was addressed or given up in the course of the trial as the result of their not remembering certain material facts. It will not be correct to allow an application for review in such cases. 50 L.W. 903=1940 Mad. 203. The going into evidence in a second appeal is not an error apparent on the face of the record within the meaning

of R. 1. 145 I.C. 810 (2)=14 Pat.L.T. 234=1933 P. 433. See also 141 I.C. 427=1933 L. 223. The trial Court found that it had no jurisdiction to try the suit as against defendant 2. The suit was accordingly dismissed as against defendant 2. On appeal by defendant 1 the question of jurisdiction did not arise in the appellate Court and was not discussed but the Court passed a decree against defendant 2. Held, that no decree could be passed against defendant 2 and as this was a defect apparent on the face of the record review should be allowed. 1935 C. 153 (1). Where two judgments constitute the "judgment" of one single Court, if one is vitiated by mistake or error apparent on the face of the record, that one cannot be a valid material on which a decree can be founded. The necessary consequence of the situation is that the other judgment, though not vitiated by such mistake or error, cannot by itself constitute the proper basis of the decree of the Court, for either one conjoint judgment or two concurring judgments are needed as the basis of the decree of the Court and hence application for review should be granted. 167 I.C. 449=1937 R. 56.

NEW EVIDENCE.—The discovery of a reasonable ground for adjournment by Court at a later stage is a good ground for granting review. 140 I.C. 226=1932 M. W.N. 1262. An applicant for review on the ground of discovery of new evidence should show that (i) such evidence was available, and of undoubted character; (ii) that the evidence was so material that its absence might cause a miscarriage of justice; (iii) that it could not with reasonable care and diligence have been brought forward at the time of the decree. I.L.R. (1938) 2 Cal. 361. High Court cannot, in a second appeal, entertain review, based on the ground that since the disposal of the appeal, new documentary evidence has been discovered. 45 A. 458=21 A.L.J. 377. The consideration that, if due diligence had been exercised; the evidence subsequently discovered, or not then within knowledge of the party, would have been found, is not the test for judging if the case falls under R. 1. Each case must be judged on the peculiar circumstances of that case. 1930 P. 63. See also 146 I.C. 830=10 O.W.N. 454=1933 O. 328; 1940 All. 519=1940 A.L.J. 632; 1939 P. W.N. 909; 31 Bom.L.R. 436. Newly discovered evidence must be conclusive. 119 I.C. 99=1929 A. 545; 1940 All. 519; 156 I.C. 733=1935 R. 184. Application for review will not lie on the ground of the discovery of a new and effective argument arising from a document which was before the Court and the terms of which were put in issue and were perfectly well known to the parties. 141 I.C. 881=1933 M. 290. Fresh documentary evidence cannot be admitted in review, unless and until it is shown that the evidence in question could not be produced

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at the trial for the reasons given in R. 1. 146 I.C. 830=10 O.W.N. 454=1933 O. 328. See also 39 P.L.R. (J & K.) 145; 1937 R. D. 264. The applicant praying for review of judgment on the ground of discovery of new evidence must prove his inability to produce it during trial in spite of due diligence. 38 A. 280=14 A.L.J. 204; 19 N. L.J. 276. Review on the sole allegation that new evidence had been discovered which was not within the applicant's knowledge cannot be granted without strict proof of such obligation. 9 I.C. 26. High Court will not accept a review of a judgment in a second appeal dismissed under O. 41, R. 11 on the ground that new evidence to prove a fact has been discovered. 36 C.L.J. 76=27 C.W.N. 918. The new important matter alleged to have been discovered must have existed at the date of the decree. (24 M. 1; 50 I.C. 119; Foll.; 51 I.C. 625, Dist.) 64 I.C. 324; 144 I.C. 103=1933 M. 485. The greatest care ought to be exercised in granting a review when it is asked for on the ground of discovery of fresh evidence after judgment. 45 C. 60=21 C.W.N. 1076=42 I.C. 484; 64 I.C. 324; 47 C. 568=31 C. L.J. 134; 50 I.C. 119=23 C.W.N. 242; 26 I.C. 281=41 C. 809. The application should be rejected when the applicant has not filed an affidavit or mentioned any relevant dates to support his theory that the new piece of evidence only came to his notice after the decision sought to be reviewed, especially when he is not even ready with any proof. 1936 R.D. 486 (1). The new evidence must be such as would entitle the Court to modify or cancel the decree. 38 I.C. 142. An application to receive fresh evidence discovered out of Court by the parties to an appeal comes under O. 47, I. 1, and not under O. 41, R. 27. 19 C.W.N. 401=42 C. 675. Discovery of document after judgment containing an admission of liability by defendant is a good ground for review. 11 I.C. 15=195 P.L.R. 1911; 135 P.L.R. 1916=35 I.C. 342. Discovery of new and important matter—Plaintiff failing to produce papers called for by defendant on false pretext—Subsequent tracing of papers by defendant after decree—Right to apply for review, after disposal of suit by High Court in Second Appeal. 15 P. 295=17 P.L.T. 575=1936 P. 595. Where a suit for restitution of conjugal rights was decreed and; subsequently, the wife filed a petition to the Ecclesiastical Court for a decree for nullity and the Ecclesiastical Court found out the relation between the parties to be that of cousins and upon this finding gave a decree for nullity. *Held*, that the matter which came to light by reason of investigation of the Ecclesiastical Court was a matter of evidence which after the exercise of due diligence was not within the wife's knowledge and, therefore, a valid ground for reviewing the decree for restitution of conjugal

rights. 120 I.C. 465. Fraud practised upon the Court or upon the party may be discovered after the order complained of is made and may be new and important matter which could not be within the knowledge of the applicant at the time when the decree was passed or the order made and an application for review on the ground of such fraud must be considered on merits. A decree vitiated by fraud may be set aside by (i) suit, and (ii) by review of judgment; the latter being the more regular procedure. 33 C.W.N. 572; 19 I.C. 371=1929 C. 513. Though the case of a *pardashin* lady is neglected by her agents, she cannot apply for re-hearing of the case in review. 42 I.C. 970; 40 I.C. 79. Review—Duty whether confined to the evidence on the basis of which review was granted. 53 C. 856=31 C.W.N. 1035=1927 C. 21.

BURDEN OF PROOF.—In an application for review on the ground that evidence was overlooked by excusable misfortune, the burden lies heavily upon the applicant to prove that this misfortune is excusable; and that the evidence which he now seeks to adduce could not be produced at the proper time after the exercise of due diligence as laid down by the provisions of R. 1. 143 I.C. 720=1933 S. 110. When a tenant who is served with a notice under S. 81 of the Agra Tenancy Act does not pay up the arrears or contest the claim for ejectment within the period allowed by law and allows an order of ejectment to be passed against him, it is for him to explain; if he seeks a review of that order, why he did not exercise the options given to him by the law within the period allowed by the law. 1936 R.D. 466.

OTHER SUFFICIENT REASON.—Rule 1 must be read as defining the limits within which review is under the new Code, permitted; and reference to practice under former and different statutes is misleading. 43 M.L.J. 332=3 L. 127=49 I.A. 144=1922 P.C. 112 (P.C.); 13 L. 546=138 I.C. 379=1932 L. 596. So construing, the words; "*any other sufficient reason*" are to be interpreted as meaning a reason sufficient on grounds at least analogous to those specified immediately previously. (*Ibid.*); 49 B. 839; 1939 Lah. 460; 1939 Cal. 628=2 Fed.L.J. 112=43 C.W.N. 913; 1938 Nag. 221; 4 R. 266=1927 R. 20; 96 I.C. 832=1926 L. 665; 92 I.C. 1013; 5 R. 675; 146 I.C. 231=1933 A. 778; 100 I.C. 30; 104 I.C. 136=31 C.W.N. 822; 11 L. 158=123 I.C. 845=1930 L. 37; 113 I.C. 887; 33 C.W.N. 883=1929 C. 470; 11 P. 519=139 I.C. 533. In all applications for review based on mistake or error or any sufficient reason the applicant has to show a mistake or error apparent on the face of the record or a mistake or error analogous thereto. Where a Court applies a particular statute to a given set of events whereas on the said date it is obvious from the record that a wholly different statute applies, it may be a mistake

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apparent on the face of the record. 175 I. C. 649=1938 Nag. 221. The 'other sufficient reason' which would justify a review under O. 47, R. 1, must be of a cognate nature. A mistaken view of the law or of the facts is not a matter which can be covered by the expression 'some other reason'. 1941 A.W.R. (Rev.) 683=1941 O.A. (Supp.) 623. The negligence on the part of a party or his agent is not any sufficient reason analogous to those mentioned in R. 1 (1). Where therefore through negligence, the agent or pleader of a party has certified full satisfaction of decree, the executing Court has no power to review the order striking off the execution as fully satisfied. 150 I.C. 44=1934 N. 143. The "discovery of new and important evidence" in R. 1 would refer only to a discovery made since the order sought to be reviewed was passed. 66 I.C. 558=1922 A. 366. See also 1939 P.W.N. 909. Review is not to be granted on the ground that if the Court allowed the applicants another opportunity of producing evidence they might persuade the Judge that the view taken by him on the previous occasion was erroneous. 37 A. 440=13 A.L.J. 673; 57 I.C. 145; 14 I.C. 837. The mere fact that the party seeking a review desires **to have a fresh sifting of the evidence** is clearly not a sufficient reason for review. 19 N.L.J. 276. Where a judgment is based on the decision of the Revenue Court, the reversing of the Revenue Court's decision in appeal is a good ground for granting a review of the judgment. 33 A. 566=8 A. L.J. 584; 19 I.C. 689. That the meaning of proviso to O. 44, R. 1 is not as understood by the Court is no ground for review of an order rejecting the application to appeal in *forma pauperis*. 154 I.C. 943=1935 Pesh. 22. The omission of the Court and the pleaders to notice certain provisions of the Code which apply to a case is a sufficient reason within O. 47, R. 1, for granting a review. 52 I.C. 29=30 C.L.J. 200. A mistake as regards procedure or law is not a sufficient ground for allowing a review. Though a plea of inadequate service of notice may not be good ground for review of certain *ex parte* execution proceedings, ignorance of such proceedings though due to faulty service, would be a good ground to justify a review of the *ex parte* proceedings. 1940 R.D. 332=1940 A.W.R. (B.R.) 141=1940 O.A. 864. The expression "where the ground of such appeal is common to the applicant and the appellant" refers to a case where the grounds of appeal and review are the same and does not refer to a comparison between the actual appeal by a party and a possible appeal by the applicant for review. 24 C. L. J. 517=21 C. W. N. 430. An application for restoration of an appeal rejected under O. 41, R. 10 (2) may be treated as an application for review

of the order rejecting appeal. 32 I.C. 86. The discovery of the ruling of the High Court contrary to another ruling of equal authority of the same High Court on which the Court has passed an order is not a sufficient cause for review. 18 I.C. 275=17 C.L.J. 416; 1927 M. 998; 1926 M. 764=50 M.L.J. 493. An application for review of judgment can be granted in part. 11 I.C. 102=15 C.L.J. 339. See also 28 N.L.R. 245=140 I.C. 21. A Court can review its order, which was passed on the alleged consent of both parties on an application by one of the parties that he never consented to it. 15 C.L.J. 408=17 C.W.N. 631. A review of the decree, which was right when it was made on the ground of the happening of some subsequent event is not justified. 48 I.C. 157=111 P.W.R. 1918; 104 I.C. 136=31 C.W.N. 822. A review cannot be granted on ground other than those enumerated in O. 47. 22 I.C. 785=197 P.L.R. 1914. A Court can entertain review of an order of dismissal for default even in cases where no application for restoration of the suit is made within time. 109 P.R. 1913=19 I. C. 481; 4 P. 704 (dismissal for non-payment of printing fees). See also 37 C.W.N. 1045; 1933 P. 557. Default of appearance is not a reason contemplated by R. 1, nor is it analogous to any such reason. 52 M.L.J. 123=1927 M. 355=99 I.C. 954; 37 C.W.N. 1045. Where Court refused to grant adjournment because appellant's counsel was unprepared to argue, and did not permit the appellant to file a written argument and further its judgment did not state that it considered certain aspects of the question of limitation a review was not granted. 115 I. C. 173=1929 N. 89. No application for review will lie on the ground of the discovery of a new and effective argument arising from a document which was before the Court and the terms of which were put in issue and were perfectly well known to the parties. [13 L. 127 (P.C.), App.] 141 I.C. 381=1933 M. 290. A party can only ask for a review on the ground of other 'sufficient cause' if he can show the judgment to be incorrect. 13 I.C. 318=131 P.W.R. 1912; 17 L.W. 254=1923 M. 392. The words "for any other sufficient reason" in R. 1 mean a reason sufficient on grounds at least analogous to those specified immediately previous to discovery of new and important matter or mistake or error apparent on the face of the record. A deliberate order passed by a Bench of the High Court with a view to obtain a just decision of the dispute between the parties does not constitute a reason for review analogous to discovery of fresh evidence or a manifest mistake on the record. A review cannot therefore be granted against an order deliberately passed by a bench for the benefit of the parties in order to meet the circumstances of a particular case. 7 O.W.N. 741

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=126 I.C. 677=1930 O. 392. See also 1934 R. 233; 1939 Lah. 460. Where in an execution application, an objection was raised that the decree was not executable for want of engrossment on a non-judicial stamp; and the Judge who heard the application did not say a word about it in his order, such an omission would clearly amount to 'other sufficient reason' under R. 1, of O. 47; even if it did not constitute a 'mistake or error apparent on the face of the record' entitling a succeeding Judge to review the order of his predecessor. 47 L.W. 51=1938 Mad. 307. The general body of creditors should not be allowed to suffer by the *bona fide* mistake of the Official Receiver in allowing an order of discharge to be passed *ex parte*. That is a sufficient cause for the Court to review or set aside the order. 61 M.L.J. 719. A misconception on the part of the pleader in consequence of which the evidence on a certain point had been shut out and the issue found against the party is a matter of considerable importance and would come under the words "for any sufficient reason." 1931 S. 3. Where a decision is erroneous owing to the fact that a decision of High Court binding upon the Court was not referred to it, the Court can grant a review. 26 I.C. 366=1915 M.W. N. 22. But see 1926 M. 764=50 M.L.J. 493; 1927 M. 998=106 I.C. 514. Where a Judge who heard the case issues notice on an application for review, his successor is not prohibited from disposing of it. (*Ibid.*) Review—Notice to the opposite side. See 92 I.C. 800=1926 M. 133 (2). The phrase "or for any other sufficient reason" means that the reason must be one sufficient to satisfy the Court. 62 I.C. 253=4 N.L.J. 16; 11 L. 158=123 I.C. 845=1930 L. 37. The mere fact of failing to produce evidence on account of wrong advice of counsel is no ground for re-hearing the case. 48 I.C. 918=4 O.L.J. 695. For review there should be more than simple non-reference by the Judge to evidence in favour of either party. 2 P. 765. A point of law which could have been raised but was not raised does not justify grant of review. 5 P.L.J. 344=57 I.C. 11. Where there has been an abandonment of a specific question involved in an issue which was raised at the instance of the plaintiff in the suit, he is not entitled to apply for review of judgment on the ground that the abandonment of the question involved was the result of an erroneous view taken by the plaintiff's pleader. That would not constitute "sufficient reason" for a review under O. 47, R. 1. 50 L.W. 903=1940 Mad. 203. An order rejecting a memorandum of appeal, as being insufficiently stamped is open to review. 55 I.C. 502. See also 1938 Pat. 111 (dismissal of appeal for non-payment of printing charges—Application to restore; if one for review).

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Where appeal was summarily rejected as out of time; when it was within time in accordance with the practice prevailing regarding the supply of copy stamps, and this was overlooked in rejecting the appeal, review would lie. 1936 L. 650. Wrong information given by the copying department in copy of judgment regarding dates, may be 'sufficient cause' to review an order summarily rejecting on appeal as having been filed out of time. 155 I.C. 88=1935 N. 109. The fact that the judgment as it stood was open to misconstruction and that the points raised involved questions of importance and of frequent occurrence and that it was desirable to have the views of the appellate Court declared are good grounds for review. 19 I.C. 363=6 S.L.R. 127. See on this point 139 I.C. 788=1932 R. 129. Where the mistake though apparent is only of a clerical nature and does not affect the actual decision of the case it is no ground for review. 148 I.C. 718=1934 N. 111. Where the recital in a document was found to be false and collusive and the Court gave its judgment based on this finding; *held*, that even if the document was genuine the judgment could not be reviewed on that ground. 161 I.C. 501=1936 S. 7. A review of an order of Court cancelling a reference to arbitration and fixing the case for evidence is competent, and it depends upon circumstances whether the order passed in review is correct or not. 189 I.C. 466=1940 Lah. 276.

Per *Sathe, J.M.*—It cannot be laid down once for all that illness can never be a sufficient cause for granting a review application under O. 47, R. 1. Each case must be considered on its merits. 1940 R.D. 502.

Per *Harper, S.M.*—A review is justified only when there is something intrinsically wrong in the order against which the application is made. Illness is not a sufficient ground. 1940 R.D. 502. Absence owing to illness on the date of the order is not sufficient ground for asking for review of the order passed on that day without contest by him. 1941 O.A. (Supp.) 863=1941 A.W. R. (Rev.) 1070. Application for review is one of the three remedies open to a person against whom an *ex parte* decree has been passed and hence there is nothing inherently wrong in such an application being presented. 1939 A.W.R. (B.R.) 42. See also 18 R.D. 586=16 L.R. 9 (Rev.); 1929 Sind 110.

NOTICE.—A Judge is not justified in passing an order reviewing his prior order without giving notice to the person affected by the order. 116 I.C. 714. See also 46 I.C. 458=1933 P. 643. Under O. 47 the Court should re-hear the case on the merits after the review is granted. But where the review relates to the correction of an error apparent on the face of the decree all that the Court has to do is to decide after notice to the party whether or not to make correction. 1930 M.W.N. 166.

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MISCELLANEOUS: APPEAL AND REVIEW.—Effect of filing appeal—Review—Duty and power of appellate Court. 2 P. 676=45 M.L.J. 578=50 I.A. 183 (P.C.). Rules of procedure are not made for the purpose of hindering justice. 2 P. 676 (P.C.). R. 1 of O. 47 is intended to provide against action in two Courts simultaneously. Where a person prefers an appeal and then applies to the lower Court for review the order of the lower Court on the review application is invalid and its illegality is not affected by the subsequent withdrawal of the appeal. 33 Bom.L.R. 378; 14 R.D. 294 (1). The fact that the party could have appealed from an order which on the face of it is erroneous is no bar to an application for review. 14 L. 55=1933 L. 226. R. 1 does not apply where after filing an application for review the opposite party prefers an appeal. 63 I.C. 841. When an appeal is withdrawn, it must be treated as if it had never been "presented" within the meaning of O. 47, R. 1. 43 A. 288=19 A.L.J. 24. A Court can entertain an application for review and dispose of it on the merits even though subsequently an appeal is filed against the decree originally passed. 18 A.L.J. 135=42 A. 317; 17 A.L.J. 1021=42 A. 79. See also 148 I.C. 496=1934 A. 250. The application for review is not maintainable after preferring an appeal against the same decree. 35 I.C. 867; 1927 B. 232=29 Bom.L.R. 371=101 I.C. 766; 30 C.W.N. 968. See also 1941 R.D. 428=1941 O.W.N. 813; 1941 P.W.N. 557. On the withdrawal of the appeal the original Court has jurisdiction to entertain an application for review of its judgment. 14 I.C. 327. Where an appeal against judgment by the High Court is dismissed under O. 41, R. 11, the District Court cannot deal with an application for review of the same judgment. 23 Bom.L.R. 597=46 B. 1. If an application for review is made and also an appeal is preferred, the Court to which the review application is made, can still entertain the application for review. 38 B. 416=23 I.C. 513=16 Bom.L.R. 189; 41 I.C. 497=44 C. 1011. Where a surety against whom execution has been ordered applied for review of the order on the ground that the Court had no jurisdiction to do so without calling upon him to show cause why execution could not be ordered, *held*, as the surety had a right of appeal, it was not open to him to invoke the remedies by way of review or revision. 1931 M.W.N. 963. An appeal may be preferred even after an application for review; the Court in such a case can proceed with application for review; but the hearing of the appeal must be stayed. 57 I.C. 785; 65 I.C. 125. A lower Court cannot review its order after it has been confirmed on appeal. 40 P.R. 1918=45 I.C. 84. It is illegal for an inferior Court to review the judgment of a superior Court. 50 I.C. 910. An appli-

cation for review can be continued after the filing of appeal from the decree. If the review succeeds then the appeal becomes incompetent and cannot be heard. 50 I.C. 329=15 N.L.R. 65; 31 Bom.L.R. 137=116 I.C. 227=1929 B. 183. But see 11 I.C. 343=14 O.C. 108; 24 O.C. 280=66 I.C. 205. Every order in which in granting a review a Court fails to observe the terms of O. 47 should not be interfered with in revision. 104 I.C. 746. Appeal against original decree—Supersession of the decree on review appeal cannot be heard. 30 C.W.N. 738=96 I.C. 384=1926 C. 943. Appeal—Right of—No appeal lies from an order rejecting an application for review. Where the appellate Court entertains the appeal, its order is liable to be set aside by a superior tribunal. 14 R.D. 294 (2). But an appeal lies from an order granting the review. 36 C.W.N. 212=1932 C. 552. While there is a right of appeal, if the provisions of R. 4 of O. 47 are contravened, there is none if R. 1 of O. 47 is contravened. 116 I.C. 221=1929 L. 26. In appealable cases the review application should be filed before the appeal is lodged. 36 C.W.N. 40=1932 C. 171. When the lower appellate Court has postponed the consideration of an application for review, there is no appeal as the order cannot be construed as a final order. Again such an order is not included in the list of appealable orders in O. 47, R. 1. Hence the only remedy is revision under S. 115. 119 I.C. 561=1929 A. 375. There is nothing in R. 1 or in other provisions of the Code which would justify Courts in refusing to entertain an application for review merely on the ground that, subsequent to the making of the application, an appeal has been filed. The policy of the Code appears to be that a person cannot, after filing a second appeal, be allowed to obtain a review of judgment in lower Court which should have the effect of altering the judgment and decree from which he has appealed. 119 I.C. 561=1929 A. 375.

COURT-FEE.—Review application relating only to a portion of reliefs in plaint—Court-fee. See 57 C. 679.

ORDER ACCEPTING REVIEW—REVISION.—Where trial Court had jurisdiction to decide whether any irregularities were committed, and if so, whether those irregularities amounted to an error apparent on the face of the record within the purview of R. 1, even if that point had been wrongly decided, it could not be said that it had assumed jurisdiction which it did not possess or that it had lost it on account of an erroneous decision on a question of law and therefore such a decision is not open to revision. 152 I.C. 620=1934 L. 825. See also 141 I.C. 188=1933 L. 169; 1934 A. 971.

PRACTICE AND PROCEDURE.—If a judge wants to review his own order, he should follow the provisions of R. 1. He should

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

2. An application for review of a decree or order of a Court, not being a High Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made

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direct the pleader of the party who wants such review to advise his clients to file an application for review on which notice should be issued to the opposite party and the judge should then in their presence determine whether a review ought to be granted and the case reopened or not. But he cannot without notice to opposite party cancel his previous order and re-open the case. 146 I.C. 458=1933 P. 643 (2). An appeal which has been withdrawn must be treated as if it had never been preferred within the meaning of O. 47, R. 1. An application for review filed after the appeal is withdrawn is competent. Where a judgment-debtor filed a review application against an ejectment order, on the ground that he could not appear on the last day on account of his mother's death, and his own subsequent illness, and prayed for its cancellation and the Tahsildar dismissed it, but the Collector set it aside and granted the review and cancelled the original order of ejectment on the ground that the adjournments given for the payment of arrears were inadequate, it was held that the Collector's action in granting the review application was entirely irregular and could not be justified. It was further held that though a ground not taken in the memo. of appeal could be raised in arguments, it could not travel beyond the original case as made out in the trial Court and that no decision could rest on any such ground unless the party who might be affected thereby has had sufficient opportunity of contesting the case on that ground. 1940 R.D. 378=1940 A.W.R. (B.R.) 234. The Court which can review its judgment is the Court which has pronounced it and not the appellate Court before which the appeal is pending. The only remedy open to a party who has discovered new and important matter, which could not with due diligence have been found before, is to move the Court for a review of the judgment. 147 I.C. 339=1934 A. 175. An application under O. 47, R. 1 designed merely to escape the consequences of the law of limitation, maintainable. 1933 P. 557=147 I.C. 179. If an application for review of judgment is presented on the original side of the High Court before an appeal is preferred, the Court is not deprived of its jurisdiction to entertain the application for review, on the ground that, when the application comes on to be dealt

with, an appeal is pending under Rr. 2, 3 and 34 of the Rules and Orders of the High Court, Original Side Chapter 32, the application for review must be held to be presented when the memorandum of review is filed and not when it is urged in Court. The person who files a memorandum of review takes a step which initiates proceedings for review, and by so doing applies for review of judgment within the meaning of O. 47, R. 1. 41 C.W.N. 129=170 I.C. 653.

O. 47, R. 1 (2).—The word "party" in this sub-rule is properly used in its context. It pre-supposes that the person to whom it refers is a party to the decree. 159 I.C. 186=1935 R. 364. Persons who have never been parties to a suit or to an appeal at all, need neither file a suit to set aside the original decree or the appellate decree, nor need they file an application for review. 159 I.C. 186=1935 R. 364. Father and son were defendants in mortgage suit and a mortgage decree was passed against both. In an appeal filed by the father alone, the son was not impleaded but the Court substituted decree ordering the son to pay the whole amount out of his pocket and the decree was sought to be executed by arresting him. *Held*, that the appellate Court had no power to do so nor was the son bound to apply for review of the appellate decree as he was no party to the appeal. (*Ibid.*) Irrespective of the time when a person aggrieved by a decree discovers material evidence, *viz.*, whether before or after an appeal is filed, he has no right to apply for a review if he has already preferred an appeal. He being incompetent to apply for a review, his application is invalid and the Court will have no jurisdiction to inquire into the application. The subsequent withdrawal of the appeal cannot validate the application for a review which was initially void so as to confer on the Court a jurisdiction which it had none when the application was filed. 157 I.C. 366=31 N.L.R. 418=1935 N. 174. Application for review—Subsequent presentation of appeal—Competency—Grant of review—Effect. 43 L.W. 542.

O. 47, R. 2.—Review cannot be granted where applicant has mismanaged his case and wishes to secure a re-hearing thereof. 23 I.C. 394. R. 2 would prevent an application for review being filed against the order of a deceased Judge, if the Judge

8. When an application for review is granted a note thereof shall be made in the register and the Court may at once rehear the case or make such order in regard to the re-hearing as it thinks fit.

Registry of application granted, and order for rehearing.

9. No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained.

Bar of certain applications.

LOC. AMS.—[ALLAHABAD, BOMBAY OUDH AND SIND.] Add the following rule at the end of O. 47 :—

“10. R. 38 of O. 41 shall apply so far as may be, to proceedings under this order.”

ORDER XLVIII.

Miscellaneous.

1. (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.

Process to be served at expense of party issuing.

(2) The court-fee chargeable for such service shall be paid within a time to be fixed before the process is issued.

Costs of service.

LOC. AMS.—[ALLAHABAD AND OUDH.] Add the words “except as provided in O. 4, r. 1 (2)” at the beginning of cl. (1) of r. 1.

[NAGPUR.] To sub-r. (2) of r. 1 of O. 48, prefix the words “Except as provided in O. 4, r. 1 (2)” and substitute the word “the” for “The”.

[CALCUTTA.] Substitute for sub-r. (2) :—

“(2) The court-fee chargeable for such service shall be paid when the process is applied for, or within such time, if any, as the Court may, when ordering its issue, fix for the purpose.”

2. All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons.

Orders and notice how served.

3. The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned.

Use of forms in appendices.

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vious order must be set aside in appeal. 105 I.C. 4.

APPEAL.—An appeal does not lie from an order granting an application for review except on the grounds specified in R. 7. 141 I.C. 188=1933 L. 169; 181 I.C. 455; 1939 P.W.N. 719.

REVISION.—No revision lies when there is a right of appeal from the final decree. 32 I.C. 860=48 P.W.R. 1916; 1927 B. 599=29 Bom.L.R. 1355. But see also 12 I.C. 246=49 P.W.R. 1911; 31 M.L.J. 509=36 I.C. 437; 34 C.W.N. 265.

O. 47, R. 8.—Provisions of the rule are mandatory. 1930 A.L.J. 1057. A review may be granted either as to the whole or part, and according to R. 8 on admitting of a review the whole case is not re-opened. 20 C.W.N. 1165=27 C.L.J. 326. It is open to Court to determine whether the whole case is to be re-heard or in part or in its entirety. In the absence of any special direction the whole case is re-opened. 53 C. 856=31 C.W.N. 1035=1927 C. 21. A Court can under R. 8 grant a review and at once proceed to re-hear the case. 26 I.C. 366=1915 M.W.N. 22. It is open to Court to make a simple order for re-hearing without making an order that no evidence should be produced except that which has been discovered subsequent to the suit.

157 I.C. 1084=1935 A.L.J. 436=1935 A. 435.

O. 47, R. 9.—Where a plea of *res judicata* has been wrongly accepted between the parties by a single Judge of the Chief Court, the question cannot be re-opened afterwards by a Division Bench. 10 I.C. 679=25 P.W.R. 1911. As to scope and effect of O. 47, R. 9, see 8 L. 54=1927 L. 200. A second review of an order is barred by R. 9 as it is practically for the review of the order passed on review. 10 I.C. 679=25 P.W.R. 1911; 20 C.W.N. 1165=27 C.L.J. 326. See also 8 L. 54=1927 L. 200.

O. 48, R. 1.—See 3 C.W.N. 82; 11 W. R. 290; 9 W.R. 127. The provisions of R. 1 operate as between party and party and not between the Government and the party. 8 Pat.L.T. 756=102 I.C. 791=1927 P. 318.

O. 48, R. 2.—See 5 B. 249. The words of S. 80 as to how notice has to be served are mandatory and are not controlled by the provision contained in R. 2 which should be read as subject to the special procedure as to service contained in S. 83. 35 C.W. N. 161=58 C. 850=1931 C. 503. Duty of Court to fix time for payment of process fee—Non-compliance—Effect. See 158 I. C. 250.

O. 48, R. 3.—See 24 C. 766 (772).

LOC. AMS.—[CALCUTTA.] O. 48, r. 3.—Insert the following words *after* the word “Appendices” :—

“or such other forms as may be prescribed by the High Court of Judicature at Fort William in Bengal.”

[OUDH.] The following is *added* as r. 4 to O. 48 :—

“Except as otherwise provided, in every interlocutory proceeding and in every proceeding after decree in the trial Court, the Court may, either on the application of any party, or of its own motion, dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement.”

[RANGOON.] The words “or such forms as may be prescribed by the High Court of Judicature at Rangoon” shall be *inserted* after the word “Appendices.”

ORDER XLIX.

Chartered High Courts.

1. Notice to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except Who may serve processes of High Courts. summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court, by any rule or order, directs.

2. Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court. Saving in respect of Chartered High Courts.

3. The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely :— Application of rules.

- (1) rule 10 and rule 11, clauses (b) and (c) of Order VII ;
- (2) rule 3 of Order X ;
- (3) rule 2 of Order XVI ;
- (4) rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 (so far as relates to the manner of taking evidence) of Order XVIII ;
- (5) rules 1 to 8 of Order XX ; and
- (6) rule 7 of Order XXXIII (so far as relates to the making of a memorandum) ;

and rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction.

LOC. AMS.—[BOMBAY.] In r. 3, the word “and” immediately preceding paragraph (6) shall be *omitted* and the following paragraph shall be *inserted* between paragraphs (5) and (6), namely :—

“(5-a) R. 72-A of O. 21 ; and ”

For the words and figures “r. 35” occurring in item (6) of r. 3, the words and figures “rr. 31 and 35” shall be *substituted*.

The following clause shall be *inserted* as cl. (1), namely :—

“(1) r. 21-A of O. 5 ;”

For the existing cl. (1) the following shall be *substituted*, namely :—

“(1-a) rr. 10 and 11, cls. (b) and (c), and rr. 19 to 26, of O. 7 ;

“(1-b) rr. 11 and 12 of O. 8 ;”

Below cl. (6), the following shall be *inserted*, namely :—

“(7) r. 38 of O. 41,” and

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O. 49, R. 1.—Mode of effecting of summons. 96 I.C. 375=1926 C. 977.

O. 49, R. 2.—See 9 A. 93. O. 41, R. 31 and O. 20 and the rules thereunder do

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not apply to the Chartered High Courts as the rules relating to judgments were in force when the C. P. Code was enacted. 27 A.L.J. 713=116 I.C. 23=1929 A. 403.

8. When an application for review is granted a note thereof shall be made in the register and the Court may at once rehear the case or make such order in regard to the re-hearing as it thinks fit.
 Registry of application granted, and order for rehearing.

9. No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained.
 Bar of certain applications.

LOC. AMS.—[ALLAHABAD, BOMBAY OUDH AND SIND.] Add the following rule at the end of O. 47 :—

“10. R. 38 of O. 41 shall apply so far as may be, to proceedings under this order.”

ORDER XLVIII.

Miscellaneous.

1. (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.
 Process to be served at expense of party issuing.

(2) The court-fee chargeable for such service shall be paid within a time to be fixed before the process is issued.
 Costs of service.

LOC. AMS.—[ALLAHABAD AND OUDH.] Add the words “except as provided in O. 4, r. 1 (2)” at the beginning of cl. (1) of r. 1.

[NAGPUR.] To sub-r. (2) of r. 1 of O. 48, prefix the words “Except as provided in O. 4, r. 1 (2)” and substitute the word “the” for “The”.

[CALCUTTA.] Substitute for sub-r. (2) :—

“(2) The court-fee chargeable for such service shall be paid when the process is applied for, or within such time, if any, as the Court may, when ordering its issue, fix for the purpose.”

2. All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons.
 Orders and notice how served.

3. The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned.
 Use of forms in appendices.

NOTES.

vious order must be set aside in appeal.
 105 I.C. 4.

APPEAL.—An appeal does not lie from an order granting an application for review except on the grounds specified in R. 7.
 141 I.C. 188=1933 L. 169; 181 I.C. 455; 1939 P.W.N. 719.

REVISION.—No revision lies when there is a right of appeal from the final decree.
 32 I.C. 860=48 P.W.R. 1916; 1927 B. 599=29 Bom.L.R. 1355. But see also 12 I.C. 246=49 P.W.R. 1911; 31 M.L.J. 509=36 I.C. 437; 34 C.W.N. 265.

O. 47, R. 8.—Provisions of the rule are mandatory. 1930 A.L.J. 1057. A review may be granted either as to the whole or part, and according to R. 8 on admitting of a review the whole case is not re-opened.
 20 C.W.N. 1165=27 C.L.J. 326. It is open to Court to determine whether the whole case is to be re-heard or in part or in its entirety. In the absence of any special direction the whole case is re-opened. 53 C. 856=31 C.W.N. 1035=1927 C. 21. A Court can under R. 8 grant a review and at once proceed to re-hear the case. 26 I.C. 366=1915 M.W.N. 22. It is open to Court to make a simple order for re-hearing without making an order that no evidence should be produced except that which has been discovered subsequent to the suit.

157 I.C. 1084=1935 A.L.J. 436=1935 A. 435.

O. 47, R. 9.—Where a plea of *res judicata* has been wrongly accepted between the parties by a single Judge of the Chief Court, the question cannot be re-opened afterwards by a Division Bench. 10 I.C. 679=25 P.W.R. 1911. As to scope and effect of O. 47, R. 9, see 8 L. 54=1927 L. 200. A second review of an order is barred by R. 9 as it is practically for the review of the order passed on review. 10 I.C. 679=25 P.W.R. 1911; 20 C.W.N. 1165=27 C.L.J. 326. See also 8 L. 54=1927 L. 200.

O. 48, R. 1.—See 3 C.W.N. 82; 11 W. R. 290; 9 W.R. 127. The provisions of R. 1 operate as between party and party and not between the Government and the party. 8 Pat.L.T. 756=102 I.C. 791=1927 P. 318.

O. 48, R. 2.—See 5 B. 249. The words of S. 80 as to how notice has to be served are mandatory and are not controlled by the provision contained in R. 2 which should be read as subject to the special procedure as to service contained in S. 83. 35 C.W.N. 161=58 C. 850=1931 C. 503. Duty of Court to fix time for payment of process fee—Non-compliance—Effect. See 158 I.C. 250.

O. 48, R. 3.—See 24 C. 766 (772).

APPENDIX A.

PLEADINGS.

(1) Titles of Suits.

IN THE COURT OF

A. B. (*add description and residence*) PlaintiffC. D. (*add description and residence*) Defendant.

(2) Description of Parties in Particular Cases.

¹[The Secretary of State or the Federation of India or the Province of as the case may be.]

The Advocate-General of

The Collector of

The State of

The A. B. Company, Limited, having its registered office at

A. B., a public officer of the C. D. Company.

A. B. (*add description and residence*), on behalf of himself and all other creditors of C. D., late of (*add description and residence*).A. B. (*add description and residence*), on behalf of himself and all other holders of debentures issued by the Limited. Company,

The Official Receiver.

A. B., a minor (*add description and residence*), by C. D. [*or by the Court of Wards*], his next friend.A. B. (*add description and residence*), a person of unsound mind [*or of weak mind*], by C. D., his next friend.

A. B., a firm carrying on business in partnership at

A. B. (*add description and residence*), by his constituted attorney, C. D. (*add description and residence*).A. B. (*add description and residence*), Shebait of Thakur.A. B. (*add description and residence*), executor of C. D., deceased.A. B. (*add description and residence*), heir of C. D., deceased.

(3) Plaints.

No. 1.

MONEY LENT.

(Title.)

A. B., the above-named plaintiff, states as follows:—

LEG. REF.

¹ Words within brackets have been substituted by A.O., 1937, for the former words, viz., "The Secretary of State for India in Council".

NOTES.

APPENDIX A.—The forms in Appendix A must be used with caution. They seem to have been drafted by some one with an imperfect knowledge of pleading and sometimes are in direct conflict with the Code.

For example, where they provide that original documents which are part of the evidence should be annexed to the plaint, they are to be taken as the standard of the requisite brevity and also no doubt as specimens of the character of pleadings required. But they are not to be adhered to slavishly, they are in fact not perfect by any means. 58 C. 418=134 I.C. 538=1931 C. 458. Forms in the Appendix—Necessity for adherence. See 1938 R. 478.

1. On the day of 19 , he lent the defendant rupees re-payable on the day of .
2. The defendant has not paid the same, except rupees paid on the day of 19 .
- [If the plaintiff claims exemption from any law of limitation, say:—]
3. The plaintiff was a minor [or insane] from the day of till the day of .
4. [Facts showing when the cause of action arose and that the Court has jurisdiction.]
5. The value of the subject-matter of the suit for the purpose of jurisdiction is rupees and for the purpose of Court-fees is rupees.
6. The plaintiff claims rupees, with interest at per cent. from the day of 19 .

No. 2.

MONEY OVERPAID.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff agreed to buy and the defendant agreed to sell bars of silver at annas per tola of fine silver.
2. The plaintiff procured the said bars to be assayed by E.F., who was paid by the defendant for such assay, and E.F. declared each of the bars to contain 1,500 tolas of fine silver, and the plaintiff accordingly paid the defendant rupees.
3. Each of the said bars contained only 1,200 tolas of fine silver, of which fact the plaintiff was ignorant when he made the payment.
4. The defendant has not repaid the sum so overpaid.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 3.

GOODS SOLD AT A FIXED PRICE AND DELIVERED.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , E.F. sold and delivered to the defendant [one hundred barrels of flour, or the goods mentioned in the schedule hereto annexed, or sundry goods].
2. The defendant promised to pay rupees for the said goods on delivery [or on the day of , some day before the plaint was filed.]
3. He has not paid the same.
4. E.F. died on the day of 19 . By his last will he appointed his brother, the plaintiff, his executor.
[As in paras. 4 and 5 of Form No. 1.]
7. The plaintiff as executor of E.F. claims [Relief claimed].

No. 4.

GOODS SOLD AT A REASONABLE PRICE AND DELIVERED.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , plaintiff sold and delivered to the defendant [sundry articles of house-furniture], but no express agreement was made as to the price.
2. The goods were reasonably worth rupees.
3. The defendant has not paid the money.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 5.

GOODS MADE AT DEFENDANT'S REQUEST, AND NOT ACCEPTED.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , E.F. agreed with the plaintiff that the plaintiff should make for him [six tables and fifty chairs] and that E.F. should pay for the goods on delivery rupees.
2. The plaintiff made the goods, and on the day of 19 , offered to deliver them to E.F., and has ever since been ready and willing so to do.
3. E.F. has not accepted the goods or paid for them.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 6.

DEFICIENCY UPON A RE-SALE [GOODS SOLD AT AUCTION].

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff put up at auction sundry [goods], subject to the condition that all goods not paid for and removed by the purchaser within [ten days] after the sale should be re-sold by auction on his account, of which condition the defendant had notice.

2. The defendant purchased [one crate of crockery] at the auction at the price of rupees.

3. The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [ten days] after.

4. The defendant did not take away the goods purchased by him, nor pay for them within [ten days] after the sale, nor afterwards.

5. On the day of 19 , the plaintiff re-sold the [crate of crockery], on account of the defendant, by public auction, for rupees.

6. The expenses attendant upon such re-sale amounted to rupees.

7. The defendant has not paid the deficiency thus arising, amounting to rupees.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 7.

SERVICES AT A REASONABLE RATE.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. Between the day of 19 , and the day of 19 , at , plaintiff [executed sundry drawings, designs and diagrams] for the defendant, at his request; but no express agreement was made as to the sum to be paid for such services.

2. The services were reasonably worth rupees.

3. The defendant has not paid the money.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 8.

SERVICES AND MATERIALS AT A REASONABLE COST.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , at , the plaintiff built a house [known as No. , in], and furnished the materials therefor, for the defendant, at his request, but no express agreement was made as to the amount to be paid for such work and materials.

2. The work done and materials supplied were reasonably worth rupees.

3. The defendant has not paid the money.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 9.

USE AND OCCUPATION.

(Title.)

A.B., the above-named plaintiff, executor of the will of X.Y., deceased, states as follows:—

1. That the defendant occupied the [house No. Street], by permission of the said X.Y., from the day of 19 , until the day of 19 , and no agreement was made as to payment for the use of the said premises.

2. That the use of the said premises for the said period was reasonably worth rupees.

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff as executor of X.Y. claims [Relief claimed].

No. 10.

ON AN AWARD.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant, having a difference between them concerning [a demand of the plaintiff for the price of ten barrels of oil which the defendant refused to pay], agreed in writing to submit the difference to the arbitration of E. F. and G.H., and the original document is annexed hereto.

2. On the _____ day of _____ 19____, the arbitrators awarded that the defendant should [pay the plaintiff _____ rupees].
3. The defendant has not paid the money.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 11.

ON A FOREIGN JUDGMENT.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19____, at _____, in the State [or Kingdom] of _____, the _____ Court of that State [or Kingdom], in a suit therein pending between the plaintiff and the defendant duly adjudged that the defendant should pay to the plaintiff _____ rupees, with interest from the said date.
2. The defendant has not paid the money.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 12.

AGAINST SURETY FOR PAYMENT OF RENT.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19____, E.F. hired from the plaintiff for the term of _____ years, the [house No. _____, _____ Street], at the annual rent of _____ rupees, payable [monthly].
2. The defendant agreed, in consideration of the letting of the premises to E.F., to guarantee the punctual payment of the rent.
3. The rent for the month of _____ 19____, amounting to _____ rupees, has not been paid.

[If, by the terms of the agreement, notice is required to be given to the surety, add:—]

4. On the _____ day of _____ 19____, the plaintiff gave notice to the defendant of the non-payment of the rent, and demanded payment thereof.
5. The defendant has not paid the same.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 13.

BREACH OF AGREEMENT TO PURCHASE LAND.

(Title.)

A.B., the above-named plaintiff states as follows:—

1. On the _____ day of _____ 19____, the plaintiff and the defendant entered into an agreement, and the original document is hereto annexed.
[Or, on the _____ day of _____ 19____, the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty bighas¹ of land in the village of _____ for _____ rupees.]
2. On the _____ day of _____ 19____, the plaintiff, being then the absolute owner of the property [and the same being free from all incumbrances as was made to appear to the defendant], tendered to the defendant a sufficient instrument of transfer of the same [or, was ready and willing, and is still ready and willing, and offered, to transfer the same to the defendant by a sufficient instrument] on the payment by the defendant of the sum agreed upon.
3. The defendant has not paid the money.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 14.

NOT DELIVERING GOODS SOLD.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19____, the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff on the _____ day of _____ 19____, and that the plaintiff should pay therefor _____ rupees on delivery.
2. On the [said] day the plaintiff was ready and willing, and offered to pay the defendant the said sum upon delivery of the goods.
3. The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would have accrued to him from such delivery.
[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

LEG. REF.

High Court has substituted "acres" "bighas".

¹ For the word "bighas" the Calcutta

No. 15.

WRONGFUL DISMISSAL.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant, or in the capacity of foreman, or as the case may be] and that the defendant should employ the plaintiff as such for the term of [one year] and pay him for his services rupees [monthly].

2. On the day of 19 , the plaintiff entered upon the service of the defendant and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice.

3. On the day of 19 , the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 16.

BREACH OF CONTRACT TO SERVE.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] salary of rupees, and that the defendant should serve the plaintiff as [an artist] for the term of [one year].

2. The plaintiff has always been ready and willing to perform his part of the agreement [and on the day of 19 , offered so to do].

3. The defendant [entered upon] the service of the plaintiff on the above-mentioned day, but afterwards on the day of 19 , he refused to serve the plaintiff as aforesaid.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 17.

AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed. [Or state the tenor of the contract.]

[2. The plaintiff duly performed all the conditions of the agreement on his part.]

3. The defendant [built the house referred to in the agreement in a bad and unworkmanlike manner].

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 18.

ON A BOND FOR THE FIDELITY OF A CLERK.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff took *E.F.* into his employment as a clerk.

2. In consideration thereof, on the day of 19 , the defendant agreed with the plaintiff that if *E.F.* should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all moneys, evidences of debt or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding rupees.

[Or, 2. In consideration thereof, the defendant by his bond of the same date bound himself to pay the plaintiff the penal sum of rupees, subject to the condition that if *E.F.* should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all moneys, evidences of debt or other property which should be at any time held by him in trust for the plaintiff, the bond should be void.]

[Or, 2. In consideration thereof, on the same date, the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed.]

3. Between the day of 19 , and the day of 19 , *E.F.* received money and other property, amounting to the value of rupees, for the use of the plaintiff, for which sum he has not accounted to him, and the same still remains due and unpaid.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 19.

BY TENANT AGAINST LANDLORD WITH SPECIAL DAMAGE.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant, by a registered instrument, let to the plaintiff [the house No. Street] for the term of years, contracting with the plaintiff, that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term.

2. All conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain this suit.

3. On the day of 19 , during the said term, *E. F.*, who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. The plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend rupees in moving, and lost the custom of *G.H.*, and *I.J.*, by such removal.]

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 20.

ON AN AGREEMENT OF INDEMNITY.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant, being partners in trade under the style of *A.B.* and *C.D.*, dissolved the partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm.

2. The plaintiff duly performed all the conditions of the agreement on his part.

3. On the day of 19 [a judgment was recovered against the plaintiff and defendant by *E.F.*, in the High Court of Judicature at , upon a debt due from the firm to *E.F.*, and on the day of 19 ,] the plaintiff paid rupees [in satisfaction of the sale].

4. The defendant has not paid the same to the plaintiff.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 21.

PROCURING PROPERTY BY FRAUD.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he, the defendant, was solvent, and worth rupees over all his liabilities].

2. The plaintiff was thereby induced to sell [and deliver] to the defendant, [dry goods] of the value of rupees.

3. The said representations were false [or state the particular falsehoods] and were then known by the defendant to be so.

4. The defendant has not paid for the goods. [Or, if the goods were not delivered.] The plaintiff, in preparing and shipping the goods and procuring their restoration, expended rupees.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 22.

FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant represented to the plaintiff that *E.F.* was solvent and in good credit, and worth rupees over all his liabilities [or that *E.F.* then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit.]

2. The plaintiff was thereby induced to sell to *E.F.* [rice] of the value of rupees [on months credit].

3. The said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff [or to deceive and injure the plaintiff].

4. *E.F.* [did not pay for the said goods at the expiration of the credit aforesaid, or] has not paid for the said rice, and the plaintiff has wholly lost the same.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 23.

POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain land called _____ and situate in _____ and of a well therein, and of water in the well, and was entitled to the use and benefit of the well and of the water therein, and to have certain springs and streams of water which flowed and ran into the well to supply the same to flow or run without being fouled or polluted.

2. On the _____ day of _____ 19____, the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which flowed into the well.

3. In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water.

[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

No. 24.

CARRYING ON A NOXIOUS MANUFACTURE.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at all times hereinafter mentioned was, possessed of certain lands called _____, situated in _____,

2. Ever since the _____ day of _____ 19____, the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands and corrupted the air, and settled on the surface of the lands.

3. Thereby the trees, hedges, herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value, and the cattle and livestock of the plaintiff on the lands became unhealthy, and many of them were poisoned and died.

4. The plaintiff was unable to graze the lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep and farming stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the lands as he otherwise would have had.

[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

No. 25.

OBSTRUCTING A RIGHT OF WAY.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of [a house in the village of _____].

2. He was entitled to a right of way from the [house] over a certain field to a public highway and back again from the highway over the field to the house, for himself and his servants [with vehicles, or on foot] at all times of the year.

3. On the _____ day of _____ 19____, defendant wrongfully obstructed the said way, so that the plaintiff could not pass [with vehicles, or on foot, or in any manner] along the way [and has ever since wrongfully obstructed the same].

4. (State special damage, if any.)

[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

No. 26.

OBSTRUCTING A HIGHWAY.

(Title.)

1. The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from _____ to _____ so as to obstruct it.

2. Thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones [or into the said trench] and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

No. 27.

DIVERTING A WATER-COURSE.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a [stream] known as the _____, in the village of _____, district of _____.

2. By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill.

3. On the day of 19 , the defendant by cutting the bank of the stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. By reason thereof the plaintiff has been unable to grind more than sacks per day, whereas before the said diversion of water, he was able to grind sacks per day.

[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

No. 28.

OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. Plaintiff is and was at the time hereinafter mentioned, possessed of certain lands situate, etc., and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.

2. On the day of 19 , the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

No. 29.

INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendants were common carriers of passengers by railway between and .

2. On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway.

3. While he was such passenger, at [or near the station of or between the stations of and], a collision occurred on the said railway caused by the negligence and unskilfulness of the defendants' servants, whereby the plaintiff was much injured [having his leg broken, his head cut, etc., and state the special damage, if any as], and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as [a salesman].

[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

Or thus:—2. On that day the defendants by their servants so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along the defendant's railway which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plaintiff, whereby, etc., [as in para. 3.]

No. 30.

INJURIES CAUSED BY NEGLIGENT DRIVING.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. The plaintiff is a shoemaker, carrying on business at .
The defendant is a merchant of .

2. On the day of 19 , the plaintiff was walking southward along Chowringhee, in the City of Calcutta, at about 3 o'clock in the afternoon. He was obliged to cross Middleton Street, which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot pavement on the further side thereof, a carriage of the defendants drawn by two horses under the charge and control of the defendant's servants, was negligently, suddenly and without any warning turned at a rapid and dangerous place out of Middleton Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken, and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

No. 31.

FOR MALICIOUS PROSECUTION.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant obtained a warrant of arrest from [a Magistrate of the said city, or as the case may be] on a charge

of _____, and the plaintiff was arrested thereon, and imprisoned for _____ [days or hours, and gave bail in the sum of _____ rupees to obtain his release].

2. In so doing the defendant acted maliciously and without reasonable or probable cause.

3. On the _____ day of _____ 19 _____, the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

4. Many persons, whose names are unknown to the plaintiff, hearing of the arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him; or in consequence of the said arrest, the plaintiff lost his situation as clerk to one E.F.; or in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

No. 32.

MOVABLES WRONGFULLY DETAINED.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19 _____, plaintiff owned [or state facts showing a right to the possession] the goods mentioned in the schedule hereto annexed [or describe the goods] the estimated value of which is _____ rupees.

2. From that day until the commencement of this suit the defendant has detained the same from the plaintiff.

3. Before the commencement of the suit, to wit, on the _____ day of _____ 19 _____, the plaintiff demanded the same from the defendant, but he refused to deliver them.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims—

- (1) delivery of the said goods, or _____ rupees, in case delivery cannot be had;
- (2) _____ rupees compensation for the detention thereof.

The Schedule.

No. 33.

AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFEREE WITH NOTICE.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19 _____, the defendant C.D., for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent, and worth _____ rupees over all his liabilities].

2. The plaintiff was thereby induced to sell and deliver to C.D. [one hundred boxes of tea], the estimated value of which is _____ rupees.

3. The said representations were false, and were then known by C.D., to be so [or at the time of making the said representations, C.D., was insolvent, and knew himself to be so].

4. C.D. afterwards transferred the said goods to the defendant E.F., without consideration [or who had notice of the falsity of the representation].

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims—

- (1) delivery of the said goods, or _____ rupees, in case delivery cannot be had;
- (2) _____ rupees compensation for the detention thereof.

No. 34.

RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19 _____, the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at _____, contained [ten bighas].

2. The plaintiff was thereby induced to purchase the same at the price of _____ rupees in the belief that the said representation was true and signed an agreement, of which the original is hereto annexed. But the land has not been transferred to him.

3. On the _____ day of _____ 19 _____, the plaintiff paid the defendant _____ rupees as part of the purchase-money.

4. That the said piece of ground contained in fact only [five bighas].

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims—

- (1) _____ rupees, with interest from the _____ day of _____ 19 _____;
- (2) that the said agreement be delivered up and cancelled.

No. 35.

AN INJUNCTION RESTRAINING WASTE.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. The plaintiff is the absolute owner of [*describe the property*].
2. The defendant is in possession of the same under a lease from the plaintiff.
3. The defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff.
[*As in paras. 4 and 5 of Form No. 1.*]
6. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.
[*Pecuniary compensation may also be claimed.*]

No. 36.

INJUNCTION RESTRAINING NUISANCE.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. Plaintiff is, and at all times hereinafter mentioned was, the absolute owner of [the house No. Street, Calcutta].
2. The defendant is, and at all the said times was, the absolute owner of [a plot of ground in the same street].
3. On the day of 19 , the defendant erected upon his said plot a slaughter-house, and still maintains the same; and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff].
4. In consequence the plaintiff has been compelled to abandon the said house, and has been unable to rent the same.
[*As in paras 4 and 5 of Form No. 1.*]
7. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance.

No. 37.

PUBLIC NUISANCE.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. The defendant has wrongly heaped up earth and stones on a public road known as Street at so as to obstruct the passage of the public along the same and threatens and intends, unless restrained from so doing, to continue and repeat the said wrongful act.
2. The plaintiff has obtained the consent in writing of the Advocate-General [or of the Collector or other officer appointed in this behalf] for the institution of this suit.
[*As in paras. 4 and 5 of Form No. 1.*]
5. The plaintiff claims—
 - (1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road;
 - (2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid.

No. 38.

INJUNCTION AGAINST THE DIVERSION OF A WATERCOURSE.

(Title.)

A.B., the above-named plaintiff, states as follows:—[*As in Form No. 27.*]

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

No. 39.

RESTORATION OF MOVABLE PROPERTY THREATENED WITH DESTRUCTION, AND FOR AN INJUNCTION.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. Plaintiff is, and at all times hereinafter mentioned was, the owner of [a portrait of his grandfather which was executed by an eminent painter], and of which no duplicate exists [or state any facts showing that the property is of a kind that cannot be replaced by money].
2. On the day of 19 , he deposited the same for safe-keeping with the defendant.

3. On the day of 19 , he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up.

5. No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting].

[As in paras. 4 and 5 of Form No. 1.]

8. The plaintiff claims—

(1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said [painting];

(2) that he be compelled to deliver the same to the plaintiff.

No. 40.

INTERPLEADER.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. Before the date of the claims hereinafter mentioned, G.H., deposited with the plaintiff [describe the property] for a [safe-keeping].

2. The defendant C.D. claims the same [under an alleged assignment thereof to him from G.H.].

3. The defendant E.F., also claims the same [under an order of G. H., transferring the same to him].

4. The plaintiff is ignorant of the respective rights of the defendants.

5. He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the Courts shall direct.

6. The suit is not brought by collusion with either of the defendants.

[As in paras. 4 and 5 of Form No. 1.]

9. The plaintiff claims—

(1) that the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto;

(2) that they be required to interplead together concerning their claims to the said property;

[(3) that some person be authorized to receive the said property pending such litigation];

(4) that upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto.

No. 41.

ADMINISTRATION BY CREDITOR ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. E.F., late of , was at the time of his death, and his estate still is, indebted to the plaintiff in the sum of

[Here insert nature of debt and security, if any].

2. E.F., died on or about the day of . By his last will, dated the day of , he appointed C.D., his executor [or devised his estate in trust, etc., or died intestate, as the case may be].

3. The will was proved by C.D. [or letters of administration were granted, etc.]

4. The defendant has possessed himself of the movable [and immovable, or the proceeds of the immovable] property of E.F., and has not paid the plaintiff his debt.

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims that an account may be taken of the movable [and immovable] property of E.F., deceased and that the same may be administered under the decree of the Court.

No. 42.

ADMINISTRATION BY SPECIFIC LEGATEE.

(Title.)

[Alter Form No. 41 thus]—

[Omit paragraph 1 and commence paragraph 2] E.F., late of , died on or about the day of . By his last will, dated the day of , he appointed C.D., his executor, and bequeathed to the plaintiff [here state the specific legacy].

For paragraph 4 substitute—

The defendant is in possession of the movable property of E.F., and amongst other things, of the said [here name the subject of the specific bequest].

For the commencement of paragraph 7 substitute—

The plaintiff claims that the defendant may be ordered to deliver to him the said [here name the subject of the specific bequest], or that, etc.,

No. 43.

ADMINISTRATION BY PECUNIARY LEGATEE.

(Title.)

[Alter Form No. 41 thus]—

[Omit paragraph 1 and substitute for paragraph 2] *E.F.*, date of died on or about the day of By his last will, dated the day of he appointed *C.D.* his executor, and bequeathed to the plaintiff a legacy of rupees.

In paragraph 4 substitute "legacy" for "debt."

Another form.

(Title.)

E.F., the above-named plaintiff, states as follows:

1. *A.B.* of *K.* in the died on the day of By his last will, dated the day of , he appointed the defendant and *M.N.* [who died in the testator's lifetime] his executors, and bequeathed his property, whether movable or immovable, to his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should attain twenty-one, or a daughter who should attain that age or marry, upon trust as to his immovable property for the person who would be the testator's heir-at-law, and as to his movable property for the persons who would be the testator's next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The will was proved by the defendant on the day of . The plaintiff has not been married.

3. The testator was at his death entitled to movable and immovable property; the defendant entered into the receipt of the rents of the immovable property and got in the movable property; he has sold some part of the immovable property.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims—

(1) to have the movable and immovable property of *A.B.* administered in this Court, and for that purpose to have all proper directions given and accounts taken;

(2) such further or other relief as the nature of the case may require.

No. 44.

EXECUTION OF TRUSTS.

(Title.)

A.B., the above-named plaintiff, states as follows:

1. He is one of the trustees under an instrument of settlement bearing date on or about the day of made upon the marriage of *E.F.* and *G.H.* the father and mother of the defendant, [or an instrument of transfer of the estate and effects of *E.F.* for the benefit of *C.D.*, the defendant, and the other creditors of *E.F.*]

2. *A.B.* has taken upon himself the burden of the said trust, and is in possession of [or of the proceeds of] the movable and immovable property transferred by the said instrument.

3. *C.D.* claims to be entitled to a beneficial interest under the instrument.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff is desirous to account for all the rents and profits of the said immovable property [and the proceeds of the sale of the said, or of part of the said, immovable property, or movable, or the proceeds of the sale of, or of part of, the said movable property, or the profits accruing to the plaintiff as such trustee in the execution of the said trust]; and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust estate may be administered in the Court for the benefit of *C.D.*, the defendant, and all other persons who may be interested in such administration in the presence of *C.D.*, and such other persons so interested as the Court may direct, or that *C.D.*, may show good cause to the contrary.

[N.B.—Where the suit is by a beneficiary, the plaint may be modelled mutatis mutandis, on the plaint by a legatee.]

No. 45.

FORECLOSURE OR SALE.

(Title.)

A.B., the above named plaintiff, states as follows:—

1. The plaintiff is mortgagee of lands belonging to the defendant.

2. The following are the particulars of the mortgage:—

(a) (date);

(b) (names of mortgagor and mortgagee);

(c) (sum secured);

(d) (rate of interest);

(e) (property subject to mortgage);

(f) (amount now due);

(g) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).

(If the plaintiff is mortgagee in possession, add.)

3. The plaintiff took possession of the mortgaged property on the _____ day of _____ and is ready to account as mortgagee in possession from that time.
[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims—

(1) payment, or in default [sale or] foreclosure [and possession];
[Where Order 34, Rule 6 applies.]

(2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance.

No. 46.

REDEMPTION.

(Title)

A.B., the above-named plaintiff, states as follows:—

1. The plaintiff is mortgagor of lands of which the defendant is mortgagee.

2. The following are the particulars of the mortgage:—

(a) (date);

(b) (names of mortgagor and mortgagee);

(c) (sum secured);

(d) (rate of interest);

(e) (property subject to mortgage);

(f) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).

(If the defendant is mortgagee in possession, add.)

3. The defendant has taken possession [or has received the rents] of the mortgaged property.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims to redeem the said property and to have the same reconveyed to him [and to have possession thereof].

LOC. AM.—[RANGOON] Appendix A, Forms Nos. 45 and 46.

In Forms Nos. 45 and 46 of Appendix A, renumber clause 6 as clause 7 and insert the following as clause 6:—

"6. The persons, who, to the knowledge of the plaintiff, are interested in the mortgage security or in the right of redemption are as follows, namely:—"

No. 47.

SPECIFIC PERFORMANCE (No. 1).

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. By an agreement dated the _____ day of _____ and signed by the defendant, he contracted to buy of [or sell to] the plaintiff certain immovable property therein described and referred to, for the sum of _____ rupees.

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [or to accept a transfer and possession of the said property] and to pay the costs of the suit.

No. 48.

SPECIFIC PERFORMANCE (No. 2).

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19____, the plaintiff and defendant entered into an agreement, in writing, and the original document is hereto annexed.

The defendant was absolutely entitled to the immovable property described in the agreement.

2. On the _____ day of _____ 19____, the plaintiff tendered _____ rupees to the defendant, and demanded a transfer of the said property by a sufficient instrument.

3. On the _____ day of _____ 19____, the plaintiff again demanded such transfer. [Or the defendant refused to transfer the same to the plaintiff.]

4. The defendant has not executed any instrument of transfer.

5. The plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

[As in paras. 4 and 5 of Form No. 1.]

8. The plaintiff claims—

- (1) that the defendant transfers the said property to the plaintiff by a sufficient instrument [following the terms of the agreement];
- (2) rupees compensation for withholding the same.

No. 49.

PARTNERSHIP.

(Title)

A.B., the above-named plaintiff, states as follows:—

1. He and C.D., the defendant, have been for _____ years [or months] past carrying on business together under articles of partnership in writing [or under a deed, or under a verbal agreement].

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners. [Or the defendant has committed the following breaches of the partnership articles:—

- (1)
- (2)
- (3)

[As in paras. 4 and 5 of Form No. 1.]

5. The plaintiff claims—

- (1) dissolution of the partnership;
- (2) that accounts be taken;
- (3) that a receiver be appointed.

[N.B.—In suits for the winding up of any partnership, omit the claim for dissolution; and instead insert a paragraph stating the facts of the partnership having been dissolved.]

(4) Written Statements.

General Defences.

Denial	.. The defendant denies that (set out facts). The defendant does not admit that (set out facts). The defendant admits that _____ but says that _____
Protest	.. The defendant denies that he is a partner in the defendant firm of _____ The defendant denies that he made the contract alleged or any contract with the plaintiff. The defendant denies that he contracted with the plaintiff as alleged or at all. The defendant admits assets but not the plaintiff's claim. The defendant denies that the plaintiff sold to him the goods mentioned in the plaint or any of them.
Limitation	.. The suit is barred by article _____ or article _____ of the second schedule to the 'Indian Limitation Act, 1877.
Jurisdiction	.. The Court has no jurisdiction to hear the suit on the ground that (set forth the grounds). On the _____ day of _____ a diamond ring was delivered by the defendant to and accepted by the plaintiff in discharge of the alleged cause of action.
Insolvency	.. The defendant has been adjudged an insolvent. The plaintiff before the institution of the suit was adjudged an insolvent and the right to sue vested in the receiver.
Minority	.. The defendant was a minor at the time of making the alleged contract.
Payment into Court	.. The defendant as to the whole claim (or as to Rs. _____, part of the money claimed, or as the case may be) has paid into Court Rs. _____ and says that this sum is enough to satisfy the plaintiff's claim (or the part aforesaid).
Performance remitted	.. The performance of the promise alleged was remitted on the (date).
Rescission	.. The contract was rescinded by agreement between the plaintiff and defendant.
Res judicata	.. The plaintiff's claim is barred by the decree in suit (give the reference).
Estoppel	.. The plaintiff is estopped from denying the truth of (insert statements as to which estoppel is claimed) because (here state the facts relied on as creating the estoppel).
Ground of defence subsequent to institution of suit.	Since the institution of the suit, that is to say, on the _____ day of _____ (set out facts).

LEG. REF.

¹ See now the Indian Limitation Act, 1908 (IX of 1908).

No. 1.

DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED.

1. The defendant did not order the goods.
2. The goods were not delivered to the defendant.
3. The price was not Rs.

[or]

4. }
5. }
6. }

Except as to Rs. , same as

- 1.
- 2.
- 3.

7. The defendant [or A.B., the defendant's agent] satisfied the claim by payment before suit to the plaintiff [or to C.D., the plaintiff's agent] on the day of 19 .

8. The defendant satisfied the claim by payment after suit to the plaintiff on the day of 19 .

No. 2.

DEFENCE IN SUITS ON BONDS.

1. The bond is not the defendant's bond.
2. The defendant made payment to the plaintiff on the day according to the condition of the bond.
3. The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond.

No. 3.

DEFENCE IN SUITS ON GUARANTEES.

1. The principal satisfied the claim by payment before suit.
2. The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement.

No. 4.

DEFENCE IN ANY SUIT FOR DEBT.

1. As to Rs. 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff.

Particulars are as follows:—

1907, January 25th	..	..	..	Rs.
„ February 1st	..	..	..	150
				50
			Total ..	200

2. As to the whole [or as to Rs. , part of the money claimed] the defendant made tender before suit of Rs. and has paid the same into Court.

No. 5.

DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING.

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control of the defendant's servants. The carriage belonged to of Street, Calcutta, livery stable-keepers employed by the defendant to supply him with carriages and horses; and the person under whose charge and control the said carriage was, was the servant of the said
2. The defendant does not admit that the said carriage was turned out of Middleton Street either negligently, suddenly or without warning, or at a rapid or dangerous pace.
3. The defendant says the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.
4. The defendant does not admit the statements contained in the third paragraph of the plaint.

No. 6.

DEFENCE IN ALL SUITS FOR WRONGS.

1. Denial of the several acts [or matters] complained of.

No. 7.

DEFENCE IN SUITS FOR DETENTION OF GOODS.

1. The goods were not the property of the plaintiff.
2. The goods were detained for a lien to which the defendant was entitled.

Particulars are as follows:—

1907, May 3rd. To carriage of the goods claimed from Delhi to Calcutta:—
45 maunds at Rs. 2 per maund Rs. 90

No. 8.

DEFENCE IN SUITS FOR INFRINGEMENT OF COPYRIGHT.

1. The plaintiff is not the author [*assignee, etc.*].
2. The book was not registered.
3. The defendant did not infringe.

No. 9.

DEFENCE IN SUITS FOR INFRINGEMENT OF TRADE MARK.

1. The trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

No. 10.

DEFENCES IN SUITS RELATING TO NUISANCES.

1. The plaintiff's lights are not ancient [*or deny his other alleged prescriptive rights*].
2. The plaintiff's lights will not be materially interfered with by the defendant's buildings.
3. The defendant denies that he or his servants pollute the water [*or do what is complained of*].

[*If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of the claim, i.e., whether by prescription, grant or what.*]

4. The plaintiff has been guilty of laches of which the following are particulars:—

1870. Plaintiff's mill began to work.

1871. Plaintiff came into possession.

1883. First complaint.

5. As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff. [*If other grounds are relied on, they must be stated, e.g., limitation as of past damage.*]

No. 11.

DEFENCE TO SUIT FOR FORECLOSURE.

1. The defendant did not execute the mortgage.
2. The mortgage was not transferred to the plaintiff (*if more than one transfer is alleged, say which is denied*).
3. The suit is barred by article _____ of the second schedule to the ¹ Indian Limitation Act, 1877.
4. The following payments have been made, viz.:—

(Insert date) _____	Rs.
(Insert date) _____	1,000
(Insert date) _____	500

5. The plaintiff took possession on the _____ of _____, and has received the rents ever since.

6. That plaintiff released the debt on the _____ of _____

7. The defendant transferred all his interest to A.B. by a document, dated _____

No. 12.

DEFENCE TO SUIT FOR REDEMPTION.

1. The plaintiff's right to redeem is barred by article _____ of the second schedule to the ¹ Indian Limitation Act, 1877.

2. The plaintiff transferred all interest in the property to A.B.

3. The defendant, by a document dated the _____ day of _____ transferred all his interest in the mortgage-debt and property comprised in the mortgage to A.B.

4. The defendant never took possession of the mortgaged property, or received the rents thereof.

[*If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits.*]

No. 13.

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE.

1. The defendant did not enter into the agreement.
2. A.B. was not the agent of the defendant (*if alleged by plaintiff*).
3. The plaintiff has not performed the following conditions—(*Conditions*).
4. The defendant did not—(*alleged acts of part performance*).

LEG. REF.

(IX of 1908).

¹ See now the Indian Limitation Act, 1908

5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following matter—(*State why*).
6. The agreement is uncertain in the following respects—(*State them*).
7. (*or*) The plaintiff has been guilty of delay.
8. (*or*) The plaintiff has been guilty of fraud (*or* misrepresentation).
9. (*or*) The agreement is unfair.
10. (*or*) The agreement was entered into by mistake.
11. The following are particulars of (7), (8), (9), (10) (*or as the case may be*).
12. The agreement was rescinded under Conditions of Sale, No. 11 (*or by mutual agreement*).

(*In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on, e.g., the Indian Limitation Act, accord and satisfaction, release, fraud, etc.*)

No. 14.

DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATEE.

1. A. B.'s will contained a charge of debts; he died insolvent; he was entitled at his death to some immovable property which the defendant sold and which produced the net sum of Rs. , and the testator had some movable property which the defendant got in, and which produced the net sum of Rs. .
2. The defendant applied the whole of the said sums and the sum of Rs. which the defendant received from rents of the immovable property in the payment of the funeral and testamentary expenses and some of the debts of the testator.
3. The defendant made up his accounts and sent a copy thereof to the plaintiff on the day of 19 , and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer.
4. The defendant submits that the plaintiff ought to pay the costs of this suit.

No. 15.

PROBATE OF WILL IN SOLEMN FORM.

1. The said will and codicil of the deceased were not duly executed according to the provisions of the ¹Indian Succession Act, 1865 [*or the Hindu Wills Act, 1870*].
 2. The deceased at the time of the said will and codicil respectively purport to have been executed, was not of sound mind, memory and understanding.
 3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him whose names are at present unknown to the defendant].
 4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud so far as is within the defendant's present knowledge, being [*state the nature of the fraud*].
 5. The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof [*or of the contents of the residuary clause in the said will, as the case may be*].
 6. The deceased made his true last will, dated the 1st January, 1873, and thereby appointed the defendant sole executor thereof.
- The defendant claims—
- (1) that the Court will pronounce against the said will and codicil propounded by the plaintiff;
 - (2) that the Court will decree probate of the will of the deceased dated the 1st January, 1873, in solemn form of law.

No. 16.

PARTICULARS. (O. 6, R. 5.)

(Title of suit.)

The following are the particulars of (*here state the matters in respect of which particulars have been ordered*) delivered pursuant to the order of the of . (*Here set out the particulars ordered in paragraphs if necessary.*)

Particulars.

APPENDIX B.

PROCESS.

No. 1.

SUMMONS FOR DISPOSAL OF SUIT. (O. 5, Rr. 1, 5.)

(Title.)

[Name, description and place of residence.]

To

WHEREAS

for

has instituted a suit against you
you are hereby summoned to appear in this Court in

LEG. REF.

¹ See now Act XXXIX of 1925.

person or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions on the day of 19 , at o'clock in the noon, to answer the claim; and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce on that day all the witnesses upon whose evidence and all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before-mentioned, the suit will be heard and determined in your absence.

Given under my hand and the Seal of the Court, this
day of 19 .

Judge.

Seal.

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both.

LOC. AMS.—[BOMBAY.] The following note shall be inserted in red ink in Form Nos. 1, 2, 3, 5 and 6:—

"NOTE.—Also take notice that in default of your filing an address for service on or before the date mentioned you are liable to have your defence struck out".

[CALCUTTA.] Form No. 1-A. Insert the following Form:—

¹ Nos. 1, 1-A, 2=Revised H. C. Form No. (P.) 5.

SUMMONS TO DEFENDANT FOR ASCERTAINMENT WHETHER THE SUIT
WILL BE CONTESTED.

(O. 5, Rr. 1, 5.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS has instituted a suit against you
for you are hereby summoned to appear in this Court in
person or by a pleader duly instructed, and able to answer all material questions relating to
the suit [or who shall be accompanied by some person able to answer all such questions]
on the day of 19 , at o'clock in the fore-
noon.

²1. To answer the claim and as the day fixed for your appearance is appointed for the final disposal of the suit you must be prepared to produce on that day all the witnesses upon whose evidence and all the documents upon which you intend to rely in support of your defence.

2. To state whether you contest or do not contest the claim either in whole or in part and if you contest to receive directions of the Court as to the date on which your written statement is to be filed, the witness or witnesses upon whose evidence you intend to rely in support of your defence are to be produced the document(s) upon which you intend to rely are to be filed, also the date of trial and other matters.

Take notice that, in the event of your admitting the claim, either in whole or in part the Court will forthwith pass judgment in accordance with such admissions, or in the event of the claim not being contested the suit shall be decided at once.

3. To answer the claim and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

Seal.

NOTICE 1.—Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness and the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses.

2.—If you admit the claim, you should pay the money into Court together with the costs of this suit, to avoid execution of the decree which may be against your person or property, or both.

[MADRAS] Insert the following "Note" in Form No. 1:—

"NOTE.—Also take notice that in default of your filing an address for service before the day before-mentioned you are liable to have your defence struck out."

¹ Form Nos. 1, 1-A and 2 combined into one in H. C. Form No. (P.) 5.

² Strike out 1, 2 or 3 as the summons

may be for final disposal or ascertaining whether the suit will be contested for the settlement of issues.

In Appendix B after Form No. 1 insert the following as Form No. 1-A:—

¹No. 1-A.

SUMMONS FOR ASCERTAINING WHETHER A SUIT IS CONTESTED OR NOT, AND
IF NOT CONTESTED FOR ITS IMMEDIATE DISPOSAL. (O. 5, Rr. 1, 5.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS

for _____ has instituted a suit against you
you are hereby summoned to appear in this Court
in person or by a pleader duly instructed, and able to answer all material questions relating
to the suit (or who shall be accompanied by some person able to answer all such questions)
on the _____ day of _____ 19____, at _____ o'clock in the _____ noon and to state
whether you contest or do not contest the claim and, if you contest, to receive directions of
Court as to the date on which you have to file the written statement, the date of trial and
other matters.

Take notice that in the event of the claim not being contested the suit shall be
decided at once.

Take further notice that in default of your appearance on the day and hour before-
mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this _____ day of _____

19 ____

Seal.

Judge.

NOTICE.—If you admit the claim, you should pay the money into Court together with
the costs of the suit, to avoid execution of the decree, which may be against your person or
property, or both.

[CALCUTTA.] Insert the following form and number it as 1-A:—

“No. 1-A.

SUMMONS TO DEFENDANT FOR ASCERTAINMENT WHETHER THE SUIT
WILL BE CONTESTED. (Order 5, Rr. 1 and 5.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS

_____ has instituted a suit against you for
you are hereby summoned to appear in this Court in person
or by a pleader duly instructed, and able to answer all material questions relating to the
suit on the _____ day of _____ 19____, at _____ o'clock in the _____
noon in order that on that day you may inform the Court whether you will or will not con-
test the claim either in whole or in part and in order that in the event of your deciding
to contest the claim either in whole or in part directions may be given you as to the date
upon which your written statement is to be filed and the witness or witnesses upon whose
evidence you intend to rely in support of your defence are to be produced and also the
document or documents upon which you intend to rely.

Take notice that, in default of your appearance on the day before-mentioned, the suit
will be heard and determined in your absence and take further notice that in the event of
your admitting the claim either in whole or in part the Court will forthwith pass judg-
ment in accordance with such admissions.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 ____

Seal.

Judge.

NOTICE.—If you admit the claim either in whole or in part you should come pre-
pared to pay into Court the money due by virtue of such admission together with the costs
of the suit, to avoid execution of any decree which may be passed against your person or
property, or both.”

[SIND.] Insert the following in red ink in Forms 1, 2, 3, 5 and 6:—

Note.—Also take notice that in default of your filing an address for service on or
before the date mentioned you are liable to have your defence struck out.

No. 2.

SUMMONS FOR SETTLEMENT OF ISSUES. (O. 5, Rr. 1 and 5.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS

for

_____ has instituted a suit against you
you are hereby summoned to appear in this Court in

LEG. REF.

by P. Dis. No. 7 of 1927.

¹ This Form was newly inserted in Madras

person, or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions on the day of 19, at o'clock in the noon, to answer the claim; and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before-mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19, Judge.

NOTICE—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both.

LOC. AMS.—[BOMBAY.] See note under Form 1, Bombay, page 1444.

[SIND.] See the Local Amendment of Sind for Form No. 1, Appendix B.

No. 3.

SUMMONS TO APPEAR IN PERSON. (O. 5, R. 3.) (Title.)

To

[Name, description and place of residence.]

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person on the day of 19, at o'clock in the noon, to answer the claim; and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before-mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19, Judge.

LOC. AMS.—[BOMBAY.] See note under Form 1, Bombay, page 1444.

[SIND.] See the Local Amendment of Sind for Form No. 1, Appendix B.

No. 4.

SUMMONS IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT. (O. 37, R. 2.) (Title.)

To

[Name, description and place of residence.]

WHEREAS has instituted a suit against you under O. XXXVII of the Code of Civil Procedure, 1908, for Rs. balance of the principal and interest due to him as the of a

of which a copy is hereto annexed, you are hereby summoned to obtain leave from the Court within ten days from the service hereof to appear and defend the suit, and within such time to cause an appearance to be entered for you. In default whereof, the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs. and the sum of Rs. for costs¹ [together with such interest, if any, from the date of the institution of the suit as the Court may order].

Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits, or that it is reasonable that you should be allowed to appear in the suit.

GIVEN under my hand and the seal of the Court, this day of 19, Judge.

LOC. AM.—[BOMBAY]. Substitute the following as Form No. 4:—

"No. 4.

SUMMONS IN SUMMARY SUIT. (O. 37, R. 2.) (Title.)

To

[Name, description and place of residence.]

WHEREAS has instituted a suit against you under O. XXXVII of the Code of Civil Procedure, 1908, for (possession of and for Rs.

LEG. REF.

¹ Inserted by Act XXX of 1926.

for rent and/or mesne profits, or for Rs. for and interest or as the case may be) you are hereby summoned within ten days from the service hereof to cause an appearance to be entered for you, in default whereof the plaintiff will be entitled after the expiration of such ten days to obtain a decree for possession and/or as the case may be for any sum not exceeding the sum of Rs. and the sum of Rs. for costs together with such interest, if any, as the Court may order.

If you cause an appearance to be entered for you, the plaintiff will thereafter serve upon you a summons for judgment at the hearing of which you will be entitled to ask the Court for leave to defend the suit.

Leave to defend may be obtained if you satisfy the Court by affidavit or otherwise that there is a defence to the suit on the merits or that it is reasonable that you should be allowed to defend.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge."

No. 4-A.

SUMMONS FOR JUDGMENT IN SUMMARY SUIT.
[O. 37, R. 3 (1).]

In the

Suit No.

of 19 Court.

Plaintiff

v.

Defendant.

Upon reading the affidavit of (the plaintiff or as may be).

Let all parties concerned attend the (Judge or Subordinate Judge, as may be) on day of 19 , at o'clock

in the noon on the hearing of an application on the part of the plaintiff that he be at liberty to sign judgment in this suit against the defendant (or if against one or some of several insert names) for (possession and/or for Rs. for and interest, or as the case may be) and costs.

Dated the day of 19 .

This summons was taken out by

of

Pleader for
To

."

No. 5.

NOTICE TO PERSON WHO, THE COURT CONSIDERS, SHOULD BE ADDED AS
CO-PLAINTIFF. (O. 1, R. 10.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS for has instituted the above suit against and whereas it appears necessary that you should be added as a plaintiff in the said suit in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved.

Take notice that you should on or before the day of 19 , signify to this Court whether you consent to be so added.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

LOC. AMS.—[BOMBAY.] See note under Form 1, Bombay, page 1444.
[SIND] See the Local Amendment of Sind for Form No. 1, Appendix B.

No. 6.

SUMMONS TO LEGAL REPRESENTATIVE OF A DECEASED DEFENDANT.
(O. 22, R. 4.)

(Title.)

To

WHEREAS the plaintiff instituted a suit in this Court on the day of 19 , against the defendant who has since deceased, and whereas the said plaintiff has made an application to this Court alleging that you are the legal representative of the said , deceased and desiring that you be made the defendant in his stead:

You are hereby summoned to attend in this Court on the day of 19 , at A.M. to defend the said suit and, in default of your appearance on the day specified, the said suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

LOC. AMS.—[BOMBAY.] See note under Form 1, Bombay, page 1444.
[SIND.] See the Local Amendment of Sind for Form No. 1, Appendix B.

No. 7.

ORDER FOR TRANSMISSION OF SUMMONS FOR SERVICE IN THE
JURISDICTION OF ANOTHER COURT. (O. 5, R. 21.)¹

(Title.)

WHEREAS it is stated that
defendant

with ess in the above suit is at present residing in

: It is ordered that a summons returnable on the 19 day of

Court of

for service on the said defendant with a
witness

duplicate of this proceeding.

The court-fee of
in this Court in stamps.

chargeable in respect to the summons has been realized

Dated 19 .

Judge.

No. 8.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PRISONER.
(O. 5, R. 24.)

(Title.)

To

The Superintendent of the Jail at

UNDER the provisions of Order 5, Rule 24 of the Code of Civil Procedure, 1908, a
summons in duplicate is herewith forwarded for service on the defendant
who is a prisoner in Jail. You are requested to cause a copy of
the said summons to be served upon the said defendant and to return the original to this
Court signed by the said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 9.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PUBLIC SERVANT
OR SOLDIER. (O. 5, R. 27, 28.)

(Title.)

To

UNDER the provisions of Order 5, Rule 27 (or 28, as the case may be) of the Code of
Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the
defendant who is stated to be serving under you. You are requested to
cause a copy of the said summons to be served upon the said defendant and to return the
original to this Court signed by the said defendant, with a statement of service endorsed
thereon by you.

Judge.

No. 10.

TO ACCOMPANY RETURN OF SUMMONS OF ANOTHER COURT.
(O. 5, R. 23.)¹

(Title.)

Read proceeding from the
for service on

forwarding in

Suit No. of 19 of that Court.

Read Serving Officer's endorsement stating that the
above having been duly taken by me on the oath of
it is ordered that the
with a copy of this proceeding.

and proof of the
and
be returned to the

Judge.

NOTE.—This form will be applicable to process other than summons, the service of
which may have to be effected in the same manner.

LEG. REF.

¹ Allahabad:—This form has been cancel-

led by the Rules of the Allahabad High Court.

LOC. AM.—[BOMBAY.] Form No. 10. Amend the Form as follows:—
No. 10

TO ACCOMPANY RETURN OF SUMMONS OF ANOTHER COURT.
(O. 5, R. 23.)

(Title.)

Read proceeding from the _____ forwarding for service on
in Suit No. _____ of 19 _____ of that Court.
Read Serving Officer's endorsement stating that the _____ and proof of the
above having been duly taken by me on the oath of _____ and it is ordered
that the _____ be returned to the _____ with this proceeding.
I hereby declare that the said summons on
has been duly served.

NOTE.—This form will be applicable to process other than summons the service of
which may have to be effected in the same manner. Judge.

[CALCUTTA.] Form No 10. Insert the words "(or proof of the above having been
duly made by the declaration of _____)" after the words "proof of the above having been
duly taken by me on the oath of _____".

No. 11.

AFFIDAVIT OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS OR
NOTICE. (O. 5, R. 18.)

(Title.)

The affidavit of _____ son of _____
I _____ make oath and say, as fol-
lows:—
(1) I am a process-server of this Court.
(2) On the _____ day of _____ 19 _____ I received a summons issued
by the Court of _____ notice
the said Court, dated the _____ in Suit No. _____ of 19 _____, in
(3) The said _____ day of _____ 19 _____, for service on
to me, and I served the said summons on him on the _____ day of
notice her _____
19 _____, at about _____
o'clock in the _____ noon at _____ by tendering a copy thereof to him and re-
quiring his signature to the original summons.
her notice.

(a)
(b)
(a) Here state whether the person served, signed or refused to sign the process and
in whose presence.
(b) Signature of process-server,

(3) The said _____ or,
accompanied me to _____ not being personally known to me
the said _____, and I served the said summons on him on the _____
notice her _____
day of _____ 19 _____, at about _____ o'clock in the
noon at _____ by tendering a copy _____ thereof to
him and requiring his signature to the original summons.
her notice.

(a)
(b)
(a) Here state whether the person served, signed or refused to sign the process and in
whose presence.
(b) Signature of process-server,

(3) The said _____ or,
sonally known to me, I went to the said house, in _____ and there on the

day of 19 , at about o'clock in the
noon, I did not find the said

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to Order 5, Rules 15 and 17.

(b) Signature of process-server,

or,

(3) One accompanied me to and there pointed out to me
which he said was the house in which ordinarily resides. I did not find
the said there.

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to Order 5, Rules 15 and 17.

(b) Signature of process-server,

or,

If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service.

Sworn by the said

before me this day of

Affirmed

19 .

Empowered under section 139 of the Code of Civil Procedure,
1908, to administer the oath to deponents.

LOC. AMS.—[CALCUTTA.] Form No. 11.—Substitute the following for the existing Form:—

No. 11.

DECLARATION OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS OR
NOTICE. (O. 5, R. 18.)

(Title.)

I a process-server, of this Court declare:—

(1) On the day of 19 I received a summons issued by
the Court of in Suit No. of 19 in the said Court, dated day of
19 for service on

(2) The said was at the time personally known to me, and I served the said
summons on him
notice on her on the day of 19 , at about o'clock
in the noon at by tendering a copy thereof to him and requiring his
signature to the original summons
notice .

(a)

(b)

(a) Here state whether the person served, signed or refused to sign the process and in whose presence.

(b) Signature of process-server,

or,

(2) The said not being personally known to me pointed
out to me a person whom he stated to be the said
and I served the said summons on him on the
day of 19 at about o'clock in the noon at
by tendering a copy thereof to him and requiring his
signature to the original
summons

notice .

(a)

(b)

(a) Here state whether the persons served, signed or refused to sign the process and in whose presence.

(b) Signature of process-server,

or,

(2) The said _____ and the house in which he ordinarily resides being personally known to me, I went to the said house, in _____ and there on the _____ day of _____ 19____, at about _____ o'clock in the _____ noon, I did not find the said _____

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to O. 5, Rr. 15 and 17.

(b) Signature of process-server,

(2) One _____ at _____ or, _____ pointed out to me _____ which he said was the house in which _____ ordinarily resides. I did not find the said _____ there.

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to O. 5, Rr. 15 and 17.

(b) Signature of process-server,

(3) If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service.

[LAHORE.] Substitute the following Form for existing Form No. 11:—

No. 11.

AFFIDAVIT OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS
OR NOTICE. (O. 5, R. 18.)
(Title.)

The affidavit of _____, son of _____, I

make oath

and say as follows:—

affirm

(1) I am a Process-server of this Court.

(2) On the _____ day of _____ 19____, I received a summons _____ issued by the Court of _____ in Suit No. _____ of _____ 19____, notice _____ in the said Court, dated the _____ day of _____ 19____, for service on

(3) The said _____ was at the time personally known to me, and I served the said _____ summons on _____ him _____ on the _____ day of _____ 19____, at about _____ o'clock on the notice _____ her _____ noon at _____

by tendering a copy thereof to _____ him _____ and requiring _____ his _____ signature to the original _____ summons _____ notice _____

(a)

(b)

(a) Here state whether the person served, signed or refused to sign the process and in whose presence.

(b) Signature of process-server,

(3) The said _____ or, _____ not being personally known to me accompanied to _____ and pointed out to me a person whom he stated not to be the said _____, and I served the said _____ summons on _____ him _____ the _____ day of _____ 19____, at about _____ o'clock in the notice _____ her _____ noon at _____

by tendering a copy thereof to _____ him _____ and requiring _____ his _____ signature to the original _____ summons _____ notice _____

(a)

(b)

(a) Here state whether the person served, signed or refused to sign the process, and in whose presence.

(b) Signature of process-server,

(3) The said _____ or, _____ and his house in which he ordinarily resides being personally known to me _____ I went to the said house in _____ and there on the _____ pointed out to me by _____

day of said 19 , at o'clock in the ^{fore}noon I did not find the ^{after}

I enquired (a) neighbours.

I was told that (b) had gone to and would not be back till
Signature of process-server,

or,

(3) If substituted service has been ordered, state fully and exactly the manner in which the summons was served, with special reference to the terms of the order for substituted service.

Sworn by the said before me this day of 19 .
Affirmed

Empowered under section 139 of the Code of Civil Procedure to administer the oath to deponents.

[N.W.F.P.] Substitute the following for the third and fourth parts of (3) in Form No. 11:—

"(3) The said and his house in which he ordinarily resides being personally known to me went to the said house in and there on the pointed out to me

day of 19 , at o'clock in the ^{fore}noon, I did not find the said I ^{after}

enquired from neighbours.
I was told that had gone to and would not be back till.
Signature of process-server."

No. 12.

NOTICE TO DEFENDANT. (O. 9, R. 6.)

(Title.)

[Name, description and place of residence.]

To WHEREAS this day was fixed for the hearing of the above suit and a summons was issued to you and the plaintiff has appeared in this Court and you did not so appear, but from the return of the Nazir it has been proved to the satisfaction of the Court that the said summons was served on you but not in sufficient time to enable you to appear and answer on the day fixed in the said summons.

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the day of 19 is now fixed for the hearing of the same; in default of your appearance on the day last mentioned the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

LOC. AM.—[MADRAS.] After Form No. 12, insert the following as Form No. 12-A:—
No. 12-A.

NOTICE TO THE PROPOSED GUARDIAN OF MINOR ^{RESPONDENT}
DEFENDANT

(O. 32, Rr. 3 and 4.)

[Omitted by R. O. C. 2578 of 1922, dated 8—3—1923.]

No. 13.

SUMMONS TO WITNESS. (O. 16, Rr. 1, 5.)

(Title.)

To WHEREAS your attendance is required to on behalf of the in the above suit, you are hereby required [personally] to appear before this Court on the day of 19 , at o'clock in the forenoon, and to bring with you [or to send to this Court].

A sum of Rs. , being your travelling and other expenses and subsistence allowance for one day, is herewith sent. If you fail to comply with this order without lawful excuse, you will be subject to the consequences of non-attendance laid down in r. 12 of O. XVI of the Code of Civil Procedure, 1908.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

NOTICE.—(1) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid.

(2) If you are detained beyond the day aforesaid, a sum of Rs. will be tendered to you for each day's attendance beyond the day specified.

LOC. AM.—[MADRAS.] Add the following to note (1):—

"If the document you are summoned to produce is an entry in a letter-book, or a shop-book or other account in current use, and you are desirous of receiving back the document, you may furnish along with the document a copy of the entry."

Insert the following as Form No. 13-A after Form No. 13 in Appendix B of Schedule I:—

No. 13-A.

For Form No. 13-A in Appendix B to the First Schedule to the Code of Civil Procedure, 1908, the following form shall be substituted, namely:—

No. 13-A.

Certificate of Attendance to an officer of Government summoned as a witness in a suit to which the Crown is a Party.

(O. XVI, r. 4-A.)

(Cause Title).

This is to certify that

(name)

(designation)

Province of (name)

being a Government servant from the was summoned to give

evidence in his official capacity on behalf of the plaintiff in the above

defendant

and was in attendance in this Court from the

to the day of

day of

that a sum of Rupees

19

(inclusive) and

plaintiff

has been paid into Court by the

—towards his travelling and subsistence allowance for

days

defendant

according to the scale prescribed by the Government of the Province of (name)

has been

and that the said amount remitted to the Government Treasury

will be

at to be credited to Government under the head 'XXI-(d)

Miscellaneous—Fees and Fines.'

Dated day of

19

Presiding Judge or Chief Ministerial Officer.

(Fort St. George Gazette, Supplement to Part II, dated 10th March, 1942.)

at o'clock in the forenoon and from day to day until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

No. 15.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS. (O. 16, R. 10.)

(Title.)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons has been duly served upon the witness, and whereas it appears that the evidence of the witness is material and he has failed to attend in compliance with such summons: This proclamation is, therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued requiring the attendance of the witness in this Court on the day of 19 at o'clock in the forenoon, and from day to day until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

day of said 19, at o'clock in the forenoon I did not find the after

I enquired (a) neighbours.

I was told that (b) had gone to and would not be back till
Signature of process-server,

or,
(3) If substituted service has been ordered, state fully and exactly the manner in which the summons was served, with special reference to the terms of the order for substituted service.

Sworn by the said before me this day of 19 .
Affirmed

[N.W.F.P
No. 11:—
“(3) Th
being personally
pointed o
day of

enquired from
I was told

To
WHEREAS
issued to you a
from the retur
said summons
answer on the
Notice is
and that the
in default of
mined in your
GIVEN UP

LOC. AM.—[MADRAS.] After Form No. 12, insert the following as Form No. 12-A.

NOTICE TO THE PROPOSED GUARDIAN OF MINOR RESPONDENT
DEFENDANT

(O. 32, Rr. 3 and 4.)

[Omitted by R. O. C. 2578 of 1922, dated 8-3-1923.]

No. 13.

SUMMONS TO WITNESS. (O. 16, Rr. 1, 5.)

(Title.)

To
WHEREAS your attendance is required to on behalf of the
in the above suit, you are hereby required [personally] to appear before this Court on the
day of 19, at o'clock in the forenoon, and to bring with
you [or to send to this Court].
A sum of Rs. , being your travelling and other expenses and
subsistence allowance for one day, is herewith sent. If you fail to comply with this order
without lawful excuse, you will be subject to the consequences of non-attendance laid down
in r. 12 of O. XVI of the Code of Civil Procedure, 1908.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

NOTICE.—(1) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid.

(2) If you are detained beyond the day aforesaid, a sum of Rs. will be tendered to you for each day's attendance beyond the day specified.

LOC. AM.—[MADRAS.] Add the following to note (1):—

"If the document you are summoned to produce is an entry in a letter-book, or a shop-book or other account in current use, and you are desirous of receiving back the document, you may furnish along with the document a copy of the entry."

Insert the following as Form No. 13-A after Form No. 13 in Appendix B of Schedule I:—

No. 13-A.

CERTIFICATE OF ATTENDANCE TO AN OFFICER OF GOVERNMENT SUMMONED AS A WITNESS IN A SUIT TO WHICH THE GOVERNMENT IS A PARTY.

(O. 16, R. 4-A.)

(Cause title.)

This is to certify that (name) (designation) being a Govern-
ment servant from the province of (name) was summoned to give evidence in
his official capacity on behalf of the plaintiff in the above suit and was in attendance in
this Court from the day of to the day of 19 (inclusive) and that
a sum of Rupees has been paid into Court by the plaintiff towards his
travelling and subsistence for day according to the scale prescribed by the Govern-
ment of the province of (name) and that the said amount has been remitted to the
Government treasury at will be
to be credited to Government under the head, "XVI-A Miscellaneous Fees and Fines."

Dated

day of

19

Presiding Judge or
Chief Ministerial Officer.

No. 14.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS. (O. 16, R. 10.)

(Title.)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons could not be served upon the witness in the manner prescribed by law; and whereas it appears that the evidence of the witness is material, and he absconds and keeps out of the way for the purpose of evading the service of the summons: This proclamation is, therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued requiring the attendance of the witness in this Court on the day of 19
at o'clock in the forenoon and from day to day until he shall have
leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be
dealt with according to law.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

No. 15.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS. (O. 16, R. 10.)

(Title.)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons has been duly served upon the witness, and whereas it appears that the evidence of the witness is material and he has failed to attend in compliance with such summons: This proclamation is, therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued requiring the attendance of the witness in this Court on the day
of 19 at o'clock in the forenoon, and from day to day until
he shall have leave to depart; and if the witness fails to attend on the day and hour
aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

day of said 19 , at o'clock in the ^{fore}noon I did not find the ^{after}

I enquired (a) neighbours.

I was told that (b) had gone to and would not be back till
Signature of process-server,

or,
(3) If substituted service has been ordered, state fully and exactly the manner in which the summons was served, with special reference to the terms of the order for substituted service.

Sworn by the said before me this day of 19 .
Affirmed

Empowered under section 139 of the Code of Civil Procedure to administer the oath to deponents.

[N.W.F.P.] Substitute the following for the third and fourth parts of (3) in Form No. 11:—

"(3) The said and his house in which he ordinarily resides being personally known to me went to the said house in and there on the pointed out to me

day of 19 , at o'clock in the ^{fore}noon, I did not find the said I enquired from after neighbours.
I was told that had gone to and would not be back till.
Signature of process-server."

No. 12.

NOTICE TO DEFENDANT. (O. 9, R. 6.)

(Title.)

[Name, description and place of residence.]

To

WHEREAS this day was fixed for the hearing of the above suit and a summons was issued to you and the plaintiff has appeared in this Court and you did not so appear, but from the return of the Nazir it has been proved to the satisfaction of the Court that the said summons was served on you but not in sufficient time to enable you to appear and answer on the day fixed in the said summons.

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the day of 19 is now fixed for the hearing of the same; in default of your appearance on the day last mentioned the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 . Judge.

LOC. AM.—[MADRAS.] After Form No. 12, insert the following as Form No. 12-A:—
No. 12-A.

NOTICE TO THE PROPOSED GUARDIAN OF MINOR ^{RESPONDENT}
DEFENDANT

(O. 32, Rr. 3 and 4.)

[Omitted by R. O. C. 2578 of 1922, dated 8-3-1923.]

No. 13.

SUMMONS TO WITNESS. (O. 16, Rr. 1, 5.)

(Title.)

To

WHEREAS your attendance is required to on behalf of the in the above suit, you are hereby required [personally] to appear before this Court on the day of 19 , at o'clock in the forenoon, and to bring with you [or to send to this Court].

A sum of Rs. , being your travelling and other expenses and subsistence allowance for one day, is herewith sent. If you fail to comply with this order without lawful excuse, you will be subject to the consequences of non-attendance laid down in r. 12 of O. XVI of the Code of Civil Procedure, 1908.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

NOTICE.—(1) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid.

(2) If you are detained beyond the day aforesaid, a sum of Rs. will be tendered to you for each day's attendance beyond the day specified.

LOC. AM.—[MADRAS.] Add the following to note (1):—

"If the document you are summoned to produce is an entry in a letter-book, or a shop-book or other account in current use, and you are desirous of receiving back the document, you may furnish along with the document a copy of the entry."

Insert the following as Form No. 13-A after Form No. 13 in Appendix B of Schedule I:—

No. 13-A.

CERTIFICATE OF ATTENDANCE TO AN OFFICER OF GOVERNMENT SUMMONED AS A WITNESS IN A SUIT TO WHICH THE GOVERNMENT IS A PARTY.

(O. 16, R. 4-A.)

(Cause title.)

This is to certify that (name) (designation) being a Govern-
ment servant from the province of (name) was summoned to give evidence in
his official capacity on behalf of the plaintiff in the above suit and was in attendance in
this Court from the day of to the day of 19 (inclusive) and that
a sum of Rupees has been paid into Court by the plaintiff towards his
travelling and subsistence for day according to the scale prescribed by the Govern-
ment of the province of (name) and that the said amount has been remitted to the
Government treasury at will be
to be credited to Government under the head, "XVI-A Miscellaneous Fees and Fines."

Dated

day of

19

Presiding Judge or
Chief Ministerial Officer.

No. 14.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS. (O. 16, R. 10.)

(Title.)

To WHEREAS it appears from the examination on oath of the serving officer that the summons could not be served upon the witness in the manner prescribed by law; and whereas it appears that the evidence of the witness is material, and he absconds and keeps out of the way for the purpose of evading the service of the summons: This proclamation is, therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued requiring the attendance of the witness in this Court on the day of 19
at o'clock in the forenoon and from day to day until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

No. 15.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS. (O. 16, R. 10.)

(Title.)

To WHEREAS it appears from the examination on oath of the serving officer that the summons has been duly served upon the witness, and whereas it appears that the evidence of the witness is material and he has failed to attend in compliance with such summons: This proclamation is, therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued requiring the attendance of the witness in this Court on the day of 19 at o'clock in the forenoon, and from day to day until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

No. 16.

WARRANT OF ATTACHMENT OF PROPERTY OF WITNESS. (O. 16, R. 10.)
(Title.)

To

The Bailiff of the Court.

WHEREAS the witness cited
 by has not after the expiration of the period limited in the pro-
 clamations issued for his attendance, appeared in Court; you are hereby directed to hold
 under attachment property belonging to the said witness to the value
 of and to submit a return, accompanied with an inventory thereof, within
days.

GIVEN under my hand and the seal of the Court, this
 19 .

day of

Judge.

No. 17.

WARRANT OF ARREST OF WITNESS. (O. 16, R. 10.)
(Title.)

To

The Bailiff of the Court.

WHEREAS has been duly served with a summons but has failed to
 attend [absconds and keeps out of the way for the purpose of avoiding service of a
 summons]; you are hereby ordered to arrest and bring the said before the
 Court.

You are further ordered to return this warrant on or before the day
 of 19 with an endorsement certifying the day on and the manner
 in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day
 of 19

Judge.

No. 18.

WARRANT OF COMMITTAL. (O. 16, R. 16.)
(Title.)

To

The Officer-in-Charge of the Jail at

WHEREAS the plaintiff (or defendant in the above-named suit) has made application
 to this Court that security be taken for the appearance of to give
 evidence (or to produce a document) on the day of 19,
 and whereas the Court has called upon the said to furnish such security,
 which he has failed to do: This is to require you to receive the said into your
 custody in the civil prison and to produce him before this Court at on
 the said day and on such other day or days as may be hereafter ordered.

GIVEN under my hand and the seal of the Court, this day of 19.

Judge.

No. 19.

WARRANT OF COMMITTAL. (O. 16, R. 18.)
(Title.)

To

The Officer-in-Charge of the Jail at

WHEREAS whose attendance is required before
 this Court in the above-named case to give evidence (or to produce a document) has been
 arrested and brought before the Court in custody; and whereas owing to the absence of the
 plaintiff (or defendant) the said cannot give such evidence or pro-
 duce such document, and whereas the Court has called upon the said to give security for his appearance on the
 to give security for his appearance on the day of 19,
 at which he has failed to do. This is to require you to receive the said
 into your custody in the civil prison and to produce him before this Court at
 on the day of 19.

GIVEN under my hand and the seal of the Court, this day of 19.

Judge.

LOC. AM.—[ALLAHABAD.] Add the following Form:—

No. 20.

APPLICATION FOR ISSUE OF SUMMONS TO A PARTY OR WITNESSES.

No. of suit.

Name of parties.
 In the Court of the

Date fixed for hearing						
[Form No. 4.] 1	2	3	4	5	6	
Number of witnesses to be summoned.	Name and full address of each person to be summoned.	Rank or occupation.	Distance of residence from Court.		Cash paid for	
			Rail.	Road.	Travel- ling ex- penses.	Diet expen- ses.
					Name and address of person to whom unexpended travelling expenses and diet money should be re- turned.	

APPENDIX C.

DISCOVERY, INSPECTION AND ADMISSION.

No. 1.

ORDER FOR DELIVERY OF INTERROGATORIES. (O. 11, R. 1.)

In the Court of
Civil Suit No.

A.B.

of

19

.. against ..

.. Plaintiff

C.D., E.F. and G.H.

..

.. Defendants.

Upon hearing
filed the

and upon reading the affidavit of

19

the

be at liberty to deliver to the

interrogatories in writing, and that the said

do answer the interrogatories as prescribed by Order XI, r. 8, and that the costs of this application be

No. 2.

INTERROGATORIES. (O. 11, R. 4.)

(Title as in No. 1, supra.)

Interrogatories on behalf of the above-named [Plaintiff or defendant C.D.] for the examination of the above-named [defendants E.F. and G.H. or plaintiff].

1. Did not, etc.

2. Has not, etc.

etc.

etc.

etc.

[The defendant E.F. is required to answer the interrogatories numbered

[The defendant G.H. is required to answer the interrogatories numbered

]]

No. 3.

ANSWER TO INTERROGATORIES. (O. 11, R. 9.)

(Title as in No. 1, supra.)

The answer of the above-named defendant E. F. to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named E.F., make oath and say as follows:—

1. } Enter answers to interrogatories in paragraphs numbered consecuti-

2. } vely.

3. I object to answer the interrogatories numbered on the ground that [state grounds of objection].

No. 4.

ORDER FOR AFFIDAVIT AS TO DOCUMENTS. (O. 11, R. 12.)

(Title as in No. 1, supra.)

Upon hearing
It is ordered that the do within days from the date of this order, answer on affidavit stating which documents are, or have been in his possession or power relating to the matter in question in this suit, and that the costs of this application be

No. 5.

AFFIDAVIT AS TO DOCUMENTS. (O. 11, R. 13.)

(Title as in No. 1, supra.)

I, the above-named defendant C. D., make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the first schedule hereto [*state grounds of objection*].

3. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

4. The last-mentioned documents were last in my possession or power on [*state when and what has become of them, and in whose possession they now are*].

5. According to the best of my knowledge, information and belief I have not now, and never had, in my possession, custody or power; or in the possession, custody or power of my pleader or agent, or in the possession, custody or power of any other person on my behalf, any account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said first and second schedules hereto.

No. 6.

ORDER TO PRODUCE DOCUMENTS FOR INSPECTION. (O. 11, R. 14.)

(Titles as in No. 1, supra.)

Upon hearing _____ day of _____ 19____; and upon reading the affidavit of _____ filed the
do, at all reasonable times, on reasonable notice, produce at _____ situate at _____
the following documents, namely, _____, and that the _____ be at liberty
to inspect and peruse the documents so produced, and to make notes of their contents. In
the meantime it is ordered that all further proceedings be stayed and that the costs of this
application be.

No. 7.

NOTICE TO PRODUCE DOCUMENTS. (O. 11, R. 16.)

(Title as in No. 1, supra.)

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*plaint or written statement, or affidavit*] dated the _____ day of _____ 19____.[*Describe documents required.*]

X.Y., pleader for the

To Z., Pleader for the

No. 8.

NOTICE TO INSPECT DOCUMENTS. (O. 11, R. 17.)

(Title as in No. 1, supra.)

Take notice that you can inspect the documents mentioned in your notice of the _____ day of _____ 19____ [*except the documents numbered _____ in that notice*] at [*insert place of inspection*] on Thursday, next, the _____ instant between the hours of 12 and 4 o'clock.Or, that the [*plaintiff or defendant*] objects to giving you inspection of documents mentioned in your notice of the _____ day _____ 19____ on the ground that [*state the ground*]:—

No. 9.

NOTICE TO ADMIT DOCUMENTS. (O. 12, R. 3.)

(Title as in No. 1, supra.)

Take notice that the plaintiff [*or defendant*] in this suit proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or plaintiff*], his pleader or agent, at _____ on _____ between the hours of _____ and the defendant [*or plaintiff*] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent or delivered were so served, sent or delivered, respectively; saving all just exceptions to the admissibility of all such documents as evidence in this suit.G. H., pleader [*or agent*] for plaintiff [*or defendant*],To E.F., pleader [*or agent*] for defendant [*or plaintiff*].[*Here describe the documents and specially as to each document whether it is original or a copy.*]

No. 10.

NOTICE TO ADMIT FACTS. (O. 12, R. 5.)

(Title as in No. 1, supra.)

Take notice that the plaintiff [or defendant] in this suit requires the defendant [or plaintiff] to admit, for the purposes of this suit only, the several facts respectively hereunder specified; and the defendant [or plaintiff] is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this suit.

G. H., pleader [or agent] for plaintiff [or defendant].

To E. F., pleader [or agent] for defendant [or plaintiff].

The facts, the admission of which is required, are—

1. That M. died on the 1st January, 1890.
2. That he died intestate.
3. That N. was his only lawful son.
4. That O. died on the 1st April, 1896.
5. That O. was never married.

No. 11.

ADMISSION OF FACTS PURSUANT TO NOTICE. (O. 12, R. 5.)

(Title as in No. 1, supra.)

The defendant [or plaintiff] in this suit, for the purposes of this suit only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified; saving all just exception to the admissibility of any such facts or any of them, as evidence in the suit:

Provided that this admission is made for the purposes of this suit only, and is not an admission to be used against the defendant [or plaintiff] on any other occasion or by any one other than the plaintiff [or defendant, or party requiring the admission].

E. F., pleader [or agent] for defendant [or plaintiff].

To G. H., pleader [or agent] for plaintiff [or defendant].

Facts admitted.	Qualifications or limitations, if any, subject to which they are admitted.
1. That M died on the 1st January, 1890.	1.
2. That he died intestate	2.
3. That N. was his lawful son	3. But not that he was his only lawful son.
4. That O. died	4. But not that he died on the 1st April, 1896.
5. That O. was never married	5.

No. 12.

NOTICE TO PRODUCE (GENERAL FORM). (O. 12, R. 8.)

(Title as in No. 1, supra.)

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books, papers, letters, copies of letters and other writings and documents in your custody, possession or power, containing any entry, memorandum or minute relating to the matters in question in this suit, and particularly.

G. H., pleader [or agent] for plaintiff [or defendant].

To E. F., pleader [or agent] for defendant [or plaintiff].

APPENDIX D.

DECREES.

No. 1.

DECREE IN ORIGINAL SUIT. (O. 20, Rr. 6, 7.)

(Title.)

Claim for

THIS suit coming on this day for final disposal before in the presence of
 ordered and decreed that for the plaintiff and of for the defendant, it is
 by the to the and that the sum of Rs. be paid
 with interest thereon at the rate of on account of the costs of this suit,
 of realization, per cent. per annum from that date to date

GIVEN under my hand and the seal of the Court, this

19 .

day of

Costs of Suit.

Plaintiff.		Defendant.	
	Rs. A. P.		Rs. A. P.
1. Stamp for plaint ..		Stamp for power ..	
2. Do. for power ..		Do. for petition ..	
3. Do. for exhibits ..		Pleader's fee. ..	
4. Pleader's fee on Rs. ..		Subsistence for witnesses ..	
5. Subsistence for witnesses.		Service of process ..	
6. Commissioner's fee ..		Commissioner's fee ..	
7. Service of process. ..			
Total ..		Total ..	

LOC. AMS.—[CALCUTTA] Form No. 1. *Cancel* the table under the head "costs of suit" in the Form and *substitute* therefor the following:—

Plaintiff.		Defendant.	
	Rs A. P.		Rs A. P.
1. Stamp for plaint ..		1. Stamp for power ..	
2. Do. for power ..		2. Do. for petitions and affidavits ..	
3. Stamp for petitions and affidavits ..		3. Costs of exhibits including copies made under the Bankers' Books Evidence Act, 1891. ..	
4. Cost of exhibits including copies made under the Bankers' Books Evidence Act 1891. ..		4. Pleadings' fees ..	
5. Pleadings' fee on Rs. ..		5. Subsistence and travelling allowances of witnesses (including those of party if allowed by Judge) ..	
6. Subsistence and travelling allowances of witnesses (including those of party, if allowed by Judge). ..		6. Process fees ..	
7. Process fees ..		7. Commissioner's fees ..	
8. Commissioner's fees ..		8. Demi-paper ..	
9. Demi-paper ..		9. Cost of transmission of records ..	
10. Costs of transmission of records. ..		10. Other costs allowed under the Code and General Rules and Orders ..	
11. Other costs allowed under the Code and General Rules and Orders ..		11. Adjournment costs not paid in cash (to be deducted or added as the case may be) ..	
12. Adjournment costs not paid in cash (to be added or deducted as the case may be) ..			
Total ..		Total ..	

[PATNA.] Form No. 1. *Substitute* the following for the schedule of "costs of suits" in the form of decree:—

Costs of Suit.

Plaintiff.			Defendant.		
		Rs. A. P.			Rs. A. P.
1. Stamp for plaint ..			Stamp for power ..		
2. Do. for power ..			Do. for petition or affi ..		
3. Do. for petition or ..			davit ..		
affidavit ..			Costs for exhibits ..		
4. Costs for exhibits ..			Pleaders' fee ..		
5. Pleader's fee on Rs. ..			Subsistence— ..		
6. Subsistence— ..			(a) for defendant or ..		
(a) for plaintiff or his ..			his agent ..		
agent ..			(b) for witnesses ..		
(b) for witnesses ..			Commissioners' fee ..		
7. Commissioners' fee ..			Service of process ..		
8. Service of process ..			Copying or typing charge ..		
9. Copying or typing ..					
charge ..					
Total ..			Total ..		

No. 2.

SIMPLE MONEY DECREE (S. 34.)

(Title.)

Claim for
THIS suit coming on this day for final disposal before in the
presence of for the defendant, it is ordered that the for the plaintiff and of
for the sum of Rs. do pay to the
per cent. per annum from with interest thereon at the rate of
said sum and do also pay Rs. to the date of realization of the
rate of per cent. per annum from this date to the date of realization.
GIVEN under my hand and the seal of the Court, this
day of 19 .

*Costs of Suit.**Judge.*

Plaintiff.			Defendant.		
		Rs. A. P.			Rs. A. P.
1. Stamp for plaint ..			Stamp for power ..		
2. Do. for power ..			Do. for petition ..		
3. Do. for exhibits ..			Pleaders' fee ..		
4. Pleaders' fee on Rs. ..			Subsistence for witnesses ..		
5. Subsistence for wit- ..			Service of process ..		
ness ..			Commissioners' fee ..		
6. Commissioners' fee ..					
7. Service of process ..					
Total ..			Total ..		

LOC. AMS.—[CALCUTTA.] Form No. 2. *Cancel* the table under the head "costs of suit" and *substitute* therefor the following:—

Costs of suit.

Plaintiff.			Defendant.		
		Rs. A. P.			Rs. A. P.
1. Stamp for plaint ..			1. Stamp for power ..		
2. Do. for power ..			2. Do. for petition and affi- ..		
			davits ..		

Plaintiff.			Defendant.		
3. Stamp for petition and affidavits ..	Rs.	A. P.	3. Costs of exhibits including copies made under the Bankers' Books Evidence Act, 1891. ..	Rs.	A. P.
4. Costs of exhibits including copies made under the Bankers' Books Evidence Act, 1891 ..			4. Pleaders' fee ..		
5. Pleaders' fee on Rs. ..			5. Subsistence and travelling allowance of witnesses (including those of party if allowed by Judge) ..		
6. Subsistence and travelling allowance of witnesses (including those of party, if allowed by Judge) ..			6. Process fees ..		
7. Process fees ..			7. Commissioners' fees ..		
8. Commissioners' fees ..			8. Demi-paper ..		
9. Demi-paper ..			9. Cost of transmission of records ..		
10. Cost of transmission of records.			10. Other costs allowed under the Code and General Rules and Orders ..		
11. Other costs allowed under the Code and General Rules and Orders.			11. Adjournment costs not paid in cash (to be added or deducted as the case / e) ..		
12. Adjournment costs not paid in cash (to be added or deducted as the case may be).					
Total ..			Total ..		

[RANGOON]. After Form No. 2 insert the following as Form No. 2-A:—

2-A.

DECREE IN A COMPROMISED SUIT WHERE PROCEEDINGS ARE
STAYED UPON THE TERMS OF THE COMPROMISE.

(O. 23, R. 3.)

(Title.)

Claim for

This suit coming on this day for final disposal before in the presence of
for the plaintiff and of for the defendant, it is
ordered that the agreement
dated , set out in the schedule hereto be recorded and it is decreed that all
further proceedings in this suit be, and the same are, hereby stayed upon the terms of the
said agreement, except for the purpose of carrying the same into effect, for which pur-
pose the parties are to be at liberty to apply.

GIVEN under my hand and the seal of the Court, this day of

SCHEDULE.
(Agreement.)
COSTS OF SUIT.

Plaintiff.		Defendant.	
	Rs. A. P.		Rs. A. P.
1. Stamp for plaint ..		1. Stamp for power ..	
2. Stamp for power ..		2. Stamp for petition ..	
3. Stamp for exhibits ..		3. Pleader's fee ..	
4. Pleader's fee on Rs. ..		4. Subsistence for witnesses.	
5. Subsistence for witnesses.		5. Service of process ..	
6. Commissioner's fee ..		6. Commissioner's fee ..	
7. Service of process ..			
Total. ..		Total ..	

No. 3.¹

PRELIMINARY DECREE FOR FORECLOSURE.

(O. 34, R. 2.—Where accounts are directed to be taken.)

(Title.)

This suit coming on this _____ day, etc.; it is hereby ordered and decreed that it be referred to _____ as the Commissioner to take the accounts following:—

(i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

(ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received;

(iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security, together with interest thereon (such interest to be computed at the rate agreed between the parties or, failing such rate at the same rate as is payable on the principal, or failing both such rates at nine per cent. per annum);

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall first be adjusted against any sums paid by the plaintiff under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the _____ day of _____, and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(i) that the defendant do pay into Court on or before the _____ day of _____ or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due, and the sum of Rs. _____ for the costs of the suit awarded to the plaintiff;

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and

LEG. REF.

¹ These new forms 3 to 11 have been substituted for old forms 3 to 11 by the Transfer of Property (Amendment) Supplementary Act (XXI of 1929).

Forms Nos. 7-D to 7-F have been added to provide for a final decree in a suit for foreclosure, sale or redemption, when the mortgagor pays the amount of the decree.

the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff shall be at liberty to apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

LOC. AM.—[RANGOON.] *Substitute the following:—*

No. 3.

PRELIMINARY DECREE FOR FORECLOSURE.

(Title.)

This suit coming on this day of ; It is hereby ordered and declared that the sum of Rs. being costs of this suit shall be paid by the defendant No. to the ¹; and it is declared that the amount due by the defendant No. to the plaintiff is the sum of Rs. being the balance of account as shown in the schedule hereto; and it is further declared that the plaintiff shall be entitled to apply for and obtain a final decree for foreclosure of the mortgage in suit: provided that the defendant, or²

may apply for and obtain a decree for redemption of the mortgage on payment into Court of the amount so declared to be due on or before the day of and on compliance with all further orders of the Court and on payment of such further sums as the Court may determine to be payable on finally adjusting the account up to the date of payment.

SCHEDULE.

1. Due to the plaintiff for redemption	.. Rs.
2. Due to the plaintiff for costs of suit	.. Rs.
3. Due to the plaintiff for costs, etc., in respect of the mortgage	.. Rs.
4. Less costs, etc., in respect of the mortgage due to the defendant No.	Rs.
Less costs of suit due to the defendant No.	.. Rs.
Due to the plaintiff	.. Rs.

No. 3-A.

PRELIMINARY DECREE FOR FORECLOSURE.

(O. 34, R. 2.—Where the Court declares the amount due.)

(Title.)

This suit coming on this day, etc.; it is hereby declared that the amount due to the plaintiff on his mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage security, together with interest thereon, and the sum of Rs. for the costs of this suit awarded to the plaintiff, making in all the sum of Rs.

2. And it is hereby ordered and decreed as follows:—

(i) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court of the said sum of Rs.

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interests as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such persons as he ap-

¹ Or as otherwise apportioned.

² Any other party to the suit who has a

right to redeem plaintiff's mortgage.

points, and the plaintiff shall, if so required, reconvey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit, and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 4.

FINAL DECREE FOR FORECLOSURE.

(O. 34, R. 3.)

(Title.)

Upon reading the preliminary decree passed in this suit on the _____ day of _____ and further orders (if any) dated the _____ day of _____ and the application of the plaintiff dated the _____ of _____ for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the said mortgage.

It is hereby ordered and decreed that the defendant and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned; ¹[and (if the defendant be in possession of the said mortgaged property) that the defendant shall deliver to the plaintiff quiet and peaceable possession of the said mortgaged property].

2. And it is hereby further declared that the whole of the liability whatsoever of the defendant up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished.

LOC. AMS. [BOMBAY].—(a) In line 4 of Form No. 4 for "realization" substitute "the day hereinafter referred to".

(b) For clause (2) of the said form substitute:—

"(2) That if such payment is not made on or before the said day of _____ 19____, the plaintiff shall be entitled to apply to the Court for a final decree for sale.

(c) Delete clause (3) of the said form.

[RANGOON].—Substitute the following for form 4:—

No. 4.

FINAL DECREE FOR FORECLOSURE.

(Title.)

Upon reading the preliminary decree passed in this suit on the _____ day of _____ and further orders, dated the _____ and the application of the plaintiff, dated the _____ day of _____ for a final decree, and after hearing the parties, and on it appearing that payment of the sum found due by the preliminary decree and compliance with the further orders of the Court has not been made, within the time specified, by any party entitling him to apply for a decree for redemption;

It is hereby ordered and decreed that the defendants Nos. _____ and all persons claiming through or under them or any of them are hereby absolutely debarred from all right of redemption of the property described in the Schedule hereto, and that the defendants Nos. _____ are freed from all liabilities in respect of the mortgage mentioned in the schedule hereto and on account of this suit;

And it is ordered that the defendant No. _____ shall deliver to the plaintiff possession of the said property.

SCHEDULE.

The mortgaged property.

The mortgage.

No. 5.

PRELIMINARY DECREE FOR SALE.

(O. 34, R. 4.—Where accounts are directed to be taken.)

(Title.)

This suit coming on this _____ day, etc.; it is hereby ordered and decreed that it be referred to _____ as the Commissioner to take the accounts following:—

¹ Words not required to be deleted.

(i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

(ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received;

(iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the cost of the suit) in respect of the mortgage security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum);

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed.

2. And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall first be adjusted against any sums paid by the plaintiff under clause (iii), together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(i) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs. for the costs of the suit awarded to the plaintiff;

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints and the plaintiff shall, if so required, reconvey or re-transfer the said property free from the mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the plaintiff shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

6. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

7. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

LOC. AMS.—[BOMBAY]. In Form No. 5. For clause (2) substitute:—

- 19 , the defendant shall be entitled to apply for a final decree for foreclosure or sale".
[RANGOON].—Substitute the following:—

No. 5.

PRELIMINARY DECREE FOR SALE.

(Title.)

This suit coming on this day of ; it is hereby ordered and decreed
that the sum of Rs. being costs of this suit shall be paid by the
defendant No. to the 1 and it is declared that the amount
due to the plaintiff by the defendant No. is the sum of Rs. being
the balance of account as shown in the Schedule A hereto; and it is further declared that
the plaintiff shall be entitled to apply for and obtain a final decree for sale of the property
in suit;²

Provided that any of the defendants Nos. may apply for and obtain a decree
for redemption of the mortgage on payment into Court of the amount so declared to be
due on or before the day of and on compliance with all further
orders of the Court and on payment of such further sums as the Court may determine to
be payable on finally adjusting the account up to the date of payment.

And it is further declared that the amount due to the parties to the suit whose claims
have been proved, and the priorities of such parties to payment out of the sale proceeds, are
as shown in Schedule B hereto.

SCHEDULE A.

1. Due to the plaintiff for principal and interest on the mortgage	.. Rs.
2. Due to the plaintiff for costs of suit	.. Rs.
3. Due to the plaintiff for costs, etc., in respect of the mortgage	.. Rs.
Less costs, etc., due to the defendant No.	.. Rs.
4. Less costs of suit due to the defendant No.	.. Rs.
Due to the plaintiff from defendant No.	.. Rs.

SCHEDULE B.

Order of Priority.	Party.	Amount due.
1.
2.
3.

No. 5-A.

PRELIMINARY DECREE FOR SALE.

(O. 34, R. 4.—When the Court declares the amount due.)

(Title.)

This suit coming on this day, etc., it is hereby declared that the amount due
to the plaintiff on the mortgage mentioned in the plaint calculated up to this
day of is the sum of Rs. for principal, the sum of Rs.
for interest on the said principal, the sum of Rs. for costs, charges and expenses
(other than the costs of the suit) properly incurred by the plaintiff in respect of the mort-
gage-security, together with interest thereon, and the sum of Rs.
for the costs of the suit awarded to the plaintiff, making in all the sum of Rs.

2. And it is hereby ordered and decreed as follows:

(i) that the defendant do pay into Court on or before the day of or
any later date up to which time for payment may be extended by the Court, the said sum
of Rs.

(ii) that, on such payment and on payment thereafter before such date as the Court
may fix of such amount as the Court may adjudge due in respect of such costs of the suit
and such costs, charges and expenses as may be payable under rule 10, together with such
subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule
to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his
possession or power relating to the mortgaged property in the plaint mentioned, and all such
documents shall be delivered over to the defendant, or to such person as he appoints, and
the plaintiff shall, if so required, reconvey or re-transfer the said property free from the

¹ Or as otherwise apportioned.
C. C. M.—184

² Or a specified part thereof.

said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908 and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, that plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 6.

FINAL DECREE FOR SALE. (O. 34, R. 5.)

(Title.)

Upon reading the preliminary decree passed in this suit on the _____ day of _____ and further orders (if any) dated the _____ day of _____ and the application of the plaintiff dated the _____ day of _____ for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the mortgage;

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold, and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

2. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into the Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the plaintiff for such costs of the suit including the costs of this application and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908 and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

LOC. AM.—[RANGOON]. Substitute the following:—

No. 6.

FINAL DECREE FOR SALE.

(Title.)

Upon reading the preliminary decree passed in this suit on the _____ day of _____ and further orders dated the _____ and the application of the plaintiff, dated the _____ day of _____ for a final decree, and after hearing the parties, and on it appearing that payment of the sum found due by the preliminary decree and compliance with the further orders of the Court has not been made within the time specified by any party entitling him to apply for a decree for redemption:

It is hereby ordered and decreed that the mortgaged property mentioned in the Schedule A hereto¹ be sold, and that for the purposes of such sale the parties shall produce before the Court or such officer as it appoints all documents of title in their possession or power relating to the said property;

¹ Or a specified part.

And it is further ordered and decreed that the proceeds of the sale (after deduction therefrom of the expenses of the sale) shall, subject to any orders as to setting off the amount due against the purchase money, be paid into Court and applied in payment of the amounts found due to the parties under the preliminary decree and further orders of the Court in the order of priority as shown in the Schedule B hereto.

It is further declared that the mortgages in respect of which the amounts are shown as due in Schedule B, and the right to redeem the same, shall be extinguished, except as to the right of any party entitled thereto to obtain a personal decree against the mortgagor for any balance unpaid.

SCHEDULE A.
THE PROPERTY.

SCHEDULE B.

Order of Priority.	Party.	Amount due.
1.
2.
3.

No. 7.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A
DECREE FOR FORECLOSURE IS PASSED.

(O. 34, R. 7.—Where accounts are directed to be taken.)

(Title.)

This suit coming on this day, etc., it is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

(i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

(ii) an account of the income of the mortgaged property received up to this day by the defendant or by any other person by order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received;

(iii) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum);

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. It is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage money, or, as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of and that upon such report of the Commissioner being received, it shall be, confirmed and countersigned, subject to such modification as may be necessary after consideration of such objection as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(i) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs. for the cost of the suit awarded to the defendant;

(ii) that, on such payment, and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under r. 10, together with such subsequent interest as may be payable under r. 11 of O. XXXIV of the first Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendants shall, if so required, reconvey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant shall be at liberty to apply to the Court for a final decree, that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

LOC. AM.—[RANCOON.] Substitute the following:—

No. 7.

DECREE AGAINST MORTGAGOR PERSONALLY FOR BALANCE AFTER THE SALE OF THE MORTGAGED PROPERTY.

(Title.)

Upon reading the application of the _____ and reading the final decree passed in the suit on the day of _____, and the Court being satisfied that the net proceeds of the sale held under the aforesaid decree amounted to Rs. _____ and have been paid to the parties, leaving balance (s) due as shown in the Schedule hereto; and that the balance due to _____ and are legally recoverable from the _____¹

personally; It is hereby ordered and decreed that the _____¹ do pay to _____² the sum of Rs. _____ with further interest at the rate of six per cent. per annum from the _____ day of _____³ up to the date of realization of the said sum, and the costs of this application.

SCHEDULE.

Party.	Amount due.	Balance unpaid
1.		..
2.		..
3.		..

No. 7-A.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR SALE IS PASSED.

(O. 14, R. 7.—Where accounts are directed to be taken.)

(Title.)

This suit coming on this _____ day, etc.; it is hereby ordered and decreed that it be referred to _____ as the Commissioner to take the accounts following:—

(i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

(ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by the order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received;

(iii) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate, as is payable on the principal, or, failing both such rates, at nine per cent. per annum);

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall first be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage-money, or as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or

¹ Mortgagor.
² Mortgagee.

³Being the date of payment of proceeds of sale as aforesaid.

before the day of, and that, upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(i) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs. for the costs of the suit awarded to the defendant;

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

6. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest and as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same.

7. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the defendant as aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance, and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 7-B.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR FORECLOSURE IS PASSED.

(O, 34, R. 7.—Where the Court declares the amount due.)

(Title.)

This suit coming on this day, etc.; it is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs. for the costs of the suit awarded to the defendant, making in all the sum of Rs. for

2. And it is hereby ordered and decreed as follows:

(i) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court the said sum of Rs.

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, reconvey or transfer the said property free from the said mortgage and clear off and from all incumbrances created by the defendant or any

person claiming under him or any person under whom he claims, and free from all liability whatsoever arising from the mortgage or this suit, and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 7-C.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR

A DECREE FOR SALE IS PASSED.

(O. 34, R. 7.—Where the Court declares the amount due.)

(Title.)

This suit coming on this _____ day, etc., it is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of _____ is the sum of Rs. _____ for principal, the sum of Rs. _____ for interest on the said principal, the sum of Rs. _____ for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs. _____ for costs of this suit awarded to the defendant, making in all the sum of Rs. _____

2. And it is hereby ordered and decreed as follows:—

(i) that the plaintiff do pay into Court on or before the _____ day of _____ or any later date up to which time for payment may be extended by the Court the said sum of Rs. _____

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or such person as he appoints, and the defendant shall, if so required, reconvey or re-transfer the said property to the plaintiff free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for the payment in full of the amount payable to the defendant as aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 7-D.

FINAL DECREE FOR FORECLOSURE IN A REDEMPTION SUIT ON DEFAULT OF PAYMENT
BY MORTGAGOR.
(O. 34, r. 8.)

(Title.)

Upon reading the preliminary decree in this suit on the _____ day of _____ and further orders (if any) dated the _____ day of _____, and the application of the defendant dated the _____ day of _____, for a final decree and after hearing the parties, and it appearing that the payment as directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage;

It is hereby ordered and decreed that the plaintiff and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned ¹[and (if the plaintiff be in possession of the said mortgaged property) that the plaintiff shall deliver to the defendant quiet and peaceable possession of the said mortgaged property].

2. And it is hereby further declared that the whole of the liability whatsoever of the plaintiff up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished.

No. 7-E.

FINAL DECREE FOR SALE IN A REDEMPTION SUIT ON DEFAULT OF PAYMENT BY MORTGAGOR.
(O. 34, R. 8.)

(Title.)

Upon reading the preliminary decree passed in this suit on the _____ day of _____ and further orders (if any) dated the _____ day of _____, and the application of the defendant dated the _____ day of _____, for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage;

It is hereby ordered and decreed that the mortgage property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold and that for the purposes of such sale the defendant shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

2. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the defendant for such costs of this suit including the costs of this application and such costs, charges and expenses as may be payable under rule 10, together with the subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same.

No. 7-F.

FINAL DECREE IN A SUIT FOR FORECLOSURE, SALE OR REDEMPTION WHERE THE MORTGAGOR
PAYS THE AMOUNT OF THE DECREE.
(O. 34, Rr. 3, 5 and 8.)

(Title.)

The suit coming on this _____ day for further consideration and it appearing that on the _____ day of _____ the mortgagor or _____, the same being a person entitled to redeem, has paid into Court all amounts due to the mortgagee under the preliminary decree dated the _____ day of _____; it is hereby ordered and decreed that—

(i) the mortgagee do execute a deed of re-conveyance of the property in the aforesaid preliminary decree mentioned in favour of the mortgagor¹ or, as the case may be, who has redeemed the property or an acknowledgment of the payment of the amount due in his favour;

(ii) the mortgagee do bring into Court all documents in his possession and power relating to the mortgaged property in the suit.

And it is hereby further ordered and decreed that, upon the mortgagee executing the deed of re-conveyance or acknowledgment in the manner aforesaid,—

(i) the said sum of Rs. _____ be paid out of Court to the mortgagee;

(ii) the said deeds and documents brought into the Court be delivered out of Court to the mortgagor ¹[or the person making the payment] and the mortgagee do, when so re-

¹ Words not required to be deleted.

quired, concur in registering, at the cost of the mortgagor ¹[or other person making the payment], the said deed of re-conveyance or the acknowledgment in the office of the Sub-Registrar of _____; and

(iii) ¹[if the mortgagee, plaintiff or defendant, as the case may be, is in possession of the mortgaged property] that the mortgagee do forthwith deliver possession of the mortgaged property in the aforesaid preliminary decree mentioned to the mortgagor ¹[or such person as aforesaid who has made the payment].

No. 8.

DECREE AGAINST MORTGAGOR PERSONALLY FOR BALANCE AFTER THE SALE OF THE MORTGAGED PROPERTY.

(O. 34 Rr. 6 and 8-A.)

(Title.)

Upon reading the application of the mortgagee (the plaintiff or defendant, as the case may be), and reading the final decree passed in the suit on the _____ day of _____ and the Court being satisfied that the net proceeds of the sale held under the aforesaid final decree amounted to Rs. _____ and have been paid to the applicant out of the Court on the _____ day of _____ and that the balance now due to him under the aforesaid decree is Rs. _____;

And whereas it appears to the Court that the said sum is legally recoverable from the mortgagor (plaintiff or defendant, as the case may be) personally;

It is hereby ordered and decreed as follows:—

That the mortgagor (plaintiff or defendant, as the case may be) do pay to the mortgagee (defendant or plaintiff, as the case may be) the said sum of Rs. _____ with further interest at the rate of six per cent. per annum from the day of _____ (the date of payment out of Court referred to above) up to the date of realization of the said sum, and the costs of this application.

LOC. AM.—[RANGOON]. Substitute the following:—

No. 8.

PRELIMINARY DECREE FOR REDEMPTION.

(Title.)

This suit coming on this _____ day of _____; it is hereby ordered and decreed that the sum of Rs. _____ being costs of this suit shall be paid by the defendant No. _____ to the plaintiff ²; and it is hereby declared that the amount due to the defendant No. _____ by the plaintiff is the sum of Rs. _____ being the balance of accounts as shown in the Schedule hereto; and it is further declared that, on payment into Court of the said amount on or before the _____ day of _____ and on compliance with all further orders of the Court and on payment of such further sums as the Court may determine to be payable on finally adjusting the account up to the date of payment, the plaintiff shall be entitled to apply for and obtain a final decree for redemption; and that if the plaintiff fails to make full payment as aforesaid, the defendant No. _____ shall be entitled to apply for and obtain a decree.³

SCHEDULE.

		Rs.
1. Due to the defendant No. _____	on the mortgage	..
2. Due to the defendant No. _____	for costs of suit	..
3. Due to the defendant No. _____	for costs, etc., in respect	..
of the mortgage		..
Less costs, etc., in respect of the mortgage due to the plaintiff		..
Less costs, of suit due to the plaintiff		..
Due to the defendant No. _____		..

No. 9.

PRELIMINARY DECREE FOR FORECLOSURE OR SALE.

[Plaintiff _____ .. 1st Mortgagee.
v.
Defendant No. 1 .. Mortgagor
Defendant No. 2 .. 2nd Mortgagee.]

(O. 34, Rr. 2 and 4.)

(Title.)

The suit coming on this _____ day, etc.; it is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this day of _____ is the sum of Rs. _____ for principal, the sum of Rs. _____

¹ Words not required to be deleted.

² Or as otherwise apportioned.

³ For sale or foreclosure.

for interest on the said principal, the sum of Rs. _____ for costs,
charges and expenses (other than the costs of the suit) incurred by the plaintiff in respect
of the mortgage-security with interest thereon and the sum of Rs. _____ for the
costs of this suit awarded to the plaintiff, making in all the sum of Rs. _____

(Similar declaration to be introduced with regard to the amount due to defendant No. 2 in respect of his mortgage if the mortgage-money due thereunder has become payable at the date of the suit.)

2. It is further declared that the plaintiff is entitled to payment of the amount due to him in priority to defendant No. 2¹ [or (if there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively];—

3. And it is hereby ordered and decreed as follows:—

(i) (a) that defendants or one of them do pay into Court on or before the _____ day of _____ or any later date up to which time for payment has been extended by the Court the said sum of Rs. _____ due to the plaintiff; and

(b) that defendant No. 1 do pay into Court on or before the _____ day of _____ or any later date up to which time for payment has been extended by the Court the said sum of Rs. _____ due to defendant No. 2; and

(ii) that, on payment of the sum declared to be due to the plaintiff by defendants or either of them in the manner prescribed in clause (i) (a) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court, all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant No. _____

(who has made the payment), or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims, and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant No. _____

(who has made the payment) quiet and peaceable possession of the said property.

(Similar declarations to be introduced, if defendant No. 1 pays the amount found or declared to be due to defendant No. 2 with such variations as may be necessary having regard to the nature of his mortgage.)

4. And it is hereby further ordered and decreed that, in default of payment as aforesaid of the amount due to the plaintiff, the plaintiff shall be at liberty to apply to the Court for a final decree—

(i) ¹[in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage-deed is foreclosure and not sale] that the defendants jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property; or

(ii) ¹[in the case of any other mortgage] that the mortgaged property or a sufficient part thereof shall be sold; and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property; and

(iii) ¹[in the case where a sale is ordered under clause 4 (ii) above] that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may have been passed in this suit and in payment of the amount which the Court may adjudge due to the plaintiff in respect of such costs of this suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to defendant No. 2; and that if any balance be left, it shall be paid to the defendant No. 1 or other persons entitled to receive the same; and

(iv) that, if the money realised by such sale shall not be sufficient for payment in full of the amounts due to the plaintiff and defendant No. 2, the plaintiff or defendant No. 2 or both of them, as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amounts remaining due to them respectively.

5. And it is hereby further ordered and decreed—

(a) that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in the payment of the said

LEG. REF.

¹ Words not required to be deleted.

amount, defendant No. 2 shall be at liberty to apply to the Court to keep the plaintiff's mortgage alive for his benefit and to apply for a final decree (*in the same manner as the plaintiff might have done under clause 4 above*)—

¹[(i) that the defendant No. 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the schedule annexed hereto and shall, if so required, deliver up to defendant No. 2 quiet and peaceable possession of the said property;] or

¹[(ii) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property;]

and (b) (if on the application of defendant No. 2 such a final decree for foreclosure is passed), that the whole of the liability of defendant No. 1 arising from the plaintiff's mortgage or from the mortgage of defendant No. 2 or from this suit shall be deemed to have been discharged and extinguished.

6. And it is hereby further ordered and decreed ¹[*in the case where a sale is ordered under clause 5 above*]—

(i) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by defendant No. 2 in respect of the plaintiff's mortgage and the costs of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount; and that the balance, if any, shall then be applied in payment of the amount adjudged due to defendant No. 2 in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of this suit and such costs, charges and expenses as may be payable to defendant No. 2 under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to defendant No. 1 or other persons entitled to receive the same; and

(ii) that, if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of the plaintiff's mortgage or defendant No. 2's mortgage defendant No. 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amount of the balance.

7. And it is hereby further ordered and decreed that the parties, are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

LOC. AM.—[RANGOON.] (i) *Substitute* the following for Form No. 9.

"Form No. 9.

FINAL DECREE FOR REDEMPTION.

(Title.)

Upon reading the preliminary decree passed in this suit on the day of and further orders dated the 19 , and the decree and after hearing the parties and on it appearing that payment of the sum found due by the preliminary decree and subsequent orders has been made and all further orders of the Court have been complied with by the plaintiff.

It is hereby ordered and decreed that the defendant No. shall deliver to the plaintiff to such person as the plaintiff appoints in this behalf the mortgaged property specified in the schedule hereto and all documents in the possession or power of the defendant No. relating to the said property and shall execute and have registered (as required by the plaintiff and at the cost of the plaintiff) either (i) an acknowledgment in writing that all rights created by the mortgage in suit have been extinguished, (ii) a re-transfer to the plaintiff or to such third person as he may direct of the said property freed from the mortgage and from all encumbrances created by the defendant or by any person deriving title from him² or (iii) a transfer of the mortgage to such third person as the plaintiff may direct,

SCHEDULE.

(The Property).

NOTE.—This form is applicable, with substitution of the proper party for the 'plaintiff' where the decree is in favour of a party other than the 'plaintiff'.

(ii) *Renumber* forms 12 to 23 as 10 to 21 respectively.

SCHEDULE.

Description of the mortgaged property.

LEG. REF.

¹ Words not required to be deleted.

² Or (where the defendant claims by derived title) by those under whom he claims.

No. 10.

PRELIMINARY DECREE FOR REDEMPTION OF PRIOR MORTGAGE AND
FORECLOSURE OR SALE ON SUBSEQUENT MORTGAGE.

[Plaintiff

v.

Defendant No. 1

Defendant No. 2

.. 2nd Mortgagee.

.. Mortgagor.

.. 1st Mortgagee.]

(Order 34, rules 2, 4 and 7.)

(Title.)

The suit coming on this day, etc.; it is hereby declared that the amount due to defendant No. 2 on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by defendant No. 2 in respect of the mortgage security with interest thereon and the sum of Rs. for the costs of this suit awarded to defendant No. 2, making in all the sum of Rs.

(Similar declarations to be introduced with regard to the amount due from defendant No. 1 to the plaintiff in respect of his mortgage if the mortgage money due thereunder has become payable at the date of the suit.)

2. It is further declared that defendant No. 2 is entitled to payment of the amount due to him in priority to the plaintiff ¹[or if (there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively:—]

3. And it is hereby ordered and decreed as follows:—

(i) (a) that the plaintiff or defendant No. 1 or one of them do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to defendant No. 2; and

(b) that defendant No. 1 do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to the plaintiff; and

(ii) that, on payment of the sum declared due to defendant No. 2 by the plaintiff and defendant No. 1 or either of them in the manner prescribed in clause (i) (a) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 or Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, defendant No. 2 shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff or defendant No. 1 (whoever has made the payment), or to such person as he appoints, and defendant No. 2 shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by defendant No. 2 or any person claiming under him or any person under whom he claims, and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff or defendant No. 1 (whoever has made the payment) quiet and peaceable possession of the said property.

(Similar declarations to be introduced, if defendant No. 1 pays the amount found or declared due to the plaintiff with such variations as may be necessary having regard to the nature of his mortgage.)

4. And it is hereby further ordered and decreed that, in default of payment as aforesaid, of the amount due to defendant No. 2, defendant No. 2 shall be at liberty to apply to the Court that the suit be dismissed or for a final decree—

(i) ¹[in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage-deed is foreclosure and not sale] that the plaintiff and defendant No. 1 jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver to the defendant No. 2 quiet and peaceable possession of the said property; or

(ii) ¹[in the case of any other mortgage] that the mortgaged property or a sufficient part thereof shall be sold; and that for the purposes of such sale defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property; and

(iii) ¹[in the case where a sale is ordered under clause 4(ii) above] that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to defendant No. 2 under the decree and any further orders that may be passed in this suit and in payment of the amount which the Court may adjudge due to the defendant No. 2 in respect of such costs of the suit, and such costs, charges and expenses as may be payable to the plaintiff under rule 10.

LEG. REF.

¹ Words not required to be deleted.

together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule of the Code of Civil Procedure, 1908; and that the balance, if any, shall be applied in payment of the amount due to the plaintiff and that, if any balance be left, it shall be paid to defendant No. 1 or other persons entitled to receive the same; and

(iv) that, if the money realised by such sale shall not be sufficient for payment in full of the amounts due to defendant No. 2 and the plaintiff, defendant No. 2 or the plaintiff or both of them, as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amounts remaining due to them respectively.

5. And it is hereby further ordered and decreed,—

(a) that, if the plaintiff pays into Court to the credit of this suit the amount adjudged due to defendant No. 2 but defendant No. 1 makes default in the payment of the said amount, the plaintiff shall be at liberty to apply to the Court to keep defendant No. 2's mortgage alive for his benefit and to apply for a final decree (*in the same manner as the defendant No. 2 might have done under clause 4 above*)—

¹[(i) that the defendant No. 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property;] or

¹[(ii) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property;]

and (b) (if on the application of defendant No. 2 such a final decree for foreclosure is passed), that the whole of the liability of defendant No. 1 arising from the plaintiff's mortgage or from the mortgage of defendant No. 2 or from this suit shall be deemed to have been discharged and extinguished.

6. And it is hereby further ordered and decreed ¹[*in the case where a sale is ordered under clause 5 above*]:—

(i) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by the plaintiff in respect of defendant No. 2's mortgage and the costs of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount; and that the balance, if any, shall then be applied in payment of the amount adjudged due to the plaintiff in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to defendant No. 1 or other persons entitled to receive the same; and

(ii) that, if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of defendant No. 2's mortgage or the plaintiff's mortgage, defendant No. 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amount of the balance.

7. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

APPENDIX D.

LOC. AMS.—[MADRAS] Forms Nos. 10-A and 10-B (new).

Insert the following as Forms Nos. 10-A and 10-B.²

"No. 10-A.

³FINAL DECREE FOR SALE.

[O. 34, r. 5 (2), or O. 34, r. 8 (4).]

(Title.)

Upon reading the preliminary decree passed in the above suit and the application of the plaintiff, dated _____, the appellant _____,

LEG. REF.

¹ Words not required to be deleted.

² The forms relating to mortgage decree in Appendix D to Schedule I have been superseded in whole by the provisions of S.8 and Sch. of Act 21 of 1929.

³ NOTES.—(1) In the case of a decree under Order 34, rule 5 (2), score out the words

"plaintiff" and "defendant" below the lines and in the case of a decree under Order 34, rule 8 (4), score out the same words occurring above the lines.

(2) Direction No. (2) should be struck out if the personal liability has not been adjudicated in the suit or has been declared not to exist.

and upon hearing Mr. _____ for plaintiff and Mr. _____
for defendant and it appearing that the payment directed by the said decree
has not been made:

It is hereby decreed as follows:

(1) that the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after defraying thereout the expenses of the sale) be applied in payment of what is declared due to plaintiff in the aforesaid preliminary decree together with subsequent interest and subsequent costs and that the balance, if any, be paid to the defendant or other person entitled to receive it; (2) that if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full the plaintiff be at liberty to apply for a personal decree for the amount of the balance; and (3) that the defendant do also pay plaintiff Rs. _____ for the cost of this application.

[Here enter description of mortgaged property in English or in the language of the Court.]

(Dis. No. 583 of 1915.)

No. 10-B.

¹ FINAL DECREE FOR REDEMPTION.

[O. 34, r. 3 (1), O. 34, r. 5 (1), and O. 34, r. 8 (1).]

(Title.)

Upon reading the preliminary decree in the above suit on _____ and the application
of the plaintiff I. A. No. _____ dated _____ and after hearing Mr. _____
pleader for the defendant and Mr. _____ pleader for the _____
it appearing that the payment directed by the aforesaid decree has been made: and

It is hereby decreed as follows:—

That the plaintiff do deliver up to the defendant or to such person as he appoints
defendant all documents in his possession or power relating to the mortgaged property and do also
re-transfer the property to the defendant free from the mortgage and from all m-
plaintiff brances credited by the defendant or any person claiming under him (or by those under
whom he claims) and do also put the defendant in possession of the property.
plaintiff

SCHEDULE.

Description of the mortgaged property.

The costs of the defendant in this proceeding:—
plaintiff

Particulars

Amount."

[BOMBAY] Form No. 10-A.² Add the following as form No. 10-A:—

"No. 10-A.

FINAL DECREE FOR SALE.

(Title.)

Upon reading the decree passed in the above suit on the _____ day of _____
19____, and the application of the plaintiff dated the _____ day of _____
19____, and after hearing _____ pleader for the plaintiff and
pleader for the defendant, and it appearing that the payment
directed by the said decree has not been made.

LEG. REF.

¹NOTES.—(1) In the case of a decree under Order 34, rule 8 (1), score out the words "plaintiff" and "defendant" above the lines; in the case of decrees under Order 34, rule 3 (1) and rule 5 (1), score out the words "plaintiff" and "defendant" below the lines.

(2) The words "or by those under whom he claims" will be inserted only if the mortgagee derives title from an original mortgagee.

² See footnote under the Madras Amendment.

It is hereby decreed as follows:—

(1) That the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest at _____ per cent. per annum and subsequent costs, and that the balance, if any, be paid to the defendant.

(2) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

[RANGOON.] Re-number Forms Nos. 12 to 23 as 10 to 21 respectively.

No. 11.

PRELIMINARY DECREE FOR SALE.

[Plaintiff

.. Sub or derivative mortgagee.

v.

Defendant No. 1

.. Mortgagor.

Defendant No. 2

.. Original mortgagee.]

(Order 34, rule 4.)

(Title.)

This suit coming on this _____ day, etc.; it is hereby declared that the amount due to defendant No. 2 on his mortgage calculated up to this _____ day of _____ in the sum of Rs. _____ for principal, the sum of Rs. _____ for interest on the said principal, the sum of Rs. _____ for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon and the sum of Rs. _____ for the costs of the suit awarded to defendant No. 2, making in all the sum of Rs. _____

(Similar declarations to be introduced with regard to the amount due from defendant No. 2 to the plaintiff in respect of his mortgage.)

2. And it is hereby ordered and decreed as follows:—

(i) that defendant No. 1 do pay into Court on or before the said _____ day of _____ or any later date up to which time for payment may be extended by the Court the said sum of Rs. _____ due to defendant No. 2.

(Similar declarations to be introduced with regard to the amount due to the plaintiff, defendant No. 2 being at liberty to pay such amount.)

(ii) that, on payment of the sum declared to defendant No. 2 by defendant No. 1 in the manner prescribed in clause (2) (i) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff and defendant No. 2 shall bring into Court all documents in their possession or power relating to the mortgaged property in the plaint mentioned, and all such documents (except such as relate only to the sub-mortgage) shall be delivered over to defendant No. 1, or to such person as he appoints, and defendant No. 2 shall, if so required, reconvey or re-transfer the property to defendant No. 1, free from the said mortgage clear of and from all incumbrances created by defendant No. 2 or any person claiming under him or any person under whom he claims and free from all liability arising from the mortgage or this suit and shall, if so required, deliver up to defendant No. 1, quiet and peaceable possession of the said property; and

(iii) that, upon payment into the Court by defendant No. 1, of the amount due to defendant No. 2, the plaintiff shall be at liberty to apply for payment to him of the sum declared due to him together with any subsequent costs of the suit and other costs, charges and expenses, as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall then be paid to defendant No. 2 and that if the amount paid into the Court be not sufficient to pay in full the sum due to the plaintiff, the plaintiff shall be at liberty (if such remedy is open to him by the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 for the amount of the balance.

3. And it is further ordered and decreed that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff the plaintiff shall bring into the Court all documents, etc. [as in sub-clause (ii) of clause 2].

4. And it is hereby further ordered and decreed that, in default of payment by defendants Nos. 1 and 2 as aforesaid, the plaintiff may apply to the Court for a final decree for sale, and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold; and that for the purposes of such sale the plaintiff and defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in their possession or power relating to the mortgaged property.

5. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount due to the plaintiff as specified in clause 1 above with such costs of the suit and other costs, charges and expenses as may be payable under rule 1, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to defendant No. 2; and that if any balance be left, it shall be paid to defendant No. 1 or other persons entitled to receive the same.

6. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amounts payable to the plaintiff and defendant No. 2, the plaintiff or defendant No. 2 or both of them, as the case may be, shall be at liberty (if such remedy is open under their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 or defendant No. 1 (as the case may be) for the amount of the balance.

7. And it is hereby further ordered and decreed that, if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in payment of the amount due to defendant No. 2, defendant No. 2 shall be at liberty to apply to the Court for a final decree for foreclosure or sale (as the case may be)—(*declarations in the ordinary form to be introduced according to the nature of defendant No. 2's mortgage and the remedies open to him thereunder.*)

8. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 12.

DECREE FOR RECTIFICATION OF INSTRUMENT.

(Title.)

It is hereby declared that the _____, dated the _____ day of 19____, does not truly express the intention of the parties to such _____
And it is decreed that the said _____ be rectified by _____

No. 13.

DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS.

(Title.)

It is hereby declared that the _____, dated the _____ day of _____ 19____, and made between _____ and _____, is void as against the plaintiff and all other creditors, if any, of the defendant.

No. 14.

INJUNCTION AGAINST PRIVATE NUISANCE.

(Title.)

Let the defendant _____, his agents, servants and workmen, be perpetually restrained from burning, or causing to be burnt, and bricks on the defendant's plot of land marked B in the annexed plan, so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling-house and garden mentioned in the plaint as belonging to and being occupied by the plaintiff.

No. 15.

INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL.

Let the defendant _____, his contractors, agents and workmen, be perpetually restrained from continuing to erect upon his premises in _____ any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down, so or in such manner as to darken, injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights.

No. 16.

INJUNCTION RESTRAINING USE OF PRIVATE ROAD.

(Title.)

Let the defendant _____, his agents, servants and workmen, be perpetually restrained from using or permitting to be used any part of the lane at _____, the soil of which belongs to the plaintiff, as a carriage way for the passage of carts, carriages or other vehicles either going to or from the land marked B in the annexed plan or for any purpose whatsoever.

No. 17.

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT.

(Title.)

It is ordered that the following accounts and inquiries be taken and made; that is to say:—

In creditor's suit—

1. That an account be taken of what is due to the plaintiff and all other the creditors of the deceased.

In suits by legatees—

2. That an account be taken of the legacies given by the testator's will.

In suits by next-of-kin—

3. That an inquiry be made and account taken of what or of what share, if any, the plaintiff is entitled to as next-of-kin [or one of the next-of-kin] of the intestate.

[After the first paragraph the decree will, where necessary, order, in a creditor's suit, inquiry and accounts for legatees, heirs-at-law and next-of-kin. In suits by claimants other than creditors, after the first paragraph, in all cases an order to inquire and take an account of creditors will follow the first paragraph and such of the others as may be necessary will follow omitting the first formal words. The form is continued as in a creditor's suit.]

4. An account of the funeral and testamentary expenses.

5. An account of the movable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use.

6. An inquiry what part (if any) of the movable property of the deceased is outstanding and undisposed of.

7. And it is further ordered that the defendant do, on or before the day of next, pay into Court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or for his use.

8. And that if the ¹shall find it necessary for carrying out the objects of the suit to sell any part of the movable property of the deceased, that the same be sold accordingly, and the proceeds paid into Court.

9. And that Mr. E. F. be receiver in the suit (or proceeding) and receive and get in all outstanding debts and outstanding movable property of the deceased, and pay the same into the hands of the ¹(and shall give security by bond for the due performance of his duties to the amount of rupees).

10. And it is further ordered that if the movable property of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made, and accounts taken, that is to say—

(a) an inquiry what immovable property the deceased was seized of or entitled to at the time of his death;

(b) an inquiry what are the incumbrances (if any) affecting the immovable property of the deceased or any part thereof;

(c) an account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed.

11. And that the immovable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit be sold with the approbation of the Judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent.

12. And it is ordered that G. H. shall have the conduct of the sale of the immovable property, and shall prepare the conditions and contracts of sale subject to the approval of the ¹and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle.

13. And it is further ordered that, for the purpose of the inquiries hereinbefore directed, the ¹shall advertise in the newspapers according to the practice of the Court, or shall make such inquiries in any other way which shall appear to the ¹to give the most useful publicity to such inquiries.

14. And it is ordered that the above inquiries and accounts be made and taken and that all other acts ordered to be done be completed, before the day of and that the ¹do certify the result of the inquiries, and the accounts, and that all other acts ordered as completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

15. And, lastly, it is ordered that this suit [or proceeding] stand adjourned for making final decree to the day of [Such part only of this decree is to be used as is applicable to the particular case].

LEG. REF.

¹ Here insert the name of the proper officer.

No. 18.

FINAL DECREE IN ADMINISTRATION SUIT BY LEGATEE.

(Title.)

1. It is ordered that the defendant do, on or before the day of pay into Court the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the estate of the testator and also the sum of Rs. for interest, at the rate of Rs. per cent. per annum, from the day of to the day of , amounting together to the sum of Rs.

2. Let the of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said costs when so taxed, be paid out of the said sum of Rs. ordered to be paid into Court as aforesaid, as follows:—

(a) The costs of the plaintiff to Mr. , his attorney [or pleader] or and the costs of the defendant to Mr. , his attorney [or pleader].

(b) And (if any debts are due) with the residue of the said sum of Rs. after payment of the plaintiff's and defendant's costs as aforesaid, let the sums, found to be owing to the several creditors mentioned in the schedule to the certificate of the

¹together with subsequent interest on such of the debts as bear interest, be paid; and, after making such payment, let the amount coming to the several legatees mentioned in the schedule together with subsequent interest (to be verified as aforesaid), be paid to them.

3. And if there should then be any residue, let the same be paid to the residuary legatee.

No. 19.

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE, WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE PAYMENT OF LEGACIES.

(Title.)

1. It is declared that the defendant is personally liable to pay the legacy of Rs. bequeathed to the plaintiff;

2. And it is ordered that an account be taken of what is due for principal and interest on the said legacy;

3. And it is also ordered that the defendant do, within weeks after the date of the certificate of the ¹, pay to the plaintiff the amount of what the ¹shall certify to be due for principal and interest;

4. And it is ordered that the defendant do pay the plaintiff his costs of suit, the same to be taxed in case the parties differ.

No. 20.

FINAL DECREE IN AN ADMINISTRATION SUIT BY NEXT-OF-KIN.

(Title.)

1. Let the of the said Court tax the costs of the plaintiff and defendant in this suit and let the amount of the said plaintiff's costs, when so taxed, be paid by the defendant to the plaintiff out of the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the personal estate of E.F., the intestate, within one week after the taxation of the said costs by the said ¹, and let the defendant retain for her own use out of such sum her costs, when taxed.

2. And it is ordered that the residue of the said sum of Rs. , after payment of the plaintiff's and defendant's costs as aforesaid, be paid and applied by defendant as follows:—

(a) Let the defendant, within one week after the taxation of the said costs by the ¹as aforesaid, pay one-third share of the said residue to the plaintiff A.B., and C.D., his wife, in her right as the sister and one of the next-of-kin of the said E.F., the intestate.

(b) Let the defendant retain for her own use one other third share of residue, as the mother and one of the next-of-kin of the said E.F., the intestate.

(c) And let the defendant, within one week after the taxation of the said costs by the ¹as aforesaid, pay the remaining one-third share of the said residue to G.H., as the brother and the other next-of-kin of the said E.F., the intestate.

No. 21.

PRELIMINARY DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS.

(Title.)

It is declared that the proportionate shares of the parties in the partnership are as follows:—

LEG. REF.

¹ Here insert the name of the proper officer.

C.C.M.—186

NOTES.

Form No. 21.—Although the heading of Form No. 21 in Appendix D, C. P.

It is declared that this partnership shall stand dissolved [or shall be deemed to have been dissolved] as from the day of _____ and it is ordered that the dissolution thereof as from that day be advertised in the _____ Gazette, etc.,

And it is ordered that _____ be the receiver of the partnership-estate, and effects in this suit and do get in all the outstanding book-debts and claims of the partnership.

And it is ordered the following accounts be taken:—

1. An account of the credits, property and effects now belonging to the said partnership;
2. An account of the debts and liabilities of the said partnership;
3. An account of all dealings and transactions between the plaintiff and defendant, from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts.

And it is ordered that the goodwill of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in-trade, be sold on the premises, and that the _____ may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale and that either of the parties is to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the day of _____ and that the _____ do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of _____

And, lastly, it is ordered that this suit stand adjourned for making a final decree to the day of _____

No. 22.

FINAL DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND TAKING OF PARTNERSHIP ACCOUNTS.

(Title.)

It is ordered that the fund now in Court, amounting to the sum of Rs. _____ be applied as follows:—

1. In payment of the debts due by the partnership set forth in the certificate of the _____ amounting in the whole to Rs. _____
2. In payment of the costs of all parties in this suit, amounting to Rs. _____
[These costs must be ascertained before the decree is drawn up.]
3. In payment of the sum of Rs. _____ to the plaintiff as his share of the partnership assets, of the sum of Rs. _____, being the residue of the said sum of Rs. _____ now in Court, to the defendant as his share of the partnership assets.
[Or, and that the remainder of the said sum of Rs. _____ be paid to the said plaintiff (or defendant) in part payment of sum of Rs. _____ certified to be due to him in respect of the partnership accounts.]
4. And that the defendant [or plaintiff] do on or before the day of _____ pay to the plaintiff [or defendant] the sum of Rs. _____ being the balance of the said sum of Rs. _____ due to him, which will then remain due.

No. 23.

DECREE FOR RECOVERY OF LAND AND MESNE PROFITS.

(Title.)

It is hereby decreed as follows:—

1. That the defendant do put the plaintiff in possession of the property specified in the schedule hereunto annexed.
2. That the defendant do pay to the plaintiff the sum of Rs. _____ with interest thereon at the rate of _____ per cent. per annum to the date of realization on account of mesne profits which have accrued due prior to the institution of the suit.
Or
2. That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit.
3. That an enquiry be made as to the amount of mesne profits from the institution of the suit until [the delivery of possession to the decree-holder] [the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court] [the expiration of three years from the date of the decree].

SCHEDULE.

LOC. AMS.—[MADRAS.] Insert the following:—

LEG REF.

¹Here insert the name of the proper officer.

NOTES.

Code, describes it as a form for a preliminary decree in a suit for dissolution of part-

nership and the taking of partnership accounts, it is just as much applicable when the Court is asked to declare that a dissolution has taken place and an account is still required. (Beckett, J.) 40 P.L.R. 753= 1938 Lah. 758.

No. 24.

DECREE SANCTIONING A COMPROMISE OF A SUIT ON BEHALF OF A MINOR
OR LUNATIC.

(Title.)

This suit coming on this day for final disposal in the presence of etc., and C.D., the defendant, a minor by E.F., his guardian *ad litem*, applying that this suit may be compromised in the terms of an agreement in writing dated the _____ day of _____ and made between A.B., the plaintiff, of the one part, and the said C.D., by the said guardian *ad litem* of the other part (or, on the terms hereafter set forth), and, it appearing to this Court that the said compromise is fit and proper and for the benefit of the said minor, this Court doth sanction the said compromise on behalf of the said minor, and with the consent of all parties hereto; It is ordered as follows:

(Set out the terms of the compromise.)

[SIND.] Add the following as Form No. 24:—

"No. 24.

DECREE SANCTIONING A COMPROMISE OF A SUIT ON BEHALF OF A MINOR
OR LUNATIC.

(Order 32, sub-rule 1 (a) of rule 7.)

(Title.)

This suit coming on this day for final disposal in the presence of etc., A.B. the plaintiff, a minor by C.D., his next friend (or E.F., the defendant, a minor by G.H., his guardian *ad litem*) applying that this suit may be compromised in the terms of an agreement in writing dated the day of _____ 19 _____ and made between A.B. the plaintiff (by the said next friend) of the one part and the said E.F., (by the said guardian *ad litem*) of the other part (or, on terms hereafter set forth) and, it appearing to this Court that the said compromise is fit and proper and for the benefit of the said minor, this Court doth sanction the said compromise on behalf of the said minor, and with the consent of all parties hereto: It is ordered as follows:—

(Set out the terms of the compromise)."

APPENDIX E.

EXECUTION.

No. 1.

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD NOT
BE RECORDED AS CERTIFIED. (O. 21, R. 2.)

(Title.)

To

Whereas in execution of the decree in the above-named suit has applied to this Court that the sum of Rs. _____ recoverable under the decree has been ^{paid} _____ and ^{adjusted} _____ should be recorded as certified, this is to give you notice that you are to appear before this Court on the _____ day of _____ 19 _____, to show cause why the ^{payment} _____ aforesaid ^{adjustment} _____ should not be recorded as certified.

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____
Judge.

No. 2.

PRECEPT (SECTION 46).

(Title.)

Upon hearing the decree-holder it is ordered that this precept be sent to the Court of _____ at _____ under section 46 of the Code of Civil Procedure, 1908, with directions to attach the property specified in the annexed schedule and to hold the same pending any application which may be made by the decree-holder for execution of the decree.

SCHEDULE.

Dated the _____

day of _____

19 _____

Judge.

No. 3.

ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT. (O. 21, R. 6.)

(Title.)

Whereas the decree-holder in the above suit has applied to this Court for a certificate to be sent to the Court of _____ at _____ for execution of the decree in the above suit by the said Court alleging that the judgment-debtor resides or has property within the local limits of the jurisdiction of the said Court, and it is deemed necessary and proper to send a certificate to the said Court under Order XXI, rule 6 of the Code of Civil Procedure, 1908, it is

Ordered.

That a copy of this order be sent to _____ with a copy of the decree and of any

Dated the day of 19 . Judge.

No. 4.
CERTIFICATE OF NON-SATISFACTION OF DECREE. (O. 21, R. 6.
(Title.)

Dated the _____ day of _____ 19 .

 Judge.

No. 5.
CERTIFICATE OF EXECUTION OF DECREE TRANSFERRED TO ANOTHER COURT.
(O. 21, R. 6.)
(Title.)

Signature of Muharrir in charge
LOC. AM.—[RANGOON.] In the heading of Form No. 5, for the words and figures
Signature of Judge.
6," the word and figures "S. 41" shall be substituted.

APPLICATION FOR EXECUTION OF DECREE. (O. 21, R. 11.)

In the Court of
I,
forth:—

Mode in which the assistance of the Court is required.

what extent.

¹ If partial, strike out "no" and state to

1	2	3	4	5	6	7	10
789 of 1897.	A.B.—Plaintiff.	C.D.—Defendant.	October 11th, 1897.	No.	None.	Rs. 72-4 recorded on application, dated the 4th March, 1899.	Rs. 314-8-2 principal [Interest at 6 per cent. per annum from date of decree till payment].
						Rs. A. P.	
						As awarded in the decree .. 47 10 4	
						Subsequently incurred .. 8 2 0	
						Total .. 55 12 4	
						Against the defendant C.D.	<p>[When attachment and sale of movable property is sought.]</p> <p>I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realised by attachment and sale of defendant's movable property as per annexed list and paid to me.</p> <p>[When attachment and sale of immovable property is sought.]</p> <p>I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the cost of taking out this execution be realised by the attachment and sale of defendant's immovable property specified at the foot of this application and paid to me.</p>

I declare that what is stated herein is true to the best of my knowledge and belief.
Signed , decree-holder.

Dated the day of 19 .

[When attachment and sale of immovable property is sought.]
Description and specification of property.

The undivided one-third share of the judgment-debtor in a house situated in the village of , value Rs. 40, and bounded as follows:—

East by G's house; west by H's house; south by public road; north by private lane and J's house.

I declare that what is stated in the above description is true to the best of my knowledge and belief, and so far as I have been able to ascertain the interest of the defendant in the property therein specified.

Signed , decree-holder.

LOC. AM.—[SIND]. Add the following as column No. 6-A for Form No. 6:—

"6-A. What interest, if any, in the decree transferred by original decree-holder, and date of transfer and name and address of parties thereto."

No. 7.

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE.

(O. 21, R. 16.)¹

(Title.)

To

WHEREAS has made application to this Court for execution of decree in Suit No. of 19 on the allegation that the said decree has been transferred to him by assignment, this is to give you notice that you are to appear before this Court

on the day of 19 , to show cause why execution should not be granted.

GIVEN under my hand and the seal of the Court, this day of 19 .

No. 8.

WARRANT OF ATTACHMENT OF MOVABLE PROPERTY IN EXECUTION OF A DECREE FOR MONEY. (O. 21, R. 30.)

(Title.)

To

The Bailiff of the Court

WHEREAS was ordered by decree of this Court passed on the day of

LEG. REF.

¹ App. E, No. 7.—The words "R. 16" for the words "R. 22" were substituted by Act X of 1914, Sch. I.

DECREE.			
Principal ..			
Interest ..			
Costs ..			
Costs of execution.			
Further interest ..			
Total ..			

19 , in suit No. of
 19 , to pay to the plaintiff the sum of Rs. as noted in
 the margin; and whereas the said sum of Rs. has not
 been paid. These are to command you to attach the mov-
 able property of the said as set forth in the schedule here-
 unto annexed or which shall be pointed out to you by the said
 and unless the said shall pay to you
 the said sum of Rs. together with Rs. the cost of
 this attachment, to hold the same until further orders from
 this Court.

You are further commanded to return this warrant on
 or before the day of 19 , with an en-
 dorsement certifying the day on which and manner in which it
 has been executed or why it has not been executed.

Given under my hand and the seal of the Court, this
 day of 19 .

Schedule.

LOC. AM.—[MADRAS.] In Appendix E—Form No. 8 between the words "command you
 to attach" and the words "the movable property of the said" add the words "on or before
 the day of 19 ."
 Judge.

No. 9.

WARRANT FOR SEIZURE OF SPECIFIC MOVABLE PROPERTY ADJUDGED BY DECREE. (O. 21, R. 31.)

(Title.)

To The Bailiff of the Court

WHEREAS was ordered by decree of this Court passed on
 the day of 19 , in suit No. of 19 ,
 to deliver to the plaintiff the movable property (or a share in the
 movable property) specified in the schedule hereunto annexed, and whereas the said pro-
 perty (or share) has not been delivered;

These are to command you to seize the said movable property (or a
 share of the said movable property) and to deliver it to the plaintiff or to such person as he
 may appoint in his behalf.

GIVEN under my hand and the seal of the Court this
 day of 19 .

Schedule.

Judge.

No. 10.

NOTICE TO STATE OBJECTIONS TO DRAFT OF DOCUMENT. (O. 21, R. 34.)

(Title.)

To TAKE notice that on the day of 19 , the decree-holder
 in the above suit presented an application to this Court that the Court may execute on your
 behalf a deed of , whereof a draft is hereunto annexed, of the immovable
 property specified hereunder, and that the day of 19 ,
 is appointed for the hearing of the said application, and that you are at liberty to appear
 on the said day and to state in writing any objections to the said draft.

Description of property.

GIVEN under my hand and the seal of the Court, this
 day of 19 .

Judge.

No. 11.

WARRANT TO THE BAILIFF TO GIVE POSSESSION OF LAND, ETC. (O. 21, R. 35.)

(Title.)

To The Bailiff of the Court

WHEREAS the undermentioned property in the occupancy of has been
 decreed to the plaintiff in this suit; you are hereby directed to put
 the said in possession of the same, and you are hereby authorised to remove
 any person bound by the decree who may refuse to vacate the same.

GIVEN under my hand and the seal of the Court, this
 day of 19 .

Schedule.

Judge.

No. 12.
NOTICE TO SHOW CAUSE WHY WARRANT OF ARREST SHOULD NOT ISSUE.
(O. 21, R. 37.)
(Title.)

To

WHEREAS _____ has made application to this Court for execution of decree in Suit No. _____ of 19____, by arrest and imprisonment of your person, you are hereby required to appear before this Court on the _____ day of 19____, to show cause why you should not be committed to the civil prison in execution of the said decree.

GIVEN under my hand and the seal of the Court, this day of _____ 19____.

Judge.

No. 13.
WARRANT OF ARREST IN EXECUTION. (O. 21, R. 38.)
(Title.)

To

The Bailiff of the Court.

WHEREAS

_____ was adjudged by a decree of the Court in suit No. _____ of 19____, dated the _____ day of _____ 19____, to pay to the decree-holder the sum of Rs. _____ as noted in the margin, and whereas the said sum of Rs. _____ has not been paid to the said decree-holder in satisfaction of the said decree, these are to command you to arrest the said judgment-debtor and unless the said judgment-debtor shall pay to you the said sum of Rs. _____ together with Rs. _____ for the costs of executing this process, to bring the said defendant before the Court with all convenient speed. You are further commanded to return this warrant on or before the day of _____ 19____, with an endorsement certifying the day on which and manner in which it has been executed, or the reason why it has not been executed.

DECREE.			
Principal ..			
Interest ..			
Costs ..			
Execution..			
Total ..			

GIVEN under my hand and the seal of the Court, this day of _____ 19____.

Judge.

LOC. AM.—[MADRAS.] In Form No. 13 between the words "the cost of executing this process", and the words "to bring this defendant", add the words "or unless satisfaction of the decree be endorsed by the decree-holder on the warrant in the manner provided in Order XXI, rule 25 (2)."

No. 14.
WARRANT OF COMMITTAL OF JUDGMENT-DEBTOR TO JAIL. (O. 21, R. 40.)
(Title.)

To

The Officer in charge of the Jail at

WHEREAS

_____ who has been brought before this Court this day of _____ 19____, under a warrant in execution of a decree which was made and pronounced by the said Court on the _____ day of _____ 19____, and by which decree it was ordered that the said _____ should pay _____; And whereas the said _____ has not obeyed the decree nor satisfied the Court that he is entitled to be discharged from custody; you are hereby, in the name of the King-Emperor of India, commanded and required to take and receive the said _____ into the civil prison and keep him imprisoned therein for a period not exceeding _____ or until the said decree shall be fully satisfied, or the said _____ shall be otherwise entitled to be released according to the terms and provisions of section 58 of the Code of Civil Procedure, 1908; and the Court does hereby fix _____ annas per diem as the rate of the monthly allowance for the subsistence of the said _____ during his confinement under this warrant of committal.

GIVEN under my signature and the seal of the Court, this day of _____ 19____.

Judge.

LOC. AM.—[MADRAS.] Insert the following as Form 14-A:—

No. 14-A.
ORDER OF ENTRUSTMENT OF JUDGMENT-DEBTOR TO THE CUSTODY OF AN OFFICER OF COURT.

[Order XXI, rule 40, sub-rule (2) and the proviso to sub-rule (3), Civil Procedure Code.]
IN THE COURT OF THE _____ OF _____

To

The Bailiff of the Court,

WHEREAS who has been brought before this Court, this day of 19 , under warrant in execution of a decree which was made and pronounced by the said Court on the day of 19 , and by which decree, it was ordered that the said judgment-debtor should pay Rs.

And whereas the judgment-debtor has been ordered to be kept in the custody of an officer of the Court pending the enquiry under Order XXI, rule 40, sub rule (2),

And whereas the said judgment-debtor has to be given an opportunity of satisfying the decree and for this end this Court is of opinion that the said judgment-debtor may be left in the custody of an Officer of Court,

You are hereby in the name of the King-Emperor of India commanded and required to take and receive the said judgment-debtor into your custody and keep him in that custody for a period of days or until further orders of this Court. You are hereby further informed that he is not to be allowed to go anywhere except in your company. You are further required to produce the said judgment-debtor before this Court at the expiration of the period specified, if the decree be not sooner satisfied.

Given under my hand and the seal of the Court, this day of 19 .

By order
Central Nazir.

No. 15.

ORDER FOR THE RELEASE OF A PERSON IMPRISONED IN EXECUTION OF A DECREE.

(Sections 58, 59.)

(Title.)

To

The Officer in charge of the Jail at

UNDER orders passed this day, you are hereby directed to set free judgment-debtor now in your custody.

Dated

Judge.

LOC. AMS.—[CALCUTTA.] Insert the following after Form No. 15, Appendix E:—

No. 15-A.

BOND FOR SAFE CUSTODY OF MOVABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF ANY PERSON AND SURETIES. [O. XXI-A, Rr. 3 (a) and 5.]

In the Court of

at

Civil Suit No.

of

A. B. of

against

C. D. of

Know all men by these presents that we, I. J. of etc., and K. L. of etc., and M. N. of etc., are jointly and severally bound to the Judge of the Court of in Rupees to be paid to the said Judge, for which payment to be made we bind ourselves, and each of us in the whole, our and each of our heirs, executors and administrators jointly and severally, by these presents.

Dated this

day of

19 .

And whereas the movable property, livestock specified in the schedule hereunto annexed has been attached under a warrant from the said Court dated the day of 19 , in execution of a decree in favour of in Suit No. of 19 , on the file of and the said property has been left in the charge of the said I. J.

Now the condition of this obligation is that, if the above bounden I. J. shall duly account for and produce when required before the said Court all and every the property livestock aforesaid (and shall properly maintain and take due care of the livestock aforesaid) and shall obey any further order of the Court in respect thereof, then this obligation shall be void; otherwise it shall remain in full force and be enforceable against the above bounden I. J. in the execution proceeds.

I. J.

K. L.

M. N.

Signed and delivered by the above bounden in the presence of

[MADRAS.] Form 15. For the word "Dated" substitute the words "Given under my hand and the seal of the Court, this day of 19 ."

[Lahore and Madras.] Add the following form:—

No. 15-A.

BOND FOR SAFE CUSTODY OF MOVABLE PROPERTY ATTACHED AND LEFT
IN CHARGE OF PERSON INTERESTED AND SURETIES. (O. 21, R. 43.)

In the Court of _____ at _____
Civil Suit No. _____ of _____

A.B. of _____

against _____

C.D. of _____

Know all men by these presents that we, I.J. of _____ etc., and K.L. of _____ etc., and M.N. of _____ etc., are jointly and severally bound to the Judge of the Court of _____ in Rupees _____ to be paid to the said Judge, for which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this _____ day of _____ 19 _____.

AND WHEREAS movable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the _____ day of _____ 19 _____, in execution of a decree in favour of _____ in Suit No. _____ of _____ on the file of _____ and the said property has been in the charge of the said I.J.

Now the condition of this obligation is that, if the above bounden I.J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void; otherwise it shall remain in full force.

I.J.
K.L.
M.N.

Signed and delivered by the above bounden _____

in the presence of _____

[LAHORE.] Add the following as Form No. 15-B:—

No. 15-B.

BOND FOR SAFE CUSTODY OF MOVABLE PROPERTY ATTACHED AND LEFT IN
CHARGE OF ANY PERSON AND SURETIES. [O. 21, R. 43 (1) (c).]

In the Court of _____ at _____
Civil Suit No. _____ of 19 _____.

A.B. of _____

against _____

C.D. of _____

Know all men by these presents that we, I.J. of _____ etc., and K.L. of _____ etc., and M.N. of _____ etc., are jointly and severally bound to the Judge of the Court of _____ in Rupees _____ to be paid to the said Judge, for which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this _____ day of _____ 19 _____.

And whereas the movable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court dated the _____ day of _____ 19 _____, in execution of a decree in favour of _____ in Suit No. _____ of _____ on the file of _____ and the said property has been left in the charge of the said I.J.

Now the condition of this obligation is that, if the above bounden I.J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void, otherwise it shall remain in full force and be enforceable against the above bounden I.J. in accordance with the procedure laid down in section 145, Civil Procedure Code, as if the aforesaid I.J. were a surety for the restoration of property taken in execution of a decree.

I.J.
K.L.
M.N.

Signed and delivered by the above bounden in the presence of
[RANGOON.] The following shall be inserted as Form 15-A:—

No. 15-A.

FORM OF RECEIPT FOR MONEY DEPOSITED IN CONNECTION WITH THE
ATTACHMENT OF PROPERTY TOGETHER WITH NOTICE TO DECREE-HOLDER.

In the Court of _____

Execution Case No. _____ of 19 _____

versus _____

Received the sum of Rs. _____ on account of the following expenditure to be incurred in connection with attachment of property as per list appended:—

Rs. A. P.

* Strike out if used in Courts other than the High Court of Judicature at Rangoon, and the Small Cause Court, Rangoon.

† Strike out if used in the High Court of Judicature at Rangoon, and the Small Cause Court, Rangoon.

Process Fee Rules—

*15 (1) (b) (ii)

†17 (i) (c) (ii) (2)

1. Custody fees.
2. Feeding charges.
3. Conveyance charges.
4. Other expenses (to be specified).

Total ..

N.B.—The decree-holder is hereby warned that the sum deposited by him for recurring charges will be exhausted on the day of 19, and that unless a further deposit is made before that date the attachment will cease.

Dated this day of 19

Bailiff.

"List of property to be attached."

No. 16.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVABLE PROPERTY TO WHICH THE DEFENDANT IS ENTITLED TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE IMMEDIATE POSSESSION THEREOF. (O. 21, R. 46.)

(Title.)

To

WHEREAS has failed to satisfy a decree passed against on the day of 19 in Suit No. of 19, in favour of for Rs. ; It is ordered that the defendant be, and is hereby, prohibited and restrained, until the further order of this Court, from receiving from the following property in the possession of the said that is to say, to which the defendant is entitled, subject to any claim of the said, and the said is hereby prohibited and restrained, until the further order of this Court, from delivering the said property to any person or persons whomsoever.

Given under my hand and the seal of the Court, this day of 19

Judge.

No. 17.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS NOT SECURED BY NEGOTIABLE INSTRUMENTS. (O. 21, R. 46.)

(Title.)

To

WHEREAS has failed to satisfy a decree passed against on the day of 19 in Suit No. of 19 in favour of for Rs. ; It is ordered that the defendant be, and is hereby prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from you to the said defendant namely and that you, the said, be, and you are hereby prohibited and restrained, until the further order of this Court, from making payment of the said debt, or any part thereof, to any person whomsoever or otherwise than into this Court.

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

No. 18.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES IN THE CAPITAL OF A CORPORATION. (O. 21, R. 46.)

(Title.)

To

Secretary of Defendant and to Corporation.
WHEREAS has failed to satisfy a decree passed against on the day of 19, in Suit No. of 19, in favour of for Rs. ; It is ordered that you, the defendant, be, and you are hereby, prohibited and restrained, until the further order of this Court, from making any transfer of shares in the aforesaid Corporation, namely, or from receiving payment of any dividends thereon; and you,

the Secretary of the said Corporation, are hereby prohibited and restrained from permitting any such transfer or making any such payment.

Given under my hand and the seal of the Court, this _____ day of _____ 19____ Judge.

No. 19.

ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR SERVANT OF RAILWAY COMPANY OR LOCAL AUTHORITY. (O. 21, R. 48.)

(Title.)

To

WHEREAS _____, judgment-debtor in the above-named case, is a (*describe office of judgment-debtor*) receiving his salary (*or* allowances at your hands; and whereas _____, decree-holder in the said case, has applied in this Court for the attachment of the salary (*or* allowances) of the said _____ to the extent of _____ due to him under the decree; You are hereby required to withhold the said sum of _____ from the salary of the said _____ in the monthly instalments of _____ and to remit the said sum (*or* monthly instalments) to this Court.

Given under my hand and the seal of the Court, this _____ day of _____ 19____ Judge.

No. 20.

ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT. (O. 21, R. 51.)

(Title.)

To

The Bailiff of the Court.

WHEREAS an order has been passed by this Court on the _____ day of _____ 19____, for the attachment of _____; you are hereby directed to seize the said _____ and bring the same into Court.

Given under my hand and the seal of the Court, this _____ day of _____ 19____ Judge.

No. 21.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY OR OF ANY SECURITY IN THE CUSTODY OF A COURT OF JUSTICE OR ¹[PUBLIC OFFICER]. (O. 21, R. 52.)

(Title.)

To
SIR,

The plaintiff having applied, under R. 52 of O. 21 of the Code of Civil Procedure, 1908, for an attachment of certain money now in your hands (*here state how the money is supposed to be in the hands of the person addressed, on what account, etc.*), I request that you will hold the said money subject to the further order of this Court.

I have the honour to be,

SIR,

Your most obedient servant,
Judge.

Dated the _____ day of _____ 19____

No. 22.

NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH PASSED IT. (O. 21, R. 53.)

(Title.)

To

The Judge of the Court of _____

SIR,

I have the honour to inform you that the decree obtained in your Court on the _____ day of _____ 19____, in which he was _____ and _____ in Suit No. _____ of 19____, has been attached by this Court on the application of _____, the _____ in the suit specified above. You are

LEG. REF.

¹ Words within brackets, substituted for words "Officer of Government," by A.O., 1937.

therefore requested to stay the execution of the decree of your Court until you receive an intimation from this Court that the present notice has been cancelled or until execution of the said decree is applied for by the holder of the decree now sought to be executed or by his judgment-debtor.

I have the honour, etc.,
Judge.

Dated the _____ day of _____ 19 ____.

No. 23.

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE DECREE.
(O. 21, R. 53.)

(Title.)

To

WHEREAS an application has been made in this Court by the decreeholder in the above suit for the attachment of a decree obtained by you on the day of _____ 19 ____, in the Court of _____ in Suit No. _____ of 19 ____, in which _____ was _____ and _____; It is ordered that you, the said _____ are hereby, prohibited and restrained, until the further order of this Court, from transferring or charging the same in any way. _____ and you

Given under my hand and the seal of the Court, this _____ day of _____ 19 ____.
Judge.

No. 24.

ATTACHMENT IN EXECUTION.
PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF IMMOVABLE
PROPERTY. (O. 21, R. 54.)

(Title.)

To

WHEREAS you have failed to satisfy a decree passed against you on the day of _____ 19 ____, in Suit No. _____ of 19 ____, in favour of _____ defendant.
_____ for Rs. _____; It is ordered that you, the said _____ be and you are hereby, prohibited and restrained, until the further order of this Court, from transferring or charging the property specified in the schedule hereunto annexed, by sale, gift or otherwise, and that all persons be, and that they are hereby, prohibited from receiving the same by purchase, gift or otherwise.

Given under my hand and the seal of the Court, this _____ day of _____ 19 ____.

Schedule.

Judge.

No. 25.

ORDER FOR PAYMENT TO THE PLAINTIFF, ETC., OF MONEY, ETC., IN THE
HANDS OF A THIRD PARTY. (O. 21, R. 56.)

(Title.)

To

WHEREAS the following property _____ has been attached in execution of a decree in Suit No. _____ of _____ 19 ____, passed on the _____ day of _____ 19 ____, in favour of _____ for Rs. _____; It is ordered that the property so attached, consisting of Rs. _____ in money and Rs. _____ in currency-notes, or sufficient part thereof to satisfy the said decree, shall be paid over by you, the said _____ to _____

Given under my hand and the seal of the Court, this _____ day of _____ 19 ____.
Judge.

No. 26.

NOTICE TO ATTACHING CREDITOR. (O. 21, R. 58.)

(Title.)

To

WHEREAS _____ has made application to this Court for the removal of attachment on _____ placed at your instance in execution of the decree in Suit No. _____ of 19 ____, this is to give you notice to appear before this Court on _____ the _____ day of _____ 19 ____, either in person or by a pleader of the Court duly instructed to support your claim, as attaching creditor.

Given under my hand and the seal of the Court, this day of _____ 19 ____.

No. 27.
WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE FOR MONEY.
 (O. 21, R. 66.)
 (Title.)

To The Bailiff of the Court
 THESE are to command you to sell by auction, after giving _____ days' previous notice, by affixing the same in this Court-house, and after making due proclamation, the _____ property attached under a warrant from this Court, dated the _____ day of _____ 19____, in execution of a decree in favour of _____ in Suit No. _____ of 19____, or so much of the said property as shall realize the sum of Rs. _____ being the _____ of the said decree and costs still remaining unsatisfied.

You are further commanded to return this warrant on or before the day of _____ 19____, with an endorsement certifying the manner in which it has been executed, or the reason why it has not been executed.

Given under my hand and the seal of the Court, this _____ day of _____ 19____
 Judge.

No. 28.
NOTICE OF THE DAY FIXED FOR SETTLING A SALE PROCLAMATION.
 (O. 21, R. 66.)
 (Title.)

To _____
 WHEREAS in the above-named suit _____ Judgment-debtor. for the sale of _____, the decree-holder has applied that the _____ day of _____; you are hereby informed 19____, has been fixed for settling the terms of the proclamation of sale.

Given under my hand and the seal of the Court, this _____ day of _____ 19____
 Judge.

No. 29.
PROCLAMATION OF SALE. (O. 21, R. 66.)
 (Title.)

Notice is hereby given that, under R. 64 of O. 21 of the Code of Civil Procedure, (1) S. No. _____ of 1908, an order has been passed by this Court for the sale of the _____ decided by attached property mentioned in the annexed schedule, in satisfaction of the claim of the decree-holder in the suit mentioned in the margin (1) amounting with costs and interest up to date of _____ was plaintiff and _____ was defendant. sale to the sum of _____

The sale will be by public auction, and the property will be put up for sale in the lots specified in the schedule. The sale will be of the property of the judgment-debtors abovenamed as mentioned in the schedule below; and the liabilities and claims attaching to the said property, so far as they have been ascertained, are those specified in the schedule against each lot.

In the absence of any order of postponement, the sale will be held by _____ at the monthly sale commencing at _____ o'clock on the _____ at _____

In the event, however of the debt above specified and of the costs of the sale being tendered or paid before the knocking down of any lot, the sale will be stopped.

At the sale the public generally are invited to bid, either personally or by duly authorised agent. No bid by, or on behalf of, the judgment-creditors abovementioned, however will be accepted, nor will any sale to them be valid without the express permission of the Court previously given. The following are the further

Conditions of Sale.

1. The particulars specified in the schedule below have been stated to the best of the information of the Court, but the Court will not be answerable for any error, mis-statement or omission in this proclamation.

2. The amount by which the biddings are to be increased shall be determined by the officer conducting the sale. In the event of any dispute arising as to the amount bid, or as to the bidder, the lot shall at once be again put up to auction.

3. The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid, and provided that it shall be in the discretion of the Court or Officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so.

4. For reason recorded, it shall be in the discretion of the officer conducting the sale to adjourn it subject always to the provisions of R. 69 of O. 21.

NOTES.

App. E, Form No. 29.—The effect of condition 3 in form No. 29, App. E, is to give the Court a *Quasi* revisional discretion

in the matter and not to require the Court itself to knock down the property. 9 Rang. 608=135 I.C. 654=1932 Rang. 17 (19 C. W.N. 633, Ref.).

5. In the case of movable property, the price of each lot shall be paid at the time of sale or as soon after as the officer holding the sale directs and in default of payment the property shall forthwith be again put up and re-sold.

6. In the case of immovable property, the person declared to be purchaser shall pay immediately after such declaration a deposit of 25 per cent. on the amount of his purchase-money to the officer conducting the sale, and in default of such deposit the property shall forthwith be put up again and re-sold.

7. The full amount of the purchase-money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of the property exclusive of such day, or if the fifteenth day be a Sunday or other holiday, then on the first office day after the fifteenth day.

8. In default of payment of the balance of purchase-money within the period allowed, the property shall be re-sold after the issue of a fresh notification of sale. The deposit, after defraying the expenses of the sale, may, if the Court thinks fit, be forfeited to Government and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

Given under my hand and the seal of the Court, this day of 19 Judge.

Schedule of Property.

Number of lot.	Description of property to be sold, with the name of each owner where there are more judgment-debtors than one.	The revenue assessed upon the estate or part of the estate; if the property to be sold is an interest in an estate or a part of an estate paying revenue to Government.	Detail of any incumbrances to which the property is liable.	Claims, if any, which have been put forward to the property and any other known particulars bearing on its nature and value.

LOC. AMS.—[ALLAHABAD.] Form No. 29. *Delete* the sentence "No bid by previously given" in the paragraph above "Conditions of sale."

[MADRAS.] *Add* the following as a "Note" to Form No. 29 (Proclamation of sale) of Appendix E to Schedule I of the Code of Civil Procedure, 1908:—

"Note.—The title-deeds relating to the property have not been filed in Court, and the purchaser will take the property subject to the risk of there being mortgages by deposit of title-deeds, or mortgages not disclosed in the encumbrance certificate".

No. 30.

ORDER ON THE NAZIR FOR CAUSING SERVICE OF PROCLAMATION OF SALE.

(O. 21, R. 66.)

(Title.)

To

The Nazir of the Court.

WHEREAS an order has been made for the sale of the property of the judgment-debtor specified in the schedule hereunder annexed, and whereas the

day of 19 has been fixed for the sale of the said property,

copies of the proclamation of sale are by this warrant made over to you and you are hereby ordered to have the proclamation published by beat of drum within each of the properties specified in the said schedule to affix a copy of the said proclamation on a conspicuous part of each of the said properties and afterwards on the Court-house, and then to submit to this Court a report showing the dates on which and the manner in which the proclamations have been published.

Dated the

day of 19 Judge.

No. 31.

CERTIFICATE BY OFFICER HOLDING A SALE OF THE DEFICIENCY OF PRICE ON A RE-SALE OF PROPERTY BY REASON OF THE PURCHASER'S DEFAULT. (O. 21, R. 71.)

(Title.)

Certified that at the re-sale of the property in execution of the decree in the above named suit, in consequence of default on the part of purchaser, there was a deficiency

NOTES.

App. E, Form No. 31.—At an execution sale the deficiency on re-sale by reason of the

purchaser's default was not certified by the officer holding the sale in accordance with Form No. 31 in App. E of the C.P. Code.

in the price of the said property amounting to Rs. , and that the expenses attending such resale amounted to Rs. , making a total of Rs. , which sum is recoverable from the defaulter.

Dated the _____ day of _____ 19 _____
Officer holding the sale.

No. 32.

NOTICE TO PERSON IN POSSESSION OF MOVABLE PROPERTY SOLD IN EXECUTION. (O. 21, R. 79.)
 (Title.)

To

WHEREAS _____ has become the purchaser at a public sale in execution of the decree in the above suit of _____ now in your possession, you are hereby prohibited from delivering possession of the said _____ to any person except the said _____

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____
Judge.

No. 33.

PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION TO ANY OTHER THAN THE PURCHASER. (O. 21, R. 79.)
 (Title.)

To

WHEREAS _____ and to _____ has become the purchaser at a public sale in execution of the decree in the above suit of _____ being debts due from you _____ to you

; it is ordered that you _____ be, and you are hereby prohibited from receiving, and you _____ from making payment of, the said debt to any person or persons except the said _____

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____

Judge.

No. 34.

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD IN EXECUTION. (O. 21, R. 79.)
 (Title.)

To

and _____, Secretary of _____ Corporation.

WHEREAS _____ has become the purchaser at a public sale in execution of the decree, in the above suit, of certain shares in the above Corporation, that is to say, of _____ standing in the name of you _____

; it is ordered that you _____ be, and you are hereby, prohibited from making any transfer of the said shares to any person except the said _____, the purchaser aforesaid or from receiving any dividends thereon; and you _____, Secretary of the said Corporation, from permitting any such transfer or making any such payment to any person except the said _____, the purchaser aforesaid.

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____

Judge.

No. 35.

CERTIFICATE TO JUDGMENT-DEBTOR AUTHORIZING HIM TO MORTGAGE, LEASE, OR SELL PROPERTY. (O. 21, R. 83.)
 (Title.)

WHEREAS in execution of the decree passed in the above suit an order was made on the _____ day of _____ 19 _____, for the sale of the under-mentioned property of the judgment-debtor _____, and whereas the Court has, on the application of the said judgment-debtor, postponed the said sale to enable him to raise the amount of the decree by mortgage, lease or private sale of the said property or of some part thereof.

This is to certify that the Court doth hereby authorize the said judgment-debtor to make the proposed mortgage, lease or sale within a period of _____ from the date of this certificate: provided that all moneys payable under such mortgage, lease or sale shall be paid into this Court and not to the said judgment-debtor.

NOTES.

Held, that the absence of such a certificate recovering the deficiency arising on the resale. 141 I.C. 367=29 N.L.R. 52=1933 would not prevent the decree-holder from N. 123.

Description of property.

day of

Given under my hand and the seal of the Court, this
19 .*Judge.*

No. 36.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE.

(O. 21, Rr. 90, 92.)

(Title.)

To

WHEREAS the under-mentioned property was sold on the
day of 19 , in execution of the decree passed in the above-
named suit and whereas the decree-holder [or
judgment-debtor], has applied to this Court to set aside the sale of the said property on the
ground of a material irregularity [or fraud] in publishing [or conducting] the sale, namely,
that

Take notice that if you have any cause to show why the said application should not be
granted, you should appear with your proofs in this Court on the
day of 19 , when the said application will be heard and determined.

Given under my hand and the seal of the Court, this
day of 19 .

*Description of property.**Judge.*

No. 37.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE.

(O. 21, Rr. 91, 92.)

(Title.)

To

WHEREAS , the purchaser of the under-mentioned property
sold on the day of 19 , in execution of the
decree passed in the above-named suit, has applied to this Court to set aside the sale of
the said property on the ground that the judgment-debtor,
had no saleable interest therein:

Take notice that if you have any cause to show why the said application should not be
granted, you should appear with your proofs in this Court on the
day of 19 , when the said application will be heard and
determined.

Given under my hand and the seal of the Court, this
19 day of

*Description of property.**Judge.*

No. 38.

CERTIFICATE OF SALE OF LAND. (O. 26, R. 94.)

(Title.)

This is to certify that has been declared the purchaser at
a sale by public auction on the day of 19 , of in execution of decree in this suit, and that the said sale has
been duly confirmed by this Court.

Given under my hand and the seal of the Court, this
19 day of

Judge.

LOC. AMS.—[NAGPUR.] In Form No. 38, insert the words "for Rs."
between the words "The purchaser" and "at a sale".

[PATNA.] Substitute the following form for Form No. 38:—

No. 38.1

CERTIFICATE OF SALE OF LAND. (O. 21, R. 94.)

District

In the Court of

Execution Case No.

at

of 19 .

Decree-holder

versus

Judgment-debtor.

This is to certify that _____ son of _____
 _____, by caste _____, by occupation _____
 _____, resident of _____ Thana _____
 District _____, has been declared the purchaser at a sale by public auction on
 the _____ day of _____ 19____, of the
 property specified below in execution of the decree in Suit No. _____
 of this Court¹ and that the said sale has been duly confirmed by this Court.
 Given under my hand and the seal of the Court, this _____ day² of
 19____

Judge.

Specification and price of properties.³

No. 39.

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE IN
 EXECUTION. (O. 21, R. 95.)
 (Title.)

To

The Bailiff of the Court.

WHEREAS _____ has become the certified purchaser of
 _____ at a sale in execution of decree in Suit No. _____
 of 19____; you are hereby ordered to put the said _____, the
 certified purchaser, as aforesaid, in possession of the same.
 Given under my hand and the seal of the Court, this _____ day of
 19____

Judge.

LOC. AM.—[MADRAS.] Substitute the following for the old one:—
 ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE IN
 EXECUTION. (O. 21, R. 95.)
 (Title.)

To

The Bailiff of the Court.

WHEREAS _____ has become the certified purchaser of
 _____ at a sale in execution of decree in Suit No. _____ of
 19____; you are hereby ordered to put the said _____, the certified pur-
 chaser, as aforesaid, in possession of the same; and you are hereby further required to state
 in your return whether there are crops on the land and whether you have delivered them
 to _____, the certified purchaser.
 Given under my hand and the seal of the Court, this _____ day of
 19____

Judge.

No. 40.

SUMMONS TO APPEAR AND ANSWER CHARGE OF OBSTRUCTING EXECUTION
 OF DECREE. (O. 21, R. 97.)
 (Title.)

To

WHEREAS _____, the decree-holder in the above suit, has com-
 plained to this Court that you have resisted [or obstructed] the officer charged with the
 execution of the warrant for possession;

You are hereby summoned to appear in this Court on the _____ day of
 19____, at _____ A.M., to answer the said complaint.
 Given under my hand and the seal of the Court, this _____ day of
 19____

Judge.

No. 41.

WARRANT OF COMMITTAL. (O. 21, R. 98.)
 (Title.)

To

The Officer-in-charge of the jail at _____

WHEREAS the under-mentioned property has been decreed to
 _____, the plaintiff in this suit, and whereas the Court is satisfied that
 without any just cause resisted [or obstructed] and is still resisting [or obstructing]
 the said _____ in obtaining possession of the property, and whereas the said
 has made application to this Court that the said _____ be committed to the

¹ If the decree has been received by trans-
 fer from other Court, enter the name of
 that Court.

² The date when the sale became absolute.

³ Particulars sufficient to identify the
 property including the name of each regis-
 tration sub-district in which any part of the
 property is situated should be fully stated.

civil prison;

You are hereby commanded and required to take and receive the said
into the civil prison and to keep him imprisoned therein for the period of
days.

19 Given under my hand and the seal of the Court, this day of

LOC. AM.—[OUDH] The following form shall be used under the provisions of r. 104
of O. 21:— Judge.

EXECUTION CASE No.

19 .

Decree-holder

vs.

Judgment-debtor.

To

WHEREAS it is alleged that a debt of Rs. judgment-debtor:

is due from you to the

Or that you are liable to deliver to the above-named judgment-debtor the property set forth in the schedule hereto attached; take notice that you are hereby required on or before the day of 19 , to pay into this Court the said sum or Rs. to deliver or account to the Nazir of this Court for the movable property detailed in the attached schedule, or otherwise to appear in person or by advocate, wakil or authorised agent in this Court at 10-30 in the forenoon of the day aforesaid and show cause to the contrary, in default whereof an order for the payment of the said sum, or for the delivery of the said property may be passed against you.

DATED this

day of

19 .

Munsif

Subordinate Judge
at

No. 42.

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND. (Section 72.)
(Title.)

To

, Collector of

SIR,

In answer to your communication No. , dated , representing that the sale in execution of the decree in this suit of land situate within your district is objectionable, I have the honour to inform you that you are authorized to make provision for the satisfaction of the said decree in the manner recommended by you.

I have the honour to be,

SIR,

Your Obedient Servant,
Judge.

LOC. AM.—[ALLAHABAD.] Add the following form:—

No. 43.

The security to be furnished under section 55 (4) shall be, as nearly as may be, by a bond in the following form:—

In the Court of

at

Suit No.

of 19 .

A. B. of

.. Plaintiff

C. D. of

Against

.. Defendant.

WHEREAS in execution of the decree in the suit aforesaid, the said C.D. has been arrested under a warrant and brought before the Court of ; and whereas the said C.D. has applied for his discharge on the ground that he undertakes within one month to apply under section 5 of Act No. III of 1907 to be declared an insolvent, and the said Court has ordered that the said C.D. shall be released from custody if the said C.D. furnish good and sufficient security in the sum of Rs. that he will appear when called upon and that he will within one month from this date apply under section 5 of Act III of 1907 to be declared an insolvent;

Therefore I, E.F., inhabitant of have voluntarily become security, and do hereby bind myself, my heirs and executors, to as Judge of the said Court and his successors in office that the said C.D. will appear at any time when called upon by the said Court, and will apply in the manner and within the time hereinbefore set forth, and in default of such appearance or of such application, I bind myself, my heirs and executors, to pay to the said Court on its order, the sum of Rs.

Witness my hand at

this

day of

19 .

(Sd.) E. F.
Surety.

Witness:

APPENDIX F. SUPPLEMENTAL PROCEEDINGS.

No. 1.

WARRANT OF ARREST BEFORE JUDGMENT. (O. 38, R. 1.) (Title.)

To

The Bailiff of the Court.

WHEREAS

Principal ..	---	---	---
Interest ..	---	---	---
Costs ..	---	---	---
TOTAL ..	---	---	---

, the plaintiff in the above suit claims the sum of Rs. as noted in the margin, and has proved to the satisfaction of the Court that there is probable cause for believing that the defendant is about to . These are to command you to demand and receive from the said the sum of Rs. as sufficient to satisfy the plaintiff's claim, and unless the said sum of Rs. is forthwith delivered to you by or on behalf of the said , to take the said into custody, and to bring him before this Court, in order that he may show cause why he should not furnish security to the amount of Rs. for his personal appearance before the Court, until such time as the said suit shall be fully and finally disposed of, and until satisfaction of any decree that may be passed

against him in the suit.

GIVEN under my hand and the seal of the Court, this

19

day of

Judge.

No. 2.

SECURITY FOR APPEARANCE OF A DEFENDANT ARRESTED BEFORE JUDGMENT. (O. 38, R. 2.) (Title.)

WHEREAS at the instance of , the plaintiff in the above suit the defendant has been arrested and brought before the Court; And whereas on the failure of the said defendant to show cause why he should not furnish security for his appearance, the Court has ordered him to furnish such security; Therefore I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall appear at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the said suit; and in default of such appearance I bind myself, my heirs and executors, to pay to the said Court, at its order, any sum of money that may be adjudged against the said defendant in the said suit.

Witness my hand at this day of 19

(Signed)

Witnesses:

- 1.
- 2.

No. 3.

SUMMONS TO DEFENDANT TO APPEAR ON SURETY'S APPLICATION FOR DISCHARGE. (O. 38, R. 3.) (Title.)

To

WHEREAS , who became surety on the day of 19 , for your appearance in the above suit, has applied to this Court to be discharged from his obligation;

You are hereby summoned to appear in this Court in person on the day of 19 , at A.M., when the said application will be heard and determined.

GIVEN under my hand and seal of the Court, this

19

day of
Judge.

No. 4.

ORDER FOR COMMITTAL. (O. 38, R. 4.) (Title.)

WHEREAS , plaintiff in this suit, has made application to the Court that security be taken for the appearance of , the defendant, to answer any judgment that may be passed against him in the suit; and whereas the Court has called upon the defendant to furnish such security, or to offer a sufficient deposit in lieu of security, which he has failed to do; it is ordered that the said defendant

NOTES.

App. F, Form No. 2.—See 1930 A.L.

J. 913=1931 All. 65.

be committed to the civil prison until the decision of the suit; or, if judgment be pronounced against him, until satisfaction of the decree.

GIVEN under my hand and seal of the Court, this

19

day of
Judge.

No. 5.

ATTACHMENT BEFORE JUDGMENT, WITH ORDER TO CALL FOR SECURITY FOR FULFILMENT OF DECREE. (O. 38, R. 5.)
(Title.)

To

The Bailiff of the Court.

WHEREAS has proved to the satisfaction of the Court that the defendant in the above suit ;
These are to command you to call upon the said defendant on or before the day of 19 , either to furnish security for the sum of rupees to produce and place at the disposal of this Court when required or the value thereof, or such portion of the value as may be sufficient to satisfy any decree that may be passed against him; or to appear and show cause why he should not furnish security; and you are further ordered to attach the said and keep the same under safe and secure custody until the further order of the Court; and you are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this

19

day of

Judge.

No. 6.

SECURITY FOR THE PRODUCTION OF PROPERTY. (O. 38, R. 5.)
(Title.)

WHEREAS at the instance of , the plaintiff in the above suit, the defendant has been directed by the Court to furnish security in the sum of Rs. to produce and place at the disposal of the Court the property specified in the schedule hereunto annexed;

Therefore I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall produce and place at the disposal of the Court, when required, the property specified in the said schedule, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree; and in default of his so doing, I bind myself, my heirs and executors, to pay to the said Court, at its order, the said sum of Rs.

or such sum not exceeding the said sum as the said Court may adjudge.

Schedule.

Witness my hand at

this

day of

19

(Signed.)

Witnesses:

- 1.
- 2.

No. 7.

ATTACHMENT BEFORE JUDGMENT, ON PROOF OF FAILURE TO FURNISH SECURITY. (O. 38, R. 6.)
(Title.)

To

The Bailiff of the Court.

WHEREAS , the plaintiff in the suit, has applied to the Court to call upon , the defendant, to furnish security to fulfil any decree that may be passed against him in the suit, and whereas the Court has called upon the said to furnish such security, which he has failed to do; these are to command

NOTES.

App. F, Form No. 6.—Per Kemp, A. C. J.—The words "Court may adjudge" in Form 6, Appendix F mean that the Court is to be the arbitrator and not that it is merely to decree what the parties consent to. Per Blackwell, J.—The words "as the said Court may adjudge" at the end of Form 6 apply only to a question which might arise in execution in proceedings against the surety. They have no application to the decree

which the Court must pass before requiring the defendant to produce and place at the disposal of the Court the property specified or the value of the same or such portion thereof as may be sufficient to satisfy the decree. Having regard to the definition of the word 'decree' in S. 2 (2) the recording of a compromise and the passing of a decree in accordance therewith would be an adjudication by the Court in the suit. 54 B. 113. =31 Bom.L.R. 1442=1930 B. 122.

you to attach _____, the property of the said _____, and keep the same under safe and secure custody until the further order of the Court; and you are further commanded to return this warrant on or before the _____ day of _____ 19____, with an endorsement certifying the date on which and manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge.

LOC. AM.—[MADRAS.] After Form. 7 of Appendix F to the First Schedule the following Form shall be inserted namely:—

No. 7-A.¹

ATTACHMENT OF IMMOVABLE PROPERTY BEFORE JUDGMENT.

To _____

Whereas on the application of _____ the plaintiff in this suit, the Court called upon you _____ the defendant to furnish security to fulfil any decree that may be passed against you in the suit or to show cause why you should not furnish such security and _____ you have failed to show cause why you should not furnish such security _____ you have failed to furnish the security required within

time fixed by the Court _____ it is ordered that you, the said _____ be and you are hereby prohibited and restrained, until the further order of this Court, from transferring or charging the properties described in the Schedule hereunto annexed, by sale, gift or otherwise, and that all persons be, and that they are hereby, prohibited and restrained from receiving the same by purchase, gift or otherwise.

GIVEN under my hand and the seal of this Court, this _____ day of _____ 19____.

Schedule.

No. 8.

TEMPORARY INJUNCTIONS. (O. 33, R. 1.)

(Title.)

Upon motion made unto this Court by _____, pleader of [or Counsel for] the plaintiff A.B., and upon reading the petition of the said plaintiff in this matter filed [this day] [or the plaint filed in this suit on the _____ day of _____] or the written statement of the said plaintiff filed on the _____ day of _____ and _____] and upon hearing the evidence of _____

add, and also the evidence of _____ in support thereof [if after notice and defendant not appearing: as to service of notice of this motion upon the defendant C.D.]: This Court doth order that an injunction be awarded to restrain the defendant C.D., his servants, agents and workmen, from pulling down or suffering to be pulled down, the house in the plaint in the said suit of the plaintiff mentioned [or in the written statement, or petition of the plaintiff and evidence at the hearing of this motion mentioned], being No. 9, Oilmongers Street, Hindupur, in the Taluk of _____, and from selling the materials whereof the said house is composed, until the hearing of this suit or until the further order of this Court.

Dated this _____ day of _____ 19____.

Judge.

[Where the injunction is sought to restrain the negotiation of a note or bill, the ordering part of the order may run thus:—]

to restrain the defendants _____ and _____ from parting with out of the custody of them or any of them, or endorsing, assigning or negotiating the promissory note [or bill of exchange] in question, dated on or about the _____ etc., mentioned in the plaintiff's plaint [or petition] and the evidence heard at this motion until the hearing of this suit, or until the further order of this Court.

[In Copyright cases]

C.D., his servants, agents or workmen from printing, publishing or vending a book, called _____ to restrain the defendant or any part thereof until the, etc.

[Where part only of a book is to be restrained]

defendant C.D., his servants, agents or workmen, from printing, publishing, selling or otherwise, disposing of such parts of the book in the plaint [or petition and evidence, etc.] mentioned to have been published by the defendant as hereinafter specified, namely, that part of the said book which is entitled _____ and also that part which is entitled [or, which is contained in page _____ to page _____ both inclusive] until _____, etc.

[In Patent cases]

and workmen, from making or vending any perforated bricks [or as the case may be] upon _____ to restrain the defendant C.D., his agents, servants

LEG. REF.

¹ Inserted by Notification in the Fort. St. George Gazette, dated 25th November, 1941.

the principle of the inventions in the plaintiff's plaint [or petition, etc., or written statement, etc.] mentioned, belonging to the plaintiffs, or either of them, during the remainder of the respective terms of the patents in the plaintiff's plaint [or as the case may be] mentioned, and from counterfeiting, imitating or resembling the same inventions, or either of them, or making any addition thereto, or subtraction therefrom, until the hearing, etc.

[In cases of Trade marks]

to restrain the defendant C.D., his servants, agents or workmen, from selling or exposing for sale, or procuring to be sold, any composition or blacking [or as the case may be] described as or purporting to be blacking manufactured by the plaintiff A.B., in bottles having affixed thereto such labels as in the plaintiff's plaint [or petition, etc.] mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the plaintiff A.B., and from using trade-cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff A.B., until the, etc.

[To restrain a partner from in any way interfering in the business.]

to restrain the defendant C.D., his agents and servants from entering into any contract, and from accepting, drawing, endorsing or negotiating any bill of exchange, note or written security in the name of the partnership-firm of B. and D., and from contracting any debt buying and selling any goods, and from making or entering into any verbal or written promise, agreement or undertaking, and from doing, or causing to be done, any act, in the name or on the credit of the said partnership-firm of B. and D., or whereby the said partnership-firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for the performance of any contract, promise or undertaking until the, etc.

No. 9.¹

APPOINTMENT OF A RECEIVER. (O. 40, R. 1.)
(Title.)

To

WHEREAS has been attached in execution of a decree passed in the above suit on the day of 19, in favour of ; You are hereby (subject to your security to the satisfaction of the Court) appointed receiver of the said property under Order XL of the Code of Civil Procedure, 1908, with full powers under the provisions of that Order.

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on . You will be entitled to remuneration at the rate of per cent. upon your receipts under the authority of this appointment.

GIVEN under my hand and the seal of the Court, this day of 19.

LOC. AMS.—[MADRAS.] Substitute the following for Form No. 9 of Appendix F to Schedule I:—

No. 9.²

APPOINTMENT OF A RECEIVER. (O. 40, R. 1.)
(Title.)

WHEREAS it appears to the Court that in the above suit it is just and convenient to appoint a receiver of the properties specified below (or whereas the properties specified below have been attached in execution of a decree passed in the above suit on the day of 19, in favour of).

It is hereby ordered that A.B., be appointed (subject to his giving security to the satisfaction of the Court) the receiver of the said property and of the rents, issues and profits thereof under Order XL of the Code of Civil Procedure, 1908, with all powers under the provisions of that order, except that he shall not without leave of the Court (1) grant leases for a term exceeding three years, or (2) institute suits in any Court (except suits for rent), or (3) institute appeals in any Court (except from a decree in a rent suit) where the value of the appeal is over Rs. 1,000, or (4) expend on the repairs of any property in any period of two years more than half of the net annual rental of the property to be repaired, such rental being calculated at the amount at which the property to be repaired, would be let when in a fair state of repair, provided that such amount shall not exceed Rs. 1,000.

And it is further ordered that the parties—to the above suit and all persons claiming under them do deliver up quiet possession of the properties, movable and immovable, specified below together with all leases, agreements for lease, kabuleats, account books, papers, memoranda and writings relating thereto to the said receiver. And it is further ordered that the said receiver do take possession of the said property movable and immovable, and collect the rents, issues and profits of the said immovable property, and

LEG. REF.

¹ The last two forms were re-numbered "9 and 10" instead of "6 and 7" respectively

by Act X of 1914, Sch. I.
² This form substituted in Madras by Dis. No. 643 of 1914.

that the tenants and occupiers do attorn and pay their rents in arrear and growing rents to the said receiver. And it is further ordered that the said receiver shall have power to bring and defend suits in his own name and shall also have power to use the names of the plaintiffs and defendants where necessary. And it is further ordered that the receipt or receipts of the said receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such receiver.

And it is further ordered that the said receiver do out of the first moneys to be received by him pay the debts due from the said and shall be entitled to retain in his hands the sums of Rs. for current expenses, but subject thereto shall pay his net receipts, as soon as the same come to his hands into Court to the credit of this suit. He shall once in every months file his accounts and vouchers in Court, the first account to be filed on the day of and to be passed on the day of . He shall be entitled to commission at the rate of Rs. per cent., on the net amounts collected by him or to the sum of Rs. per month (or as the case may be) as his remuneration (or he shall act without any remuneration).

And it is further ordered (where an additional office establishment is required) that the said receiver shall be allowed to charge to the estate in addition to his own office establishment the following further establishment:—

(Here enter specification of property.)

GIVEN under my hand and the seal of the Court, this day of 19 .

[PATNA.] Appendix F, Form No. 9.

In the Schedule of costs in the Form of Decree in Appeal No. 9. Appendix G, to the first schedule of the Civil Procedure Code, Act V of 1908, add "copying or typing charges" below the item "Pleader's fee on Rs. " in the columns for Appellant and Respondent, and number the new entry in the first column as "5."

No. 10.¹

BOND TO BE GIVEN BY RECEIVER. (O. 40, R. 3.)

(Title.)

Know all men by these presents, that we, and and are jointly and severally bound to Rs. of the Court of in, to be paid to the said or his successor in office for the time being. For which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally by these presents.

Dated this day of 19 .
Whereas a plaint has been filed in the Court by against for the purpose of [here insert the object of suit]:

And whereas the said has been appointed, by order of the abovementioned Court, to receive the rents and profits of the immovable property and to get in the outstanding movable property in the said plaint named:

Now the condition of this obligation is such, that if the above-bounden shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immovable property, and in respect of the movable property, of the said at such periods as the said Court shall appoint, and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct, then this obligation shall be void, otherwise it shall remain in full force.

Signed and delivered by the above-bounden in the presence of

Note.—If deposit of money is made, the memorandum thereof should follow the terms of the condition of the bond.

LOC. AM.—[ALLAHABAD] Add the following two forms 11 and 12:—

No. 11

The security to be furnished under Order XXXVIII, Rule 9, shall be, as nearly as may be, by a bond in the following form:

In the Court of at Suit No. of 19 .. Plaintiff

versus

.. Defendant,

Amount of suit Rupees

Whereas in the suit above specified the plaintiff aforesaid, has applied to the said Court that the said defendant, may be called on to furnish sufficient security to fulfil any decree that may be passed against him in the said suit, or that on his failure so to do, certain property of the said defendant, may be attached:

And whereas, on the failure of the said defendant, to furnish such security, or, show cause why it should not be furnished, the property aforesaid of the said defendant has been attached by order of the said Court:

Therefore I, inhabitant of, have voluntarily become security and hereby bind myself, my heirs and executors, to as

LEG. REF.

¹ The last two forms were renumbered "9 and 10" instead of "6 and 7" respectively by Act X of 1914, Sch. I.

Judge of the said Court and his successors in office, that the said defendant, shall produce and place at the disposal of the said Court, when required, the property herein below specified, namely (here give description of property or refer to an annexed schedule), or the value of the same, or such portion thereof as may be sufficient to fulfil such decree and shall when required pay the costs of the attachment, and in default of his so doing I bind myself, my heirs and executors, to pay to _____ as Judge of the said Court and his successors in office on its order such sum to the extent of rupees (here enter a sufficient sum to cover the amount of suit with costs and the costs of the attachment) as the said Court may adjudge against the said defendant.

Witness my hand at _____

this _____

day of _____ 19 ____
(Signed.)

Witnesses :

Surety.
(Signed.)

No. 12.

The security to be furnished under Order XXXIX, R. 2 (2) shall be, as far as may be, by a bond in the following form:—

In the Court of _____
of 19 ____

at _____

, Suit No. _____

.. Plaintiff

versus

.. Defendant

Whereas in the suit above specified, instituted by the said plaintiff, to restrain the said defendant _____, from (here state the breach of contract or other injury), the said Court has, on the application of the said plaintiff, granted an injunction to restrain the said defendant from the repetition (or the continuance) of the said breach of contract (or the wrongful act complained of), and required security from the said defendant against such repetition (or continuance);

Therefore I, _____, inhabitant of _____, have voluntarily become security and do hereby bind myself, my heirs and executors to _____ as Judge of the said Court and his successors in office that the said defendant shall abstain from the repetition (or continuance) of the breach of contract aforesaid (or wrongful act, or from the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right), and in default of his so abstaining, I bind myself my heirs and executors to pay into Court, on the order of the Court such sum to the extent of rupees _____ as the Court shall adjudge against the said defendant.

Witness my hand at _____
19 ____

this _____

day of _____

Witnesses :

Surety.

APPENDIX G.

APPEAL, REFERENCE AND REVIEW.

No. 1.

MEMORANDUM OF APPEAL. (O. 41, R. 1.)
(Title.)

The _____

above-named appeals to the _____

in Suit

Court at _____

from the decree of _____

No. _____

of _____

19 ____

, dated the _____

day of _____

19 ____

and sets forth the following grounds of objection to the decree appealed from, namely:—

No. 2.

SECURITY BOND TO BE GIVEN ON ORDER BEING MADE TO STAY EXECUTION OF DECREE.
(O. 41, R. 5.)
(Title.)

To _____

THIS security bond on stay of execution of decree executed by _____ witnesseth:—
That _____ the plaintiff in Suit No. _____ of 19 ____ having sued _____ the

defendant, in this Court and a decree having been passed on the _____ day of _____ 19 ____, in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the _____ Court, the said appeal is still pending.

Now the plaintiff decree-holder having applied to execute the decree the defendant has made an application praying for stay of execution and has been called upon to furnish security. Accordingly I, of my own freewill stand security to the extent of Rs. _____ mortgaging the properties specified in the schedule thereunto annexed, and covenant that if the decree of the first Court be confirmed or varied by the Appellate Court the said defendant shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable

NOTES.

App. G, Form No. 2.—The mere omission of the title and the name of the presiding

officer from a security bond will not make it an invalid document. 1930 A.L.J. 913= 1931 All. 65.

shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this _____ day of _____ 19____.

SCHEDULE.

(Signed.)

Witnessed by:

1.

2.

No. 3.

SECURITY BOND TO BE GIVEN DURING THE PENDENCY OF APPEAL. (O. 41, R. 6)
(Title.)

To

THIS security bond on stay of execution of decree executed by witnesseth:—
That _____, the plaintiff in Suit No. _____ of 19____, having sued _____ the defendant, in this Court and a decree having been passed on the _____ day of _____ 19____ in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the _____ Court, the said appeal is still pending.

Now the plaintiff decree-holder has applied for execution of the said decree and has been called upon to furnish security. Accordingly I of my own free-will, stand security to the extent of Rs. _____, mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be reversed or varied by the Appellate Court, the plaintiff shall restore any property which may be or has been taken in execution of the said decree and shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this _____ day of _____ 19____.

SCHEDULE.

Witnessed by:

1.

2.

(Signed.)

LOC. AM. [MADRAS.] In the second para. after the words "be reversed or varied by the Appellate Court" insert the words "or in further appeal or appeals from the decree of the said Court".

No. 4.

SECURITY FOR COSTS OF APPEAL. (O. 41, R. 10.)
(Title.)

To

THIS security bond for costs of appeal executed by _____ witnesseth:—
This appellant has preferred an appeal from the decree in Suit No. _____ of 19____ against the respondent, and has been called upon to furnish security. Accordingly I, of my own free-will, stand security for the costs of the appeal, mortgaging the properties specified in the schedule hereunto annexed. I shall not transfer the said properties or any part thereof, and in the event of any default on the part of the appellant, I shall duly carry out any order that may be made against me with regard to payment of the costs of appeal. Any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this _____ day of _____ 19____.

SCHEDULE.

Witnessed by:

1.

2.

(Signed.)

No. 5.

INTIMATION TO LOWER COURT OF ADMISSION OF APPEAL. (O. 41, R. 13.)
(Title.)

To

You are hereby directed to take notice that _____, the _____ in the above suit, has preferred an appeal to this Court from the decree passed by you therein on _____ day of _____ 19____.
You are requested to send with all practicable despatch all material papers in the suit.
Dated this _____ day of _____ 19____.

Judge.

No. 6.

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE
APPEAL. (O. 41, R. 14.)

(Title.)

APPEAL from the
day ofof the Court of
19 .

dated the

To

Respondent.

TAKE notice that an appeal from the decree of _____ in this case has been pre-
sented by _____ and registered in this Court, and that the _____ day
of 19 , has been fixed by this Court for the hearing of this appeal.

If no appearance is made on your behalf, by yourselves, your pleader, or by some
one by law authorised to act for you in this appeal, it will be heard and decided in your
absence.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

[Note.—If a stay of execution has been ordered, intimation should be given of the
fact on this notice.]

LOC. AM.—[MADRAS.] Insert the following note in red ink in Form No. 6 of Appen-
dix G to Schedule I, namely:—

"Also take notice that if an address for service is not filed before the aforesaid date
this appeal is liable to be heard and decided as if you had not made an appearance."

Insert the following Forms as 6-A and 6-B in Appendix G to the first schedule of
the Code of Civil Procedure:—

No. 6-A.

NOTICE TO RESPONDENT. (O. 41-A, R. 2.)

(Cause title.)

APPEAL from the
day of

of the Court of

dated the

To

Respondent.

TAKE notice that an appeal from the above decree (order) has been presented by the
above-named appellants and registered in this Court, and that if you intend to defend the
same you must enter an appearance in this Court and give notice thereof to the appellant
or his pleader within 30 days after service of this notice on you.

If no appearance is entered on your behalf by yourself, your pleader or some one
by law authorised to act for you in this appeal, it will be heard and decided in your absence.

The address for service of the appellant is that of his pleader Mr. A. B. of (insert
address) Madras.

(If the appellant appears in person, insert his address for service.)

GIVEN under my hand and the seal of the Court, this _____ day of
19 .

Registrar.

[Interlocutory application No. _____ of 19 , has been made by appellant, and
execution has been stayed (or other order made) by order dated the _____ day of
19 .]

No. 6-B.¹

MEMORANDUM OF APPEARANCE. (O. 41-A, R. 3.)

(Cause title.)

TAKE notice that the _____ respondent intends to
appear and defend the above appeal, and that his address for service of all notices and pro-
cess is (insert address).

The said respondent requires a list of the papers which the appellant proposes to
translate and print.

Dated this _____

day of _____ 19 .

(Signed) C.D.,

Vakil for Respondent.

To the Registrar, High Court of Judicature, Madras.

No. 7.

NOTICE TO A PARTY TO A SUIT NOT MADE A PARTY TO THE APPEAL BUT
JOINED BY THE COURT AS A RESPONDENT. (O. 41, R. 20.)

(Title.)

To

WHEREAS you were a party in Suit No. _____ of 19 , in the Court of _____
and whereas the _____ has preferred an appeal to this Court from the decree

LEG. REF.

¹ Forms 6-A and 6-B inserted in Madras

by Dis. No. 2057 of 1917.

passed against him in the said suit and it appears to this Court that you are interested in the result of the said appeal:

This is to give you notice that this Court has directed you to be made a respondent in the said appeal and has adjourned the hearing thereof till the day of 19, at A.M. If no appearance is made on your behalf on the said day and at the said hour the appeal will be heard and decided in your absence.

GIVEN under my hand and seal of the Court, this day of 19 Judge.

No. 8.

MEMORANDUM OF CROSS-OBJECTION. (O. 41, R. 22.)

(Title.)

WHEREAS the has preferred an appeal to the Court at from the decree of in Suit No. of 19, dated the day of 19, and whereas notice of the day fixed for hearing the appeal was served on the day of 19, the files this memorandum of cross-objection under R. 22 of O. 41 of the Code of Civil Procedure, 1908, and sets forth the following grounds of objection to the decree appealed from, namely:—

No. 9.

DECREE IN APPEAL. (O. 41, R. 35.)

(Title.)

APPEAL No. of 19, from the decree of the Court of dated the day of 19

[Memorandum of Appeal, .. Plaintiff

versus

.. Defendant.
Court at

The above-named appeals to the from the decree of in the above suit, dated the day of 19, for the following reasons, namely:—¹
This appeal coming on for hearing on the day of 19, before the respondent, it is ordered— in the presence of for the appellant and of for

The costs of this appeal, as detailed below, amounting to Rs. are to be paid by The costs of the original suit are to be paid by
GIVEN under my hand this day of 19 Judge.

Costs of Appeal.

Appellant.	Amount.	Respondent.	Amount.
	Rs. A. P.		Rs. A. P.
1. Stamp for memorandum of appeal ..		Stamp for power ..	
2. Do. for power ..		Do. for petition ..	
3. Service of process ..		Service of process ..	
4. Pleader's fee on Rs. ..		Pleader's fee on Rs. ..	
Total ..		Total ..	

LOC. AMS.—[MADRAS.]

Substitute the following for Form No. 9 in Appendix (G):—

DECREE
ORDER

IN THE COURT OF THE
Present:—

day, the day of 19, Judge.

Appeal Suit

Civil Miscellaneous Appeal Suit } No. of 19

LEG. REF.

Madras High Courts.

¹ Omitted by the Rules of the Calcutta and

Between:

Appellant.

and

Respondent.

On appeal from the Decree/Order of the Court of the
the day of 19 and made in dated

Original Suit }
Execution Petition } No.
Interlocutory Application }

of 19 .

Between:—

Plaintiff—Petitioner.

and

Defendant—Respondent.

Particulars of valuation.

1. Valuation in Appeal
2. Do. in suit

Rs. A. P.

DECREE/ORDER:—This appeal coming on this day for hearing having been heard on the day of 19, upon perusing the grounds of appeal, the Decree/Order and judgment of the lower Court and the material papers in the case and upon hearing the arguments of Mr. for the Appellant and of Mr. for the Respondent, and the appeal having stood over to this day for consideration, this Court doth order and decree that the Decree/Order of the lower Court be and hereby is confirmed and this appeal dismissed.

This Court doth further order and decree that the Appellant () do pay to the Respondent () Rs. for costs in this appeal and do bear own costs Rs.

Particulars of costs.

Appellants.	Amount. Rs. A. P.	Respondents.	Amount. Rs. A. P.
1. Stamp on appeal Memo ..		1. Stamp for power ..	
2. Stamp on vakalat.		2. Stamp for petition..	
3. Stamp on copies of lower Court decree/order and judgment including copying fee..		3. Service of process..	
4. Stamp on petitions		4. Pleader's fee on Rs. ..	
5. Process fees ..			
6. Fee for preparation of process ..			
7. Pleader's fee on Rs. ..			
Total ..		Total ..	

GIVEN under my hand and the seal of the Court this day of 19 .

Judge.

COURT

Appeal Suit }
Civil Miscellaneous } No.
Appeal Suit }

of 19 .

DECREE—ORDER

[Fort St. George Gazette, Part II, p. 577, Dated 5—5—1936.]

[Patna.] Form No. 9. — In the schedule of costs in the form of the Decree in Appeal No. 9, Appendix G, to the first Schedule of the Code of Civil Procedure, Act V of 1908, add "copying or typing charges" below the item 'Pleader's fee on Rs. ' in the columns for Appellant and Respondent and number the new entry in the first column as "5."

No. 10.

APPLICATION TO APPEAL IN FORMA PAUPERIS.

(Title.)

I the above-named, present the accompanying memorandum of appeal from the decree in the above suit and apply to be allowed to appeal as a pauper. Annexed is a full and true schedule of all the movable and immovable property belonging to me with the estimated value thereof.

Dated this _____ day of _____ 19 .

(Signed.)

[Note.—Where the application is by the plaintiff he should state whether he applied and was allowed to sue in the Court of first instance as a pauper.]

No. 11.

NOTICE OF APPEAL IN FORMA PAUPERIS. (O. 44, R. 1.)

WHEREAS the above-named _____ has applied to be allowed to appeal as a pauper from the decree in the above suit dated the _____ day of _____ 19 , and whereas the _____ day of _____ 19 , has been fixed for hearing the application, notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper an opportunity will be given to you of doing so on the aforementioned date.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 .

Judge.

No. 12.

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO THE KING IN COUNCIL SHOULD NOT BE GRANTED. (O. 45, R. 3.)

(Title.)

To

TAKE notice that _____ has applied to this Court for a certificate that as regards amount or value and nature, the above case fulfils the requirements of section 110 of the Code of Civil Procedure, 1908, or that it is otherwise a fit one for appeal to His Majesty in Council.

The _____ day of _____ 19 , is fixed for you to show cause why the Court should not grant the certificate asked for.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 .

Registrar.

LOC. AM.—[MADRAS.] Insert the following as new Forms after Form No. 12:—

No. 12-A.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL. (O. 45, R. 7.)

(In cases where the subject-matter of the appeal is of sufficient value and the findings of the Courts are not concurrent.)

Read petition presented under O. XLV, R. 3 of the Code of Civil Procedure, praying for the grant of a Certificate to enable the petitioner to appeal to His Majesty in Council against the [decree] of this Court in the _____ final order

Suit No. _____ of 19 .

The petition coming on for hearing, upon perusing the petition and the grounds of appeal to His Majesty in Council and the other papers material to the application and upon hearing the arguments of _____ for the petitioner and of _____

for the respondent (if he appears) this Court doth certify that the amount value of the subject-matter of the suit in the Court of first instance is Rs. 10,000 upwards of Rs. 10,000

and the amount value of the subject-matter in dispute on appeal to His Majesty in Council is also of the value of Rs. 10,000 or that the decree final order appealed from involves directly some claim or question to property of the value of Rs. 10,000 indirectly respecting upwards of Rs. 10,000

and that the decree final order appealed from does not affirm the decision of the lower Court.

No. 12-B.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL. (O. 45, R. 7).

(In cases where the subject-matter is of sufficient value and the findings of the Court are concurrent.)

Read petition presented under O. XLV, r. 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the decree of this Court in Suit No. _____ of 19 ____.

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of _____ for the petitioner and of _____ for the respondent (if he appears) this Court doth certify that the amount of the subject-matter of the

suit in the Court of first instance is Rs. 10,000 and the amount of the subject-matter in dispute on appeal to His Majesty in Council is also of the value of Rs. 10,000 or that the decree appealed against involves directly some claim or indirectly some claim or question to property of the value of Rs. 10,000 and that the affirming decree appealed from involves the following substantial question (s) of law, viz:—

- (1)
- (2)

No. 12-C.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL. (O. 45, R. 7).

(In cases where the subject-matter in dispute is either not of sufficient value or is incapable of money valuation.)

Read petition presented under O. XLV, R. 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the decree of this Court in

Suit No. _____ of 19 ____.

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of _____ for the petitioner and of _____ for the respondent (if he appears) this Court doth certify that the amount of the subject-matter of the

suit both in the Court of first instance and in this Court is below Rs. 10,000 in value incapable of money valuation this Court in the exercise of the discretion vested in it is satisfied that the case is a fit one for appeal to His Majesty in Council for the reasons set forth below, viz:—

- (1)
- (2)

No. 13.

NOTICE TO RESPONDENT OF ADMISSION OF APPEAL TO THE KING IN COUNCIL. (O. 45, R. 8.)

(Title.)

To

WHEREAS _____, the _____ in the above case, has furnished the security and made the deposit required by Order XLV, r. 7 of the Code of Civil Procedure, 1908.

TAKE notice that the appeal of the said _____ day of _____ Council has been admitted on the _____

GIVEN under my hand and the seal of the Court, this _____ 19 ____.

to His Majesty in _____ 19 ____ day of _____

Registrar.

No. 14.

NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED.

(O. 47, R. 4.)

(Title.)

To

TAKE notice that _____ has applied to this Court for a review of its decree passed on the _____ day of _____ 19____, in the above case. The _____ day of _____ 19____, is fixed for you to show cause why the Court should not grant a review of its decree in this case.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge.

APPENDIX H.

MISCELLANEOUS.

No. 1.

AGREEMENT OF PARTIES AS TO ISSUES TO BE TRIED. (O. 41, R. 6.)

(Title.)

WHEREAS we, the parties in the above suit, are agreed as to the question of fact [or of law] to be decided between us and the point at issue between us is whether a claim founded on a bond, dated the _____ day of _____ 19____, and filed as Exhibit _____ in the said suit, is or is not beyond the statute of limitation (or state the point at issue whatever it may be);

We therefore severally bind ourselves that, upon the finding of the Court in the negative [or affirmative] of such issue, _____ will pay to the said _____ the sum of Rupees _____ (or such sum as the Court shall hold to be due thereon,) and I, the said _____ will accept the said sum of Rs. _____ (or such sum as the Court shall hold to be due) in full satisfaction of my claim on the bond aforesaid [or that upon such finding I, the said _____, will do or abstain from doing, etc., etc.]

Plaintiff.
Defendant.

Witnesses:—

1.
2.

Dated this _____

day of _____

19____.

No. 2.

NOTICE OF APPLICATION FOR THE TRANSFER OF A SUIT TO ANOTHER COURT FOR TRIAL. (SECTION 24.)

To In the Court of the District Judge of _____

WHEREAS an application, dated the _____ day of _____ 19____, has been made to this Court by the _____ in Suit No. _____ of 19____, now pending in the Court of the _____ at _____, in which _____ is plaintiff and _____ is defendant, for the transfer of the suit for trial to the Court of the _____ at _____;

You are hereby informed that the _____ day of _____ 19____, has been fixed for the hearing of the application, when you will be heard if you desire to offer any objection to it.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

_____ day of _____
Judge.

No. 3.

NOTICE OF PAYMENT INTO COURT. (O. 24, R. 2.)

(Title.)

TAKE notice that the defendant has paid into Court Rs. _____ and says that the sum is sufficient to satisfy the plaintiff's claim in full.

To Z., Pleader for the plaintiff.

X. Y., Pleader for the defendant.

No. 4.

NOTICE TO SHOW CAUSE (GENERAL FORM).

(Title.)

To

WHEREAS the above-named _____ has made application to this Court that _____; You are hereby warned to appear in this Court in person or by a pleader duly instructed on the _____ day of _____ 19____, at _____ o'clock in the forenoon to show cause against the application, failing wherein the said application will be heard and determined *ex parte*.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____ Judge.
 LOC. AM.—[ALLAHABAD] Substitute the following for form No. 4 of Appendix H.

No. 4.

NOTICE TO SHOW CAUSE. (GENERAL FORM.)

In the Court of
 Civil suit No.
 Miscellaneous No.

at _____ District.
 of _____ 19____
 of _____ 19____

resident of

versus.

resident of

To

WHEREAS the above-named _____ has made application to this Court that you are hereby warned to appear in this Court in person or by a pleader duly instructed on the _____ day of _____ 19____ at _____ o'clock in the forenoon, to show cause against the application, failing wherein, the said application will be heard and determined *ex parte* and it will be presumed that you consent to be appointed guardian for the suit.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____

Judge.

No. 5.

LIST OF DOCUMENTS PRODUCED BY PLAINTIFF (O. 13, R. 1.)
DEFENDANT
 (Title.)

No.	Description of document.	Date, if any, which the document bears.	Signature of party or pleader.
1	2	3	4

LOC. AM.—[ALLAHABAD.] LIST OF DOCUMENTS PRODUCED BY PLAINTIFF
DEFENDANT
 (O. 13, R. 1.)
 In the Court of _____ at _____ District _____
 Suit No. _____ of 19____ .. Plaintiff
 versus .. Defendant.

List of documents produced with the plaint (or at first hearing) on behalf of plaintiff (or defendant).

This list was filed by _____ this _____ day of _____ 19____

Serial number.	Description and date, if any, of the document.	What became of the document.	Remarks.
1	2	3	4
		If brought on the record the exhibit mark put on the document.	If rejected, date of return to party, and signature of party or pleader to whom the document was returned.
			If it remains on the record after decision of the case and is enclosed in an envelope, under rule 24, Chapter III the date of enclosure in the envelope.

Signature of party or pleader producing the list.

No. 6.

NOTICE TO PARTIES OF THE DAY FIXED FOR EXAMINATION OF A WITNESS
ABOUT TO LEAVE THE JURISDICTION. (O. 18, R. 16.)

(Title.)

Plaintiff (or Defendant).

To
bythat the examination of
witness required

, a

WHEREAS in the above suit application has been made to the Court by the said ,
in the said suit may be taken immediately; and it has been shown to the Court's satisfac-
tion that the said witness is about to leave the Court's jurisdiction (*or any other good
and sufficient cause to be stated*):

TAKE notice that the examination of the said witness will be taken by the
Court on the day of 19
Dated this day of 19
Judge.

No. 7.

COMMISSION TO EXAMINE ABSENT WITNESS. (O. 26, Rr. 4, 18.)

(Title.)

To

WHEREAS the evidence of is required by the
in the above suit; and whereas ; you are requested to take the evidence on interro-
gatories [*or viva voce*] of such witness , and you are hereby appointed
Commissioner for that purpose. The evidence will be taken in the presence of the parties
or their agents if in attendance, who will be at liberty to question the witness on the
points specified, and you are further requested to make return of such evidence as soon
as it may be taken.

Process to compel the attendance of the witness will be issued by any Court having
jurisdiction on your application.

A sum of Rs. , being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this day of 19 , Judge.

LOC. AM.—[PATNA.] Form No. 7, Add the following note at the foot of the form:—

Note.—The Commissioner has power under Chapter X of the Indian Evidence Act to
control the examination of witnesses.

No. 8.

LETTER OF REQUEST. (O. 26, R. 5.)

(Title.)

(Heading:—To the President and Judges of etc., etc., *or as the case may be.*)

WHEREAS a suit is now pending in the in which A.B. is plaintiff and C.D.
is defendant; and in the said suit the plaintiff claims.

(Abstract of claim.)

And whereas it has been represented to the said Court that it is necessary for the
purposes of justice and for the due determination of the matters in dispute between the
parties, that the following persons should be examined as witnesses upon oath touching
such matters, that is to say:

E.F. of

G.H. of

I. J. of

and

And it appearing that such witnesses are resident within the jurisdiction of your hono-
rable Court;

Now I , as the of the said Court, have the
honour to request, and do hereby request, that for the reasons aforesaid and for the assis-
tance of the said Court, you, as the President and Judges of the said , or some one
or more of you, will be pleased to summon the said witness (and such other witnesses as
the agents of the said plaintiff and defendant shall humbly request you in writing so to
summon) to attend at such time and place as you shall appoint before someone or more of
you or such other person as according to the procedure of your Court is competent to take
the examination of witnesses, and that you will cause such witnesses to be examined upon
the interrogation which accompany this letter of request (*or viva voce*) touching the said
matters in question in the presence of the agents of the plaintiff and defendant or such of
them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the ans-
wers of the said witnesses to be reduced into writing, and all books, letters, papers and
documents produced upon such examination to be duly marked for identification, and that
you will be further pleased to authenticate such examination by the seal of your tribunal,
or in such other way as is in accordance with your procedure, and to return the same, to-
gether with such request in writing, if any, for the examination of other witnesses to the said
Court.

(Note.—If the request is directed to a Foreign Court, the words "through His Majesty's Secretary of State for Foreign Affairs for transmission" should be inserted after the words "other witnesses" in the last line of this form.)

No. 9.

COMMISSION FOR A LOCAL INVESTIGATION, OR TO EXAMINE ACCOUNTS.

(O. 26, Rr. 9, 11.)

(Title.)

To

WHEREAS it is deemed requisite, for the purposes of this suit, that a commission should be issued, you are hereby appointed Commissioner for the purpose of

Process to compel the attendance before you of any witnesses, or for the production of any documents whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. , being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 10.

COMMISSION TO MAKE A PARTITION. (O. 26, R. 13.)

(Title.)

To

WHEREAS it is deemed requisite, for the purposes of this suit, that a commission should be issued to make the partition or separation of the property specified in and according to the rights as declared in, the decree of this Court, dated the day of 19 , you are hereby appointed Commissioner for the said purpose and are directed to make such inquiry as may be necessary, to divide the said property according to the best of your skill and judgment in the shares set out in the said decree, and to allot such shares to the several parties. You are hereby authorized to award sums to be paid to any party by any other party for the purpose of equalizing the value of the shares.

Process to compel the attendance before you of any witness, or for the production of any documents, whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. , being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN. (O. 32, R. 3.)

(Title.)

To

Minor Defendant.
Natural Guardian.

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you, the said minor, and you¹ are hereby required to take notice that unless within days from the service upon you of this notice, an application is made to this Court for the appointment of you¹ or of some friend of you, the minor, to act as guardian for the suit, the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

LOC. AMS.—[ALLAHABAD.] Substitute the following for Form No. 11:—

No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN.

In the Court
Suit No.
Resident of

at

of

District.
19
Plaintiff

versus

Resident of

Defendant.

LEG. REF.

¹ Insert the name of the guardian.

To

(1)

Minor defendant
and¹Natural

Certificated guardian,

the person in whose care the minor is alleged to be. Whereas an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you

(1) said minor and you (2) the ¹natural certificated guardian or the person in whose care the minor is alleged to be are hereby required to take notice that unless within days from the service upon you of this notice, an application is made to this Court to show cause why the person named below should not be appointed or for the appointment of any other person willing to act as guardian for the suit, the Court will proceed to appoint the person named below or some other person to act as guardian of the minor for the purposes of the said suit.

Proposed guardian son of resident of
GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

[MADRAS.] Substitute the following for Form 11:—
No. 11.

NOTICE TO GUARDIAN APPOINTED OR DECLARED, OR TO FATHER OR OTHER NATURAL GUARDIAN,
OR TO THE PERSON IN CHARGE OF THE MINOR.

[O. 32, R. 3 (5).]

(Title.)

To

Guardian appointed or declared, or father or other natural guardian, or person in charge of the minor.

WHEREAS an application has been presented on the part of the in the above suit for the appointment of a guardian for the suit for the said minor, you are hereby required to take notice that, unless within days from the service upon you of this notice an application is made to this Court for the appointment of you or of some friend of the said minor to act as ^{his} guardian for the purposes of the said suit, the Court will proceed to appoint some other person to act as guardian of the said minor for the purposes of the said

GIVEN under my hand and the seal of the Court, this day of 19 .

[MADRAS.] Substitute the following for Form 11-A:—
No. 11-A

NOTICE TO PROPOSED GUARDIAN OF A MINOR ^{DEFENDANT}
^{RESPONDENT}

[O. 32, R. 3 (9).]

To

(Y.Z.).

(Name, description and place of residence of proposed guardian).

Take notice that X ^{plaintiff} in ^{appellant} has presented a petition to the

Court praying that you be appointed guardian *ad litem* to the minor ^{defendant (s)},
and that the same will be heard on the day of 19 . ^{respondent (s)}

2. The affidavit of X has been filed in support of this application ^{defendant (s)}

3. If you are willing to act as guardian for the said ^{respondent (s)} you are requested to sign (or affix your mark to) the declaration on the back of this notice.

4. In the event of your failure to signify your express consent in the manner indicated above, take further notice that the Court may proceed under O. 32, r. 3, Code of Civil Procedure, to appoint some other suitable person or one of its officers as guardian *ad litem* ^{defendant (s)} of the minor ^{respondent (s)} aforesaid.

LEG. REF.

¹Cut out the word "natural" if the certificated guardian is named; cut out the word "certificated" if the natural guardian be

intended and cut out both "natural" and "certificated" and the word "or" if the guardian be of neither class but one with whom the minor lives

Dated this

day of

19
(Signed.)

(To be printed on the reverse.)

I hereby acknowledge receipt of a duplicate of this notice and consent to act as guardian of the minor defendant (s) respondent (s) therein mentioned.

(Signature.)
Y.Z.

Witnesses:

1.
2.

[NAGPUR.] For Form No. 11 substitute the following:—

No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN. (O. 32, R. 4-A.)
(Title.)

To

Minor defendant
Legally appointed
Actual
Proposed
Guardian.

WHEREAS an application has been presented on the part of the plaintiff for the appointment of you on behalf of the minor defendant as the guardian of the suit of the minor defendant his legally appointed (you the said minor)¹ you actual guardian and you

the proposed guardian for the suit are hereby required to take notice that unless you, the proposed guardian, appear before this Court on or before the day appointed for the hearing of the case and stated in the appended summons, and express your consent to your appointment, or unless an application is made to this Court for the appointment of some other person to act as guardian of the minor for the suit, the Court will proceed to appoint an officer of the Court or a pleader or some other person to act as guardian to the minor for the purposes of the said suit of which summons in the ordinary form is herewith appended.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

[PATNA.] For Form No. 11 substitute the following forms:—

No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN OF APPLICATION FOR APPOINTMENT OF THE
GUARDIAN TO BE GUARDIAN FOR THE SUIT.
(O. 32, R. 3.)
(Title.)

To

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of you² as guardian for the suit to the minor defendant, you the said minor and you³ are hereby required to take notice that unless within 21 days from the service upon you of this notice you² give your consent to be appointed to act as guardian, the Court will proceed, subject to the decision of any objection that may be raised to appoint an officer of the Court to act as guardian to you the minor for the said suit.

GIVEN under my hand and the seal of this Court, this day of 19 .
Judge.

No. 11-A.

NOTICE TO MINOR DEFENDANT AND GUARDIAN OF APPLICATION FOR APPOINTMENT OF
ANOTHER PERSON TO BE GUARDIAN FOR THE SUIT.
(O. 32, R. 3.)

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of Minor defendant. Guardian (appointed by authority, or natural, or the person in whose care minor is). as guardian for the suit to the minor defendant, you the said

LEG. REF.

¹ Here insert name of guardian.

Here insert name and description of

proposed guardian.

² Here insert name of guardian upon whom the notice is to be served.

minor and you¹

are hereby required to take notice that unless within 21 days from the service upon you of this notice you¹

make an application for the appointment of yourself or of some friend of you the minor to act as guardian, the Court will proceed, subject to the decision of any objection that may be raised, to appoint²

or an officer of the Court to act as guardian to you the minor for the said suit.

GIVEN under my hand and the seal of this Court, this day of 19 Judge.

No. 11-B.

NOTICE TO THE PROPOSED GUARDIAN FOR THE MINOR DEFENDANT, WHEN THE PERSON PROPOSED IS NOT THE GUARDIAN APPOINTED BY AUTHORITY OF THE NATURAL GUARDIAN OF THE PERSON IN WHOSE CARE THE MINOR IS.

(O. 32, R. 4.)

(Title.)

District
In the Court of

at
Suit No.

of 19 .

.. Plaintiff

versus

.. Defendant.
Proposed guardian.

To

WHEREAS an application has been presented by the plaintiff in the above case for the appointment of you¹

as guardian for the suit to the minor defendant you are hereby required to take notice that unless within

days from the service upon you of this notice you make an application to the Court intimating your consent to act as guardian for the suit, the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit.

GIVEN under my hand and the seal of this Court, this day of 19 Judge.

No. 12.

NOTICE TO OPPOSITE PARTY OF DAY FIXED FOR HEARING EVIDENCE OF PAUPERISM.

(O. 33, R. 6.)

(Title.)

To

WHEREAS Court for permission to institute a suit against has applied to this O. 33, of the Code of Civil Procedure, 1908; and whereas the Court sees no reason to reject the application; and whereas the day of 19 , has been fixed for receiving such evidence as the applicant may adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof thereof.

Notice is hereby given to you under R. 6 of O. 33 that in case you may wish to offer any evidence to disprove the pauperism of the applicant, you may do so on appearing in this Court on the said day of 19 .

GIVEN under my hand and the seal of this Court, this day of 19 Judge.

No. 13.

NOTICE TO SURETY OF HIS LIABILITY UNDER A DECREE. (Section 145.)

(Title.)

To

WHEREAS you did on the said become liable as surety for the performance of any decree which might be passed against the said defendant in the above suit; and whereas a decree was passed on the day of 19 , against the said defendant for the payment of , and whereas application has been made for execution of the said decree against you:

Take notice that you are hereby required on or before the day of 19 , to show cause why the said decree should not be executed against you, and if no sufficient cause shall be, within the time specified, shown to the satisfaction of the Court, an order for its execution will be forthwith issued in the terms of the said application.

GIVEN under my hand and the seal of this Court, this day of 19 Judge.

LEG. REF.

¹ Here insert the name of the proposed guardian.

² Here insert the name and description of the proposed guardian.

No. 14.
REGISTER OF CIVIL SUITS. (O. 4, R. 2.)

Court of the _____ at _____
of _____
Register of the Civil Suits in the year 19 .

PLAINTIFF.		DEFENDANT.	CLAIM.	APPEAR- ANCE.	JUDGMENT.	APPEAL.	EXECUTION.	RETURN OF EXECUTION.	
Date of presentation of plaint.	Number of suit.	Name.	Description.	Place of residence.	Name.	Description.	Place of residence.	Name.	Description.
		Place of residence.	Place of residence.	Particulars.	Amount or value.	When the cause of action accrued.	Day for parties to appear.	Plaintiff.	Defendant.
				Date.	For whom.	For what, or amount.	Date of decision of appeal.	Judgment in appeal.	Date of application.
							Date of order.	Against whom.	For what and amount if money.
								Amount of costs.	Amount paid into Court.
								Arrested.	
									Minute of other Return than payment or arrest, and date of every return.

NOTE.—Where there are numerous plaintiffs or numerous defendants, the first plaintiff only or the first defendant only, as the case may be, need be entered in the register.

LOC. AMS.—[CALCUTTA] Cancel columns 20 to 27 of Form No. 14—Register of Civil Suits, Appendix H, Schedule I and substitute therefor the following columns:—

EXECUTION.														RETURN OF EXECUTIONS.													
No. of execution application as per execution application register and the date of application.	Relief sought, if money, amount claimed.	Order and date thereof. If portion of relief not granted, what portion.	Against whom order made.	For what, amount to be stated.	Amount of costs.	Adjustments and satisfaction reported, if any.	Amount paid into Court.	Person arrested.	Whether judgment-debtor committed to jail; if not, why not. If committed to jail, the period of stay in it.	Minute of other return, other than arrest and payment.	Amount or relief still due and why execution petition is closed.	If petition is infructuous, why and to what extent.	Appeal, if any, against order in execution and, if so, the result.														
20	21	22	23	24	25	26	27	28	29	30	31	32	33														

[MADRAS]—Form No. 14 (O. 4, R. 2).
(FORMS NOS. 14 TO 25 OMITTED.)

No. 15.

REGISTER OF APPEALS. (O. 41, R. 9.)

COURT (OR HIGH COURT) AT

Register of appeals from decrees in the year 19 .

Date of memorandum.	Number of appeal.	APPELLANT.			RESPONDENT.			DECREE APPEALED FROM			APPEARANCE.			JUDGMENT.			
		Name.	Description.	Place of residence.	Name.	Description.	Place of residence.	Of what Court.	Number of Original Suit.	Particulars.	Amount or value.	Day for parties to appear.	Appellant.	Respondent.	Date.	Confirmed, reversed or varied.	For what or amount.

LOC. AM.—[ALLAHABAD.] Add the following forms Nos. 16 to 18:—

No. 16. The security to be furnished under Order 25, Rule 1, shall be, as nearly as may be, by bond in the following form:—

In the Court of

Suit No.

at

versus

of 19 .

.. Plaintiff

.. Defendant.

WHEREAS a suit has been instituted in the said Court by the said plaintiff to recover from the said defendant the sum of rupees and the said plaintiff is residing out of British India (or is a woman) and does not possess any sufficient immovable property within British India independent of the property in the suit:

Therefore, I, inhabitant of , have voluntarily become security, and do hereby bind myself, my heirs, and executors to as Judge of the said Court and to his successors in office that the said plaintiff, his heirs and executors, shall, whenever called on by the said Court, pay all costs that may have been or may be incurred by the said defendant, in the said suit, and in default of such payment I bind myself, my heirs and executors, to pay all such costs to the said Court on its order.

Witness my hand at

this

day of 19 .

Witness.

(Signed.)
Surety.

No. 17.

ADDRESS FOR SERVICE.

Under Order VII, Rules 19 to 26; Order VIII, Rules 11 and 12; Order XLI, Rule 38; Order XLVI, Rule 8; Order XLVII, Rule 10; Order LII, Rule 1.

In the Court of the

of

Original—Suit—No.
or Case

of 19.

versus

Plaintiff.

Defendant.

This address shall be within the local limits of the District Court within which the suit is filed, or of the District Court within which the party ordinarily resides, if within the

Name, parentage and caste.	Residence.	Pargana or tahsil.	Post Office.	District.

Signature of party .. { Plaintiff.
Defendant.
Appellant.
Respondent.

Signature of Pleader.

No. 18.

In the Court of the _____ of _____ Original $\frac{\text{Suit}}{\text{or Case}}$ No. _____ of 19 ____
Plaintiff.

Defendant.

Name, parentage and caste.	Residence.	Pargana or tahsil.	Post Office.	District.

new particulars.

Signature of party

{ Plaintiff.
Defendant.
Appellant.
Respondent.

Signature of Pleader.

THE SECOND SCHEDULE.

THE SECOND SCHEDULE.
[Repealed by Act X of 1940, which consolidates the law as to Arbitration.]

THE THIRD SCHEDULE.

EXECUTION OF DECREES BY COLLECTORS.

Powers of Collector.

1. Where the execution of a decree has been transferred to the Collector under section 68, he may—

(a) proceed as the Court would proceed when the sale of immovable property is postponed in order to enable the judgment-debtor to raise the amount of the decree; or

(b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold; or

(c) sell the property ordered to be sold or so much thereof as may be necessary.

NOTES.

Sch. III.—A decree was satisfied by a lease of the judgment-debtor's properties by the Collector. Attempts were made to alter the terms of the lease but the Governor-in-Council disallowed such alteration and directed certain proceedings in respect of defaulting lessees. The lessees having defaulted in paying the lessees money the Collector cancelled the lease and sold the property which was purchased by the decree-holder. The order of the Collector confirming the sale was affirmed by the Deputy Commissioner. *Held*, in revision by the Governor-in-Council, that the order cancelling the lease and confirming the sale were illegal and without jurisdiction, as being in contravention of the prior order of the Governor-in-Council and that the sale must therefore be set aside. 19 N.L.J. 22.

Para. 1.—Where a decree is transferred to a Collector for execution, it is not open to the Collector to allow the validity of the order for sale to be questioned. In that respect, he can be in no better position than a Court executing a decree transferred to it—he cannot go behind the decree. Conversely, as it is not within the Collector's competence to consider this question, it must be open to the Court to consider it, on a proper application and assuming that there is no bar of *res judicata*. The mere fact that the carrying out of the Court's order has been delegated to the Collector cannot deprive the Court of jurisdiction to consider the validity of the order. 60 B. 516=38 Bom.L.R. 221=1936 B. 227. When a decree is transferred to the Collector for execution he can send back the papers, if he fails in effecting a sale of the property. 42 A. 152=24 C.W.N. 394=38 M.L.J. 259 (P.C.). For good reasons the Court which passed the decree can also send back the papers to the Collector without fresh application for execution. In this case the Court enforces what it has already ordered. 42 A. 152 (P.C.).

All that is delegated to the Collector is to consider the proper mode in which a decree

may be satisfied by an agriculturist debtor so as to save, if possible, the sale of his property and the Court passing the decree can enquire into the question whether the decree amount is satisfied or not and order a further execution when the Collector has returned the papers under an erroneous belief that the whole amount had been liquidated. 26 S. L.R. 506=1933 S. 112. Where a decree is sent to a Collector for execution he should let the land on premium so that the decree amount might be raised. But the Civil Court has no jurisdiction to interfere with the order passed by the Collector in respect of the transferred decree. 35 Bom.L.R. 761=1933 Bom. 369. After a Civil Court passes a decree for joint possession of a revenue paying estate the Collector not only has to make allotment but to complete the partition by delivery of possession and he fails to exercise a jurisdiction vested in him by law if he refers the parties to the Civil Court for this purpose. 56 I.C. 806. Collector to whom execution of a decree has been transferred may lease any property for a term on payment of a premium but he cannot provide for payment by instalments of the decree amount. *Held also*, that the Collector has no jurisdiction to reduce the amount of the decree by reducing the rate of interest. 50 A. 827=115 I.C. 125=1928 A. 558. The date on which the Collector ceases to have power to deal with the property under Sch. III of the C.P. Code is the date on which the deposit was made in Court of the amount to satisfy the decree fully and an alienation effected after the payment is made, is not invalid merely because the proceedings of the Collector formally continue. 122 I.C. 371=1930 N. 220. Collector becomes *functus officio* when the decree becomes adjusted between the parties. 19 N.L.J. 175=1937 Nag. 217. "Ancestral land" as defined in (All.) General Rules, Ch. IV, R. 8 (a) means property owned continuously from 1-1-1860 by the proprietor. Land gifted to the judgment-debtor after that date is not, therefore, "ancestral land".

2. Where the execution of a decree, not being a decree ordering the sale of immovable property in pursuance of a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immovable property has been so transferred, the Collector, if, after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immovable property, may proceed as hereinafter provided.

Procedure of Collector in special cases.

Notice to be given to decree-holders and to persons having claims on property.

3. (1) In any such case as is referred to in paragraph 2, the Collector shall publish a notice, allowing a period of sixty days from the date of its publication for compliance and calling upon—

(a) every person holding a decree for the payment of money against the judgment-debtor capable of execution by sale of his immovable property and which such decree-holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder ;

(b) every person having any claim on the said property to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced.

(2) Such notice shall be published by being affixed on a conspicuous part of the court-house of the Court which made the original order for sale, and in such other places (if any) as the Collector thinks fit ; and where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise.

4. (1) Upon the expiration of the said period, the Collector

NOTES.

and the sale thereof need not be by the Collector. 1933 A.L.J. 91=1933 A. 138 (1) =147 I.C. 185.

LIMITATION.—The thirty days period of limitation for making an application for setting aside sale counts from the date of acceptance of the bid by the sub-divisional Officer and not from the date of sale held by the Tahsildar, Naib Tahsildar under orders of the sub-divisional officer. 17 N.L.J. 41.

Paras. 1 and 2; SCOPE OF.—Where a mortgage is executed over properties, some items of which were under the Collector's management in execution of a money decree, under Sch. III, the mortgage is void only in respect of the items in the management of the Collector but is valid as regards the rest of the items. 122 I.C. 369=1930 N. 237.

Para. 2.—An alienation by a judgment-debtor, whose property is under the management of the Collector under Sch. III, is void *ab initio* and not merely voidable at the instance of the Collector or the decree-holder. Where a judgment-debtor privately

sells such property under the management of the Collector before the date fixed for sale, to the decree-holder himself and the Collector accepts it and sale deed is registered thereafter, the sale is void in as much as the Collector's powers had not terminated before the sale became effective and the decree also had not been extinguished by them. 1940 N.L.J. 616.

Paras. 3 and 4 (3).—Where gifted property has been attached and execution sent to Collector, it is the duty of the Collector to send notice to the donee under para. 3, calling upon her to state her objections. Where even without such notice, the donee raises objection, Collector should proceed under para. 4 (3), and not merely inform the donee that she should apply to the Court which passed the decree. 1935 O.W.N. 879.

Para. 4.—The Collector cannot adjudicate upon questions of title. 11 A. 94. On this section, *see also* 18 A. 315. An appeal from the decision by which a disputed claim is settled under this section is cognizable as a miscellaneous appeal. 4 M. 420. But *see* 7 A. 565.

Amount of decrees for payment of money to be ascertained, and immovable property available for their satisfaction. shall appoint a day for hearing any representations which the judgment-debtor and the decree-holders or claimants (if any) may desire to make, and for holding such inquiry as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment-debtor's immovable property, and may, from time to time, adjourn such hearing and inquiry.

(2) Where there is no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector, shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immovable property available for that purpose.

(3) Where any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order for sale, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector, who shall then draw up a statement as above provided in accordance with such decision.

5. The Collector may, instead of himself issuing the notices and holding the inquiry required by paragraphs 3 and 4, draw up a statement specifying the circumstances of the judgment-debtor and of his immovable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court ; and such Court shall thereupon issue the notices, hold the enquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector.

6. The decision by the Court of any dispute arising under paragraph 4 or paragraph 5 shall, as between the parties thereto, have the force of and be appealable as a decree.

7. (1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5, the Collector may,—

(a) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property ; or

(b) if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale)—

(i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property ; or

(ii) by mortgaging the whole or any part of such property ; or

(iii) by selling part of such property ; or

NOTES.

Para. 7 (1) (b).—Under para. 7 (1) (b) Collector has to take into account the whole decretal amount with interest. 37 Bom. 32 = 17 I.C. 142 = 14 Bom. L.R. 787. Though judgment-debtor makes no real attempt to pay off the decree amount for a long time after the passing of the decree, when he

pays a portion and undertakes to make further payments by a certain date, it is not advisable to order the sale of the property, especially when there is no definite valuation of the property or order to be sold by Court. Collector is competent to have recourse to sale or lease or other methods to recover the decretal amount. 19 N.L.J. 27.

(iv) by letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale ; or

(v) partly by one of such modes, and partly by another or others of such modes.

(2) For the purpose of managing the whole or any part of such property the Collector may exercise all the powers of its owner.

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer which has become payable or compound the claim of any incumbrancer whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court, either in his own name, or in the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an umpire to be named by such arbitrators.

(4) In proceeding under this paragraph, the Collector shall be subject to such rules, consistent with this Act as may, from time to time, be made in this behalf by the Provincial Government.

8. Where, on the expiration of the letting or management under paragraph 7, the amount to be recovered has not been realised, the Collector shall notify the fact in writing to the judgment-debtor or his representative in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property ; and, if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly.

9. (1) The Collector shall, from time to time, render to the Court which made the original order for sale an account of all moneys which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court.

(2) Such charges shall include all debts and liabilities from time to time due to ¹[the Crown] in respect of the property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and, if the Collector, so directs, the expenses of any witnesses summoned by him.

(3) The balance shall be applied by the Court—

(a) in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit ; and

(b) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immovable property, or otherwise as the Court may under section 73 direct ; or

(c) where the Collector has proceeded under paragraph 2—

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¹ For words "the Government" the words "the Crown" have been substituted by A. O., 1937.

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Para. 9.—Collector holds any money which may be realised in execution, at the disposal of the Civil Court by which the decree was

sent to him for execution. S. 73 applies to such proceeds. 16 A. I. See also 133 I.C. 423=1931 A.L.J. 1064=1931 A. 700. As to the right of revenue authorities, to recover expenses of sale as in cases under the Land Revenue Code, see 28 Bom.L.R. 1191=99 I.C. 289=1927 B. 17.

- (i) in keeping down the interest on incumbrances on the property ;
- (ii) where the judgment-debtor has no other sufficient means of subsistence in providing for his subsistence to such amount as the Court thinks fit ; and
- (iii) in discharging rateably the claims of the original decree-holder and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered.

(4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgment-debtor or such other person as the Court directs.

10. Where the Collector sells any property under this schedule, Sales how to be conducted. he shall put it up to public auction in one or more lots as he thinks fit, and may—

- (a) fix a reasonable reserved price for each lot ;
- (b) adjourn the sale for a reasonable time, whenever, for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property ;
- (c) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit.

11. (1) So long as the Collector can exercise or perform in respect of the judgment-debtor's immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money.

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Para. 10.—As to whether a sale of Collector is subject to the confirmation of the Civil Court, and whether Collector can set aside a sale, see 11 B. at p. 484.

Para. 11 : SCOPE OF PARA.—Para. 11 must be construed strictly. 6 O.W.N. 843=1929 O. 435. The object of Para. 11, Sch. III is that there shall be a fully substantial and certain permission on the part of the Collector, which is to be given in such a manner that the fact of its having been given is indisputable. The essence of the paragraph is that there shall be a written permission as opposed to an oral permission, which would be susceptible of evidence of varying degrees of credibility in order to establish the necessary proof. What is required is certainty, and where there is a written record of facts which cannot be disputed, an unmistakable inference drawn from this written record that permission was given, fulfils the requirements of the paragraph and a formal permission is then unnecessary. I.L.R. (1938) Nag. 573=1938 Nag. 309. It is perfectly clear that para. 11 does not forbid, in terms or otherwise, the transfer of the property in respect of which Collector can exercise or perform any of the powers or duties conferred upon him in the earlier paragraph of Sch. III. Indeed, such property can be the

subject of transfer with the permission of Collector. All it does is to impose a partial disability on the judgment-debtor in the matter of transfer during the time Collector can exercise his powers and duties respectively conferred and imposed by paras. 1 to 10. 144 I.C. 373=1933 A.L.J. 1522=1933 A. 468. A transfer made in contravention of para. 11, is void and of no legal effect whatsoever. A person who is incompetent to transfer property by reason of para. 11, is on the same footing as a minor or lunatic, who is incompetent to contract. S. 65, Contract Act, cannot be applied to such a case or invoked by the vendor in order to entitle him to a refund of the purchase-money paid by him in consideration of the transfer which is void. Nor does S. 73 of the contract apply to the case, because the law will not presume or imply a contract where there could not have been a contract. I.L.R. (1937) Nag. 111=1937 Nag. 330. See also 1933 A.L.J. 1564=1933 A. 908; 11 O.W.N. 1626=1935 Oudh 156. But a family settlement entered into by judgment-debtors does not contravene the provisions of this para. as it is not a mortgage, charge, or lease or alienation within the meaning of this para. 1935 O. W.N. 278=1935 Oudh 245. The C form sent by the Civil Court embodied Mouza R, 12 annas share for Mouza B and the absolute

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occupancy fields of Mouza A. Collector provisionally withheld Mouza R from sale as he estimated that the sale proceeds of the other two items would be sufficient to satisfy the debt. *Held*, that because R village was the last in the order, in which the attached property was intended to be sold, it could not be said that the Collector could not exercise his power in respect of it. The judgment-debtor was therefore no more competent to transfer R than he was to transfer the other two items of property. 1934 Nag. 285=153 I.C. 687. Where law has imposed a personal disability of an absolute character, as in the case of a minor or a person of unsound mind, every contract made by him is void. Where the disability is partial, as in the case of a judgment-debtor to whom Sch. III applies, an alienation made by him is invalid; but any agreement to pay money recoverable from his person and other property, movable or immovable, is unaffected by the partial disability imposed by Para. 11. Such agreement is enforceable in law and is as valid as any other contract. The executant admitted in a deed that a sum of Rs. 20,000 had been advanced to him and he undertook to repay it on demand. This covenant was quite distinct and separate from the other part of the agreement under which the debtor gave security for the payment of the amount due from him. The debtor was incompetent to mortgage the property by virtue of Para. 11. *Held*, that the creditor was entitled to enforce his remedy under the first part of the agreement. 1933 A.L.J. 1522=1933 A. 468. *See also* 164 I.C. 945=1936 O. W. N. 1033=1937 Oudh 87) enforceability of personal covenant in mortgage). The Collector cannot return the decree as satisfied till the whole amount including interest up to date of satisfaction has been paid. 37 B. 32=14 Bom.L.R. 787. Para. 11 does not apply to the case of non-ancestral property comprised in a decree for sale. Such a decree cannot be transferred for execution to Collector. But, if so transferred through a mistake, the prohibition against alienation in Para. 11, will not apply, and an alienation, without Collector's permission is not invalid. 153 I.C. 612=11 O.W.N. 1626=1935 O. 156. *See also* 11 O.W.N. 1571=1935 O. 121. A junior member of a Hindu joint family cannot be allowed to deal with family property which has been placed in charge of Collector under para. 11. 132 I.C. 568=1931 A.L.J. 400. This para. is a bar to the relinquishment by a person of his interest in immovable property, and such relinquishment is invalid. 163 I.C. 672=1936 A.L.J. 680=1936 A. 452. The word "incompetent" is to be read in the exact and plain sense that the word implies. 46 183=45 I.A. 219=35 M.L.J. 733 (P.C.). *See also* 6 O.W.N. 843=1929 O. 435; 121 I.C. 888.

The object of para. 11 is to protect the debtor as far as possible from the risk of losing his property wholly or for all time, and mere attachment before judgment cannot defeat that object. 68 I.C. 188=1922 N. 238; 46 C. 183=45 I.A. 219=35 M.L.J. 733 (P.C.). *See also* 121 I.C. 888=1929 O. 441=6 O.W.N. 750. An order transferring decree for execution to Collector takes effect the moment it is passed; a transfer made between the passing of the order and the date of its reaching the Collector, is void. 92 I.C. 44=1926 N. 246. The incompetency created by this section does not extend to the lessee from Collector. 53 I.C. 776. Para. 11 no doubt prohibits the transfer of any property by way of mortgage but the stage at which any person entitled to plead that the mortgage was void is when the suit is instituted on the mortgage. Where such an objection is not open to the judgment-debtor or his representative to contest the validity of the previous decree in a later proceeding. 1930 A.L.J. 1594=1931 A. 38. A party seeking to avoid transfer under para. 11, must show that on the date of transfer Collector was exercising powers under the Code and the decree was still unsatisfied. 17 I.C. 887=8 N.L.R. 182; 66 I.C. 642=8 O.L.J. 358. *See also* 1937 O.W.N. 784=13 Luck. 531=1937 Oudh 410. While a decree is under execution by Collector it is illegal for a Civil Court to issue process against the property. 66 I.C. 642=8 O.L.J. 358. Even where the Civil Court releases subsequently some of the properties from attachment so long as decree is under execution by Collector, judgment-debtor cannot mortgage even property released from attachment without permission of Collector. 164 I.C. 945=1936 O. W. N. 1033=1937 Oudh 87. An order by a Court executing a money decree against judgment-debtor directing Collector to pay surplus sale proceeds if any to the money decree-holder and not to judgment-debtor, does not amount to issuing a process and is not illegal. 102 I.C. 94=1927 O. 216. So long as the property is under attachment in Collector's proceedings, a mortgage of the property by the debtor would be invalid. But once Collector's power has terminated as a result of satisfaction or payment into Court by the debtor, a subsequent alienation by the debtor would not be invalid merely on the ground of formal continuation of proceedings before Collector, or on the ground that the formal order releasing the property had not yet been passed by Collector. 15 N.L.J. 173; 144 I.C. 267. A decree which has been fully satisfied out of Court is one that is incapable of execution and Collector cannot exercise any of the powers conferred upon him by the Code and thereupon the incompetency of judgment-debtor to mortgage his property ceases. A mortgage therefore executed by the judgment-debtor on the date of sale fixed by Collector to

(2) During the same period no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7.

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived.

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pay off decree-holder is not void, if decree-holder has been on that date paid off. (1930 N. 237 and 8 N.L.R. 182, Rel. on.) 1933 N. 238. But where on transfer of execution to Collector, the sale officer returns the file to Civil Court to find out the extent and correct description of the property, and the Civil Court orders thereon, it cannot be said that the Collector had not seizin of the case in the interval. Any mortgage effected in the interval by judgment-debtor would be invalid. 1936 O.W.N. 489=1936 O. 280. The question whether Collector can exercise powers or not, should be judged not from a purely theoretical point of view, but from the standpoint as to whether he can practically and effectively exercise any of his powers with respect to the property alienated under Sch. III. After Collector's certification of payment of the decree, the property, the sale of which is subsequently set aside, must be considered to have gone out of the jurisdiction of Collector. 1934 N. 285. The permission of Collector for a mortgage by judgment-debtor need not take the form of a certificate under O. 21, R. 83. It is enough if Collector knows of the mortgage and gives sanction to it in writing. 102 I.C. 94=1927 O. 216. Permission can be inferred from written words employed by the Collector from time to time there was written permission granted in the case. 7 O.W.N. 988=1930 O. 510. It is not necessary for judgment-debtor to inform Collector that a decree-holder is about to attach the property, and permission to mortgage obtained from Collector suppressing that fact, would not render mortgage invalid. 19 N.L.J. 94. 'Such property' in paragraph 11 means the judgment-debtor's property over which Collector had power to deal with under the provisions of the Sch. III. 1930 A.L.J. 1594=1931 A. 38. Where part of judgment-debtor's property is under Collector's management, judgment-debtor can validly mortgage the rest of his property. The words "such property or part" relate back to the earlier words the judgment-debtor's immovable property "or any part thereof in respect of which Collector is exercising his functions. Any part of the property in respect of which such functions are not being exercised is available to the owners thereof to deal with as they wish. 30 N.L.R. 331=1934 N. 264. Sch. III, Para. 11 (3)—If controls S. 48—Twelve years' period, if extended when decree-holder not deprived of remedy.

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11 O.W.N. 1103=1934 O. 465.

DELEGATION OF POWERS.—A Collector acting under Para. 11, is not competent to delegate his power to permit an alienation of the property by the judgment-debtor. The granting of such permission is not a mere routine work. 11 O.W.N. 1626=1935 O. 156.

Para. 11 (2).—This clause applies to all cases where Collector is making arrangements for sale of property; and when he is so acting any order of Civil Court for arrest of judgment-debtor or demanding security from him is *ultra vires* and illegal. 1935 N. 52 (1)=18 N.L.J. 138.

Para. 11 (3).—The words "period of limitation" in Para. 11 (3) apply to the restrictions placed upon the right of a decree-holder to take out execution of his decree both by the Limitation Act and S. 48 of the Code. 17 A.L.J. 1140=42 A. 118. Collector's powers under Para. 11 do not come to an end as soon as the property is sold by auction and fetches more than the decretal amount. 60 I.C. 310=16 N.L.R. 194. But see also 122 I.C. 371 1930 N. 220. Collector's power over property attached in execution of a decree terminates as soon as a payment sufficient to satisfy the decree has been made, and an alienation effected after such payment is not invalid. 122 I.C. 371. They exist at least till the confirmation of the sale. 60 I.C. 310=16 N.L.R. 194. If an objection has been raised as to a sale by a Collector his powers to confirm the sale are suspended and he must refer the objection to the Civil Court. 45 B. 812=61 I.C. 287=23 Bom. L.R. 254. A purchaser's suit, to establish his title to the property sold, is not barred by S. 47. 45 B. 812=23 Bom. L.R. 254. On this rule, see also 64 I.C. 855; 45 I.C. 240.

COLLECTOR GIVING PERMISSION TO MORTGAGE—NEGOTIATIONS FALLING—COLLECTOR DIRECTING SALE—PERMISSION, IF IMPLIEDLY REVOKED.—The effect of Collector giving the permission to mortgage a certain property in writing is to remove the incapacity which is imposed by Para. 11, on a judgment-debtor, and to confer upon him a capacity to transfer the property in such a manner as to avoid conflict with the rights of decree-holder. Any transfer made after such a permission is liable to be set aside not as being void *ab initio* but only at the instance of decree-holder if he is prejudiced. The permission to mortgage, not of a limited nature, is therefore not impliedly revoked on account

12. Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one of the Collectors of the said district as the Provincial Government may by general rule or special order direct.

Provision where property is in several districts.
Powers of Collector to compel attendance and production.

13. In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of documents.

THE FOURTH SCHEDULE.

(See section 155.)

ENACTMENTS AMENDED.

Year.	No.	Short title.	Amendment.
1870	VII	The Court-Fees Act, 1870.	In article 1 of Schedule I, after the word "plaint" the words "written statement pleading a set-off or counter-claim" and after the word "Act" the words "or of cross-objection" shall be inserted. From article 11 of Schedule II the words "from an order rejecting a plaint or" shall be omitted. For the entry in the first column of Schedule II relating to article 19 the following entry shall be substituted, namely:— "Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908."

THE FIFTH SCHEDULE.

(See section 156.)

ENACTMENTS REPEALED.

[Repealed by Sch. II of Act XVII of 1914.]

THE INDIAN COINAGE ACT (III OF 1906).

Year.	No.	Short title.	How repealed or otherwise affected by legislation.
1906	III	The Indian Coinage Act, 1906.	Repealed in part, X of 1914. Amended, IV of 1918; XXI of 1919; X of 1924; IV of 1927; II of 1934; VI of 1940.

PREFATORY NOTE.—The currency of British India is regulated by two modern Acts which supersede all prior legislation on the subject. The first, The Indian Paper Currency Act (III of 1905), deals with the issue, legal tender, and payment of currency notes. The second, the Indian Coinage Act (III of 1906) provides for the coining of silver (rupees), nickel (one-anna pieces) and bronze (pice). The standard coin of India is the silver

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of the failure of the negotiations relating to the contemplated mortgage and the subse-

quent order of Collector directing sale of that property. 1934 N. 285=153 I.C. 687.

Government rupee Other forms of rupee, such as the Portuguese rupee and Hyderabad or Sicca rupees are, however, in circulation. Gold coin of London Mint or the branch Mints which has not been decreed is legal tender at a fixed sum of rupees for one sovereign. Provision is made as to the amount of Indian coin which is legal tender. Provision is also made for the currency of certain coin made under former Acts, and the Indian Government is authorized to mint other coin for issue by the Government of territories beyond British India. (S. 23.)

The coinage of Ceylon (1892), Mauritius (1876) and East Africa and Uganda (1905) is based on the silver rupee as a standard; but in these possessions and protectorates the subsidiary pieces are the rupee-cents, and not annas and pies as in India.

In Hongkong the standard coin is the Mexican silver dollar (1895) but British dollars and Hongkong dollars are treated as equivalent to the Mexican dollar.

In the Straits Settlements (1903) and Labuan (1905) the standard coin is the Straits Settlements dollar.

In British South Africa the standard is British sterling money.

The currency of the Dominion of Canada is regulated by legislation of the Dominion Parliament. (Ency. of Laws of England, 2nd Ed., Vol. III, Title "Coins," p. 142.)

The following from the Statement of Objects and Reasons may also be noted (see *Fort St. George Gazette*, Part III, p. 129):—

"The object of this Bill is to consolidate the Acts relating to the coinage. The law, as originally formulated in the Indian Coinage Act (XXIII of 1870) has been materially modified by two Acts, namely, the Indian Coinage, and Paper Currency Act (VIII of 1893), which abolished obligatory free coinage, and the Indian Coinage and Paper Currency Act (XXII of 1899), which made gold coins a legal tender. The present Bill proposes to repeal both these Acts as well as the main Act of 1870, to reproduce the provisions, so far as they are still required, in a consolidated form and to provide for the introduction of a nickel one-anna and of a bronze coinage.

THE INDIAN COINAGE ACT (III OF 1906).¹

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THE SCHEDULE.—[*Repealed.*]

[2nd March, 1906.]

An Act to consolidate and amend the law relating to Coinage and the Mint.

WHEREAS it is expedient to consolidate and amend the law relating to Coinage and the Mint; It is hereby enacted as follows:—

LEG. REF.

¹ For Statement of Objects and Reasons, see *Gazette of India*, 1905, Part V, p. 32; for Report of Select Committee, see *ibid.*, 1906, Part V, p. 9; and for Proceedings in Council, see *ibid.*, 1905, Part VI, p. 142; *ibid.*, 1906, Part VI, p. 28.

The Act has been declared in force in the Angul district by the Angul Laws Regulation (III of 1913), B. and O. Code, Vol. I, p. 885.

The Act has been declared in force in the Arakan Hill District by the Arakan Hill District Laws Regulation (I of 1916), Bur. Code, Vol. I.

Preliminary.

Short title and extent.

1. (1) This Act may be called **THE INDIAN COINAGE ACT, 1906**; and

(2) It extends to the whole of British India, inclusive of British Baluchistan, the Sonthal Parganas and the Pargana of Spiti.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) “deface”, with its grammatical variations and cognate expressions, includes clipping, filing, stamping, or such other alteration of the surface or shape of a coin as is readily distinguishable from the effects of reasonable wear;

(b) “the Mint” includes the Mints now existing and any which may hereafter be established;

(c) “prescribed” includes prescribed by a rule made under this Act;

(d) “remedy” means variation from the standard weight and fineness;

and

(e) “standard weight” means the weight prescribed for any coin.

Power to establish and abolish Mints.

3. The Central Government may, by notification in the Official Gazette,—

(a) establish a Mint at any place at which a Mint does not for the time being exist; and

(b) abolish any Mint, whether now existing or hereafter established.

Silver Coinage.

Silver coins.

4. The following silver coins only shall be coined at the Mint for issue under the authority of the Central Government, namely:—

(a) a rupee to be called the Government rupee;

(b) a half-rupee, ¹[* * *];(c) a quarter-rupee, ¹[* * *];
²[* * * *]

Standard weight and fineness.

³[5. (1) The standard weight of the Government rupee shall be one hundred and eighty grains troy.

(2) The other silver coins shall be of proportionate weight.

(3) The standard fineness of the Government rupee shall be as follows, namely, eleven-twelfths, or one hundred and sixty-five grains of fine silver, and one-twelfth or fifteen grains of alloy: of the half-rupee, eleven-twelfths, or eighty-two and a half grains of fine silver, and one-twelfth or seven and a half grains of alloy: and of the quarter rupee, one-half, or twenty-two and a half grains of fine silver, and one-half, or twenty-two and a half grains of alloy.

(4) In the making of silver coins, a remedy shall be allowed of an amount not exceeding the following, namely:—

	Remedy in weight.	Remedy in fineness.
Rupee	} Five-thousandths. Nine-thousandths.	Two-thousandths.
Half-rupee		
Quarter-rupee		Five-thousandths.

LEG. REF.¹ The words “or eight-anna piece” and “or four-anna piece” in clauses (b) and (c), respectively were omitted by S. 2 of the Indian Coinage (Amendment) Act (XXI of 1919).² The words “and (d) an eighth of a

rupee, or two-anna piece” were omitted by S. 2 of the Indian Coinage (Amendment) Act (IV of 1918).

³ S. 5 is merely substituted for old S. 5 by Act VI of 1940.

and in applying the said remedies to quarter-rupees the remedies shall be applied to the average of one hundred coins and not to individual coins.]

Nickel Coinage.

16. The following nickel coins only shall be coined at the Mint for issue under the authority of the Central Government, namely: ²[an eight-anna, a four-anna, a two-anna and a one-anna piece].

7. The standard weight of the ³[eight-anna, four-anna, two-anna and one-anna pieces shall be one hundred and twenty, one hundred and five, ninety, and sixty grains Troy, respectively]:

Standard weight. Provided that, in the making of nickel coin, a remedy shall be allowed of an amount not exceeding one-fortieth in weight.

Bronze Coinage.

48. The following bronze coins only shall be coined at the Mint for issue under the authority of the Central Government, namely:—

- (a) a pice, or quarter-anna;
- (b) a half-pice, or one-eighth of an anna; and
- (c) a pie, being one-third of a pice, or one-twelfth of an anna.

Standard weight and composition. 9. (1) The standard weight of the pice shall be seventy-five grains Troy, and the other bronze coins shall be of proportionate weight.

(2) Bronze coins shall be coined from a mixed metal consisting of copper, tin and zinc:

Provided that, in the making of bronze coins, a remedy shall be allowed of an amount not exceeding one-fortieth in weight.

Dimensions and Designs of Coins.

Power to direct coining, and to prescribe dimensions and designs.

10. (1) The Central Government may, by notification⁵ in the Official Gazette.

(a) direct the coining and issuing of all coins referred to in sections 4, 6 and 8, and

(b) determine the dimensions of, and designs for, such coins.

(2) Until the Central Government] otherwise determines by notification under sub-section (1), the dimensions and designs of the silver coins coined under this Act shall be those prescribed for the like silver coins under the ⁶[Indian Coinage Act, 1870, at the time of the commencement of this Act.

Legal Tender.

7[11. Gold coins, coined at His Majesty's Royal Mint in England or at any Mint established in pursuance of a proclamation of His Majesty as a branch of His Majesty's Royal Mint, shall not be legal tender in British India in payment or on account, but such coins shall be received by the Reserve Bank of

LEG. REF.

¹ This section was substituted for the original S. 6 by S. 4 of the Indian Coinage (Amendment) Act (IV of 1918).

² These words were substituted for the words "a two-anna piece and a one-anna piece" by S. 3 of the Indian Coinage (Amendment) Act (XXI of 1919).

³ These words were substituted by S. 4 of the Indian Coinage (Amendment) Act (XXI of 1919).

⁴ For legal tender of bronze coins coined

outside British India, see the Bronze Coin (Legal Tender) Act (XXII of 1918).

⁵ For Notifications issued under this section, see Gen. R. and O.

⁶ Repealed by this Act.

⁷ This section was substituted for the original S. 11 by Act II of 1934. The original S. 11 stood as follows:—

Gold coins, whether coined at His Majesty's Royal Mint or at any Mint established in pursuance of proclamation of His Majesty

India and its offices, branches and agencies in India at the bullion value of such coins calculated at the rate of 8·47512 grains Troy of fine gold per rupee.]

Silver coin when a legal tender. 12. (1) The rupee and half-rupee shall be a legal tender in payment or on account:

Provided that the coin—

(a) has not lost in weight so as to be more than two per cent. below standard weight, and

(b) has not been defaced.

(2) The quarter-rupee ¹[* * *] shall be a legal tender in payment or on account for any sum not exceeding one rupee:

Provided that the coin—

(a) has not lost in weight so as to be more than such percentage below standard weight as may be prescribed as the limit of reasonable wear, and

(b) has not been defaced.

213. ³[The eight-anna, four-anna, two-anna] and one-anna nickel coins specified in section 6 shall be a legal tender in payment or on account for any sum not exceeding one rupee at the rate of ⁴[two, four,] eight and sixteen for a rupee, respectively.

Bronze coin when a legal tender. 14. The bronze coins specified in section 8 shall be a legal tender in payment or on account for any sum not exceeding one rupee at the following rates, respectively, namely:—

(a) the pice at the rate of sixty-four for a rupee, or four for an anna;

(b) the half-pice at the rate of one-hundred and twenty-eight for a rupee or eight for an anna; and

(c) the pie at the rate of one hundred and ninety-two for a rupee, or twelve for an anna.

Coin made under former Acts. 15. (1) (a) All silver coins of the weight and standard specified in Acts No. XVII of 1835,⁵ No. XXI of 1838,⁶ No. XIII of 1862⁵ and the Indian Coinage Act, 1870,⁷ and

(b) all copper coin of the weight specified in Acts No. XXI of 1835,⁵ No. XXII of 1844,⁶ No. XIII of 1862,⁵ and the Indian Coinage Act, 1870,⁷

which may have been issued since the passing of those Acts respectively, and declared by those Acts respectively to be a legal tender, shall, ⁸[subject only to the provisions of section 15-A and] in the case of silver coin to the provisos contained in section 12 of this Act in so far as such provisos apply to like coins under this Act, continue to be a legal tender for the amounts for which the like silver and bronze coins are a legal tender under this Act respectively.

(2) All double pice copper coins which may have been issued under the Acts specified in sub-section (1), clause (d), shall continue to be a legal tender in payment or on account for any sum not exceeding one rupee at the rate of thirty-two for a rupee or two for an anna.

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as a branch of His Majesty's Royal Mint, shall not be legal tender in British India in payment or on account, but such coins shall be received at any mint currency office and at any time after the 30th day of September, 1927, at any Government Treasury other than a Sub-Treasury, at the bullion value of such coins calculated at the rate of 8·47512 grains Troy of fine gold per rupee.

¹ The words "and eighth of a rupee" were omitted by S. 6 of the Indian Coinage (Amendment) Act (IV of 1918).

² This section was substituted for the original S. 13 by S. 7, *ibid.*

³ These words were substituted for the words "The two-anna" by S. 5 of the Indian Coinage (Amendment) Act (XXI of 1919).

⁴ These words were inserted by S. 5, *ibid.*

⁵ Repealed by the Indian Coinage Act (XXIII of 1870).

⁶ Repealed by Act XIII of 1862.

⁷ Repealed by this Act.

⁸ These words were substituted by S. 2 of the Indian Coinage (Amendment) Act (X of 1924).

¹[(3) All quarter-rupee silver coins which may have been issued under this Act prior to the commencement of the Indian Coinage (Amendment) Act, 1940, shall continue to be a legal tender in payment or on account for any sum not exceeding one rupee at the rate of four for a rupee.]

²[15-A. Notwithstanding anything contained in section 12, section 13, section 14 or section 15, the Central Government may, by notification in the Official Gazette, call in, with effect from such date as may be specified in the notification, any coin, of whatever date or denomination, referred to in any of those sections other than the rupee and half-rupee referred to in sub-section (1) of section 12 and on and from the date so specified such coin shall cease to be a legal tender save at a Government currency office:

Provided that such coin shall continue to be a legal tender also at Government treasuries until the expiry of such further period, not being less than twelve months, as the Central Government may fix by the notification.]

Diminished, Defaced and Counterfeit ³[] Coins.*

16. Where any silver coin which has been coined and issued under the authority of the Central Government is tendered to any person authorised by the Central Government ⁵[* * *] to act under this section, and such person has reason to believe that the coin—

(a) has been diminished in weight so as to be more than such percentage below standard weight as may be prescribed as the limit of reasonable wear, or

(b) has been defaced,
he shall, by himself or another, cut or break the coin.

Procedure in regard to coin cut under section 16 (a). 17. A person cutting or breaking coin under the provisions of clause (a) of section 16 shall observe the following procedure, namely:—

(a) if the coin has been diminished in weight so as to be more than such percentage below standard weight as may be prescribed as the limit of reasonable wear, but not more than such further percentage as may be prescribed in this behalf, he shall either return the pieces to the person tendering the coin, or, if such person so requests, shall receive and pay for the coin at such rates as may be prescribed in this behalf; and

(b) if the coin has been diminished in weight so as to be more than such further percentage below standard weight so prescribed as aforesaid, he shall return the pieces to the person tendering the coin, who shall bear the loss caused by such cutting or breaking.

Procedure in regard to coin cut under section 16 (b). 18. A person cutting or breaking coin under the provisions of clause (b) of section 16 shall observe the following procedure, namely:—

(a) If such person has reason to believe that the coin has been fraudulently defaced, he shall return the pieces to the person tendering the coin, who shall bear the loss caused by such cutting or breaking;

(b) if such person has not reason to believe that the coin has been fraudulently defaced, he shall receive and pay for the coin at its nominal value.

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¹Sub-S. (3) of S. 15 added by Act VI of 1940.

²S. 15-A was inserted by S. 3 of the Indian Coinage (Amendment) Act (X of 1924).

³The word "Silver" was omitted by S. 6 (1) of the Indian Coinage (Amendment) Act

(XXI of 1919).

⁴For persons so authorised, see Gen. R. and O.

⁵The words "or by the Local Government" were omitted by Government of India (Adaptation of Indian Laws) Order, 1937.

Explanation.—For the purposes of this section a coin which there is reason to believe has been defaced by sweating shall be deemed to have been fraudulently defaced.

Procedure in regard to coin which is liable to be cut under both clause (a) and clause (b) of section 16 19. If a coin is liable to be cut or broken under the provisions of both clause (a) and clause (b) of section 16, the person cutting or breaking the coin shall deal with it,—

(a) if he has reason to believe that the coin has been fraudulently defaced, under clause (a) of section 18 and

(b) in other cases, under section 17.

20. Where any silver ¹[or nickel] coin purporting to be coined or issued under the authority of the Central Government is tendered to any person authorised by the ²Central Government ³[* * *] to act under this section, and such person has reason to believe that the coin is counterfeit, he shall by himself or another cut or break the coin, and may, at his discretion, either return the pieces to the tenderer, who shall bear the loss caused by such cutting or breaking, or ⁴[in the case of silver coin] receive and pay for the coin according to the value of the silver bullion contained in it.

Power to certain persons to cut counterfeit silver or nickel coin and procedure in regard to coin so cut.

Supplemental Provisions.

Power to make rules. 21. (1) The Central Government may make rules to carry out the purposes and objects of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) reduce the amount of remedy allowed by sections 5, 7 and 9 in the case of any coin;

(b) provide for the guidance of persons authorised to cut or break coin under sections 16 and 20;

(c) determine the percentage of diminution in weight below standard weight not being less in any case than two per cent. which shall be the limit of reasonable wear;

(d) prescribe the further percentage referred to in clause (a) of section 17, and the rates at which payments shall be made in the case of coins falling under the same clause; ⁵[*]

5[* * * * *]

(3) Every such rule shall be published in the Official Gazette, and on such publication shall have effect as if enacted in this Act.

22. No suit or other proceeding shall lie against any person in respect of anything in good faith done, or intended to be done, under or in pursuance of the provisions of this Act.

Bar of suits.

23. Nothing in this Act shall be deemed to prohibit or restrict the making at the Mint of coins intended for issue as money by the Government of any territories beyond the limits of British India.

Saving of making of other coins at Mints.

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¹ These words were inserted by S. (2) of the Indian Coinage (Amendment) Act (XXI of 1919).

² For persons so authorized, see Gen. R. & O.

³ The words "or by the Local Govern-

ment" were omitted by A.O., 1937.

⁴ These words were inserted in S. 6 (2) of the Indian Coinage (Amendment) Act (XXI of 1919).

⁵ The word "and" and clause (e) were omitted by S. 2 of the Currency Act (IV of 1927).

24. [* * *]¹Copper coins of such descriptions as at the time of the commencement of this Act may be coined at the Mint for issue under the authority of the Central Government may [* * *]²continue to be so coined until such time as the Central Government may by notification in the Official Gazette otherwise direct, and all copper coins so coined shall be a legal tender in payment or on account for the amounts for which bronze coins of corresponding nominal value are a legal tender under this Act.

[THE SCHEDULE.]

Repealed by Sec. 3 and Schedule II of Act X of 1914.

THE COLONIAL COURTS OF ADMIRALTY (INDIA)
ACT (XVI OF 1891.)³

Year.	No.	Short Title.	How repealed or otherwise affected by legislation.
1891	XVI	The Colonial Courts of Admiralty (India) Act, 1891.	Repealed in part, X of 1914. Repealed in part and amended. VI of 1900, Ss. 47 and 48. Amended, XI of 1923.

[14th May, 1891.]

An Act to declare certain Courts in British India to be Colonial Courts of Admiralty.

WHEREAS it is provided by the Colonial Courts of Admiralty Act, 1890,⁴ that the Legislature of a British possession may by any colonial law declare any Court of unlimited civil jurisdiction in that possession to be a Colonial Court of Admiralty;

And whereas it is expedient, in pursuance of that provision, to declare certain Courts in British India to be Colonial Courts of Admiralty;

It is hereby enacted as follows:—

Title and commencement. 1. (1) This Act may be called THE COLONIAL COURTS OF ADMIRALTY (INDIA) ACT, 1891; and

(2) It shall come into effect—

(a) if Her Majesty's pleasure thereon has been signified by notification⁵ in the *Official Gazette*, on or before the first day of July, 1891, then on that day or

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¹ The words "The Acts mentioned in the schedule are hereby repealed to the extent specified in the last column thereof" and the words "Provided that" were repealed by S. 3 and Schedule II of the Repealing and Amending Act (X of 1914).

² The words "notwithstanding the repeal of the said Acts" were repealed by S. 3 and Schedule II, *ibid.*

³ For statement of Objects and Reasons, see *Gazette of India*, 1891, Pt. V, p. 140; for Proceedings in Council, see *ibid.*, 1891, Pt. VI, p. 116.

⁴ See *Gazette of India*, 1890, Pt. I, p. 654.

⁵ For notification publishing Her Majesty's assent to this Act, see *Gazette of India*, 1891, Pt. I, p. 371.

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Sec. 1.—In charges under Admiralty Jurisdiction the offence with which an accused is chargeable is the offence under English Law. Where therefore a person is charged under Ss. 4 and 304, Penal Code, he should be charged with manslaughter or a lesser offence of grievous hurt or simple hurt. The punishment which may be imposed will be the punishment which may be imposed for a like offence under the Penal Code as provided by S. 3, Colonial Courts Act (37 & 38 Vlt. Chap. XXVII). The procedure which would govern the trial, question of jurisdiction apart, would be the Procedure in the Cr. P. Code. 29 S.L.R. 281 = 160 I.C. 375 = 1936 S. 3.

(b) if Her Majesty's pleasure thereon has not been so signified on or before that day, then on the day on which Her Majesty's pleasure shall be signified by such a notification as aforesaid.

Appointment of Colonial Courts of Admiralty. 2. The following Courts of unlimited civil jurisdiction are hereby declared to be Colonial Courts of Admiralty, namely:—

- (1) the High Court of Judicature at Fort William in Bengal.
- (2) the High Court of Judicature at Madras,
- (3) the High Court of Judicature at Bombay, [and]¹
- (4) [* * *]²
- (5) [* * *]²
- (6) The District Court of Karachi.

Construction of Indian Acts referring to Admiralty and Vice-Admiralty Courts. 3. The expressions "Court having Admiralty jurisdiction" and "Admiralty Court" and the expression "Admiralty or Vice-Admiralty cause," and other expressions referring to Admiralty or Vice-Admiralty Courts or causes, shall, wherever any such expression occurs in any ³[Indian law] be deemed to include a Colonial Court of Admiralty and a Colonial Court of Admiralty cause, and to refer to a Colonial Court of Admiralty or a Colonial Court of Admiralty cause, respectively.

Court-fees in suits in the Colonial Courts of Admiralty at Karachi. 4. Court-fees in suits instituted in the Colonial Court of Admiralty at Karachi, shall, unless the jurisdiction of the Court is to be exercised in any matter relating to the slave-trade, be leviable in accordance with the provisions of Chapter III of the Court-fees Act, 1870.

5. [Repealed by Act X of 1914.]

THE SCHEDULE.

[Rep. by Act X of 1914.]

THE INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, 1926.

[16 & 17 Geo. V. CH. 40].

[27th January, 1927.]

An Act to confer on Courts in India and other parts of His Majesty's Dominions jurisdiction in certain cases with respect to the dissolution of marriages, the parties whereto are domiciled in England or Scotland, and to validate certain decrees granted for the dissolution of the marriage of persons so domiciled. (15th December, 1926.)

Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same as follows:—

1. Subject to the provisions of this Act ⁵[a High Court in British India

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¹ Word "and" inserted by Government of India (Adaptation of Indian Laws) Order, 1937.

² Sub-sections (4), and (5) omitted by *ibid.*

³ Substituted for words "enactment of the Governor-General in Council, or of a Governor in Council or Lieutenant-Governor in Council" by Government of India (Adaptation of Indian Laws) Order, 1937.

⁴ The words "Rangoon, Aden or" repealed by *ibid.*

⁵ Substituted for "a High Court in India" to which Part IX of the Government of

NOTES.

Sec. 1.—The effect of the Indian and Colonial Divorce Jurisdiction Act of 1926 upon the divorce cases is to divide His Majesty's subjects in India into two classes. Upon those who are residing within the jurisdiction of a High Court established by Letters Patent some new facilities are conferred. Those who are resident elsewhere remain under the law as it was before the Indian and Colonial Divorce Jurisdiction Act was passed. 1933 S. 70. See also 130 I.C. 524=1931 L. 245.

Divorce jurisdiction of High Courts in India where parties are domiciled in England or Scotland. constituted by His Majesty by Letters Patent] shall have jurisdiction to make a decree for the dissolution of a marriage, and as incidental thereto to make an order as to damages, alimony or maintenance, custody of children, and costs, where the parties to the marriage are British subjects domiciled in England or Scotland, in any case where a Court in [British]¹ India would have such jurisdiction if the parties to the marriage were domiciled in India:

Provided that—

(a) the grounds on which a decree for the dissolution of such a marriage may be granted by any such Court shall be those on which such a decree might be granted by the High Court in England according to the law for the time being in force in England; and

(b) any such Court in exercising such jurisdiction shall act and give relief on principles and rules as nearly as may be conformable to those on which the High Court in England for the time being acts and gives relief; and

(c) no such Court shall grant any relief under this Act except in case where the petitioner resides in India at the time of presenting the petition and the place where the parties to the marriage last resided together was in India, or make any decree of dissolution of marriage except where either the marriage was solemnized in India or the adultery or crime complained of was committed in India; and

(d) any such Court may refuse to entertain a petition in such a case if the petitioner is unable to show that by reason of official duty, poverty or any other sufficient cause he or she is prevented from taking proceedings in the Court of the country in which he or she is domiciled and the Court shall so refuse if it is not satisfied that in the interests of justice it is desirable that the suit should be determined in India.

(2) Any such order for alimony or maintenance or for custody of children shall have effect in India on the making thereof, but save as aforesaid no such decree or order shall have any force or effect either in India or elsewhere unless and until registered in manner hereinafter provided.

(3) On production of a certificate purporting to be signed by the proper officer of the High Court in India by which the decree or order is made, the decree or order shall—

(a) if the parties to the marriage are domiciled in England, be registered in the High Court in England;

(b) if the parties to the marriage are domiciled in Scotland, be registered in the books of council and session;

and upon such registration shall, as from the date of registration, have the same force and effect, and proceedings may be taken thereunder as if it had been a decree or order made on the date on which it was made by the High Court in India, by the High Court in England or the Court of Session in Scotland, as the case may be, and, in the case of an order, proceedings may be taken for the modification or discharge thereof as if it had been such an order as aforesaid:

Provided that—

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India Act applies" by Government of India (Adaptation of Acts of Parliament) Order, 1937

¹ Inserted by Government of India (Adaptation of Acts of Parliament) Order, 1937.

NOTES.

PROVISO.—Object of the Act—Grounds for divorce—Applicability of English Law—Petitioner resident in India and marriage and adultery committed in India—Jurisdiction of Indian Court to grant divorce. 56 C. 89=32 C.W.N. 742=1928 C. 657.

(i) the High Court in England or the Court of Session in Scotland shall not, unless the Court for special reasons sees fit so to do, entertain any application for the modification or discharge of any such order if and so long as the person on whose petition the decree for the dissolution of the marriage was pronounced is resident in India; and

(ii) where an order for the payment of alimony has been so registered in the books of council and session, the Court of Session shall in addition to any other power have power in the event of any material change of circumstances to discharge or modify such order.

(4) Proceedings before a High Court in India in exercise of the jurisdiction conferred by this Act shall be conducted in accordance with rules made by the Secretary of State [* * * *]¹ with the concurrence of the Lord Chancellor, and those rules shall provide—

(a) for petitions being heard before a Judge or one of two or more judges of the Court nominated for the purpose by the Chief Justice of the Court with the approval of the Lord Chancellor;

(b) for the decree or order made by such a Judge being subject to appeal to two Judges of the Court similarly nominated without prejudice however to any right of ultimate appeal to His Majesty in Council;

(c) for prohibiting or restricting the exercise of the jurisdiction where proceedings for the dissolution of the marriage have also been instituted in England or Scotland;

(d) for preventing, in the case of a decree dissolving a marriage between parties domiciled in Scotland, the making of an order for the securing of a gross or annual sum of money;

(e) for limiting cases in which applications for the modification or discharge of an order may be entertained by the Court to cases where at the time the application is made the person on whose petition the decree for the dissolution of the marriage was pronounced is resident in India;

(f) for prescribing the officer of the Court empowered to give certificates under this Act, and the form of any such certificates;

(g) for conferring on such official as may be appointed for the purpose within the jurisdiction of each High Court the like right of showing cause why a decree should not be made absolute as is exercisable in England by the King's Proctor.

(5) The decision of a High Court in India, or on an appeal therefrom as to the domicile of the parties to a marriage shall, for the purposes of this Act, be binding on all Courts in England, Scotland [India and Burma].²

Divorce Jurisdiction of High Court in Burma where parties are domiciled in England or Scotland.

³[1-A. The provisions of section one of this Act shall apply in relation to Burma as they apply in relation to India, subject to the following modifications, that is to say—

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¹ The words "in Council of India" were omitted by Government of India (Adaptation of Laws of Parliament) Order, 1937.

² Substituted for the words "and India" by Government of India (Adaptation of Laws of Parliament) Order, 1937.

³ Sections 1-A and 1-B were inserted by *ibid.*

NOTES.

Sec. 1 (2) & (3): DISSOLUTION OF MARRIAGE—DECREE NOT REGISTERED IN HIGH COURT IN ENGLAND—POSITION OF PARTIES.—No decree for dissolution of marriage made by virtue of the jurisdiction conferred on a

High Court in India under Act of 1926 has any force or effect, either in India or elsewhere, unless and until it has been registered in the High Court in England. The absence of such registration means that the marriage between the parties is at any rate to a limited extent—still in force, and a second marriage contracted by either of the parties in such circumstances, will be null and void. I.L.R. (1937) 1 Cal. 417=41 C.W.N. 268.

Secs. 1 and 1-A: JURISDICTION OF HIGH COURT.—The effect of the Indian and Colonial Divorce Jurisdiction Act of 1926 upon the divorce cases is to divide His Majesty's subjects in India into two classes. Upon those who are residing within the jurisdic-

(a) in sub-section (1) of the said section, for the words "a High Court in British India constituted by His Majesty by Letters Patent" there shall be substituted the words "the High Court at Rangoon", and for the words "where a Court in British India" there shall be substituted the words "where the Court";

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tion of a High Court established by Letters Patent some new facilities are conferred. Those who are resident elsewhere remain under the law as it was before the Indian and Colonial Divorce Jurisdiction Act was passed. I.R. 1933 Sind 132=143 I.C. 618=1933 Sind 70. Under S. 1 of the Act a High Court in India shall have jurisdiction to make a decree for the dissolution of a marriage, if in any case where a Court in India would have jurisdiction if the parties were domiciled in India. In a case where parties domiciled in Scotland last resided in Karachi. *Held*, that in view of S. 3 and the provisions of S. 10 of the Divorce Act, a District Court in Sind would have jurisdiction to divorce the parties and so the High Court of Bombay has jurisdiction to divorce such persons. 1938 Bom. 89=39 Bom.L.R. 1182. S. 1 of the Act, together with proviso (a) thereto has the effect of conferring upon a Chartered High Court the power to grant a decree of dissolution where the parties are British subjects domiciled in England or Scotland on the grounds specified in S. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, as that section has stood since January 1st, 1938. In other words a High Court has power to grant a decree of dissolution on the ground of cruelty alone. This power is however subject to proviso (c) of S. 1 of the Act of 1926 and the word "crime" therein cannot include cruelty, but must be taken to refer to the specific criminal offences mentioned in S. 176, that is to say, rape, sodomy and bestiality. Matrimonial cruelty is not a crime though of course a particular act of cruelty may be punishable criminally. I.L.R. (1939) 1 Cal. 236=43 C.W.N. 257=1939 Cal. 650. *See also* 1941 Rang. 221; 40 Bom.L.R. 900. The words "law for the time being in force in England" in Proviso (a) to S. 1 (1) of the Indian and Colonial Divorce Jurisdiction Act, in their natural adaptation mean the law in force at the time when grounds of divorce fall to be considered in the suit, and not the law in force at the time of the passing of the Act of 1926. The reference to a "Court in India having such jurisdiction" in S. 1 (1) only limits the class of persons to whom a decree of dissolution can be granted, but does not affect the grounds upon which such a decree can be granted, which by proviso (a) are to be those in force for the time being in England. Since the passing of the Matrimonial Causes Act of 1937, the High Courts in India have therefore jurisdiction to grant divorce under the Act of 1926 on any of extended grounds provided by the later Act of 1937, one of these grounds be-

ing desertion without cause for a period of at least three years immediately preceding the presentation of the petition. 1938 Bom. 425=177 I.C. 940=40 Bom.L.R. 900. The Indian and Colonial Divorce Jurisdiction Act plainly confers on any chartered High Court in British India jurisdiction to divorce British subjects domiciled in England where any Court in India would have jurisdiction if the parties to the marriage were domiciled in India. The wife of a domiciled Englishman brought a suit in the High Court of Bombay for dissolution of marriage under the Indian and Colonial Divorce Jurisdiction Act of 1926. The parties last resided together within the appellate jurisdiction of the Lahore High Court. The respondent still lived there, but the petitioner lived in Bombay at the time of the suit and for some time before. *Held*, that the Bombay High Court had jurisdiction to try the suit and was bound to do so. R. 24 of the Rules made by the Secretary of State under S. 1 (4) of the Act must be construed as extending only to matters of procedure and not as affecting jurisdiction. 42 Bom. L. R. 1083=I.L.R. (1941) Bom. 183=1941 Bom. 61.

MATRIMONIAL OFFENCES.—Where during the honeymoon the wife was struck on the face which necessitated a doctor's attendance but did no bodily harm to her and where the husband persisted in writing letters to his wife expressing his doubts as to paternity of the child of his wife, it was held that these did not amount to legal cruelty which would enable her to obtain a divorce under the Indian Colonial Divorce Jurisdiction Act. 1941 Rang. 221=1941 Rang.L.R. 290=196 I.C. 270. Where a wife refuses for an adequate reason to live in the country in which his business compels her husband to live, and refuse to have any sexual intercourse with him during the periods in which they may be in the same country, she ceases to be his wife in any proper sense and her conduct amounts to desertion; and the desertion is not broken merely by the spouses living in the same house for a few months. The mere fact that the husband and wife are living under the same roof would not prevent desertion. 41 Bom.L.R. 1234=1940 Bom. 37=I.L.R. (1940) Bom. 34. Condonation of prior matrimonial offence (adultery) is revived by a subsequent offence like desertion. 62 Cal. 541=62 C.L.J. 264.

PRACTICE OF HIGH COURT.—High Courts in India will always be slow to entertain petition for dissolution by persons not domiciled and resident in India. Only in exceptional circumstances will the Courts exercise their discretion in such cases. The

(b) in the proviso to the said sub-section, for the words "any such Court", wherever those words occur, there shall be substituted the words "the Court"; and for the words "no such Court shall" there shall be substituted the words "the Court shall not";

(c) in sub-section (3) of the said section, for the words "the High Court in India by which the decree or order is made" there shall be substituted the words "the High Court at Rangoon" and for the words "by the High Court in India" there shall be substituted the words "by the High Court at Rangoon";

(d) in sub-section (4) of the said section, for the words "a High Court in India" there shall be substituted the words "the High Court at Rangoon" and in paragraph (g) for the words "each High Court" there shall be substituted the words "the High Court";

(e) in sub-section (5) of the said section, for the words "a High Court in India" there shall be substituted the words "the High Court at Rangoon";

(f) save as aforesaid, for the word "India" wherever it occurs in the said section (except in the phrase "India and Burma") there shall be substituted the word "Burma".

1-B. (1) Any proceedings commenced under this Act before the separation of Burma from India may be continued, determined and appealed against in all respects as if Burma had continued to be part of India.

(2) The rules made under sub-section (4) of section one of this Act which immediately before the separation of Burma from India were applicable to the High Court at Rangoon shall, until superseded by fresh rules, continue to apply to that Court, and nominations made and approved under those rules shall continue to have effect.]

2. (1) His Majesty may, by Order in Council, provide for applying [the provisions of section one]¹ of this Act, subject to the necessary modifications, to any part of His Majesty's Dominions other than a self-governing dominion, in like manner as they apply to India, and, in particular, any such Order in Council may determine the Court by which the jurisdiction conferred by those provisions is to be exercised.

(2) For the purposes of this section "self-governing dominion" means the Dominion of Canada, the Commonwealth of Australia (which for this purpose shall be deemed to include Papua and Norfolk Island), the Dominion of New Zealand, the Union of South Africa, the Irish Free State, Newfoundland, and the Colony of Southern Rhodesia.

3. Any decree granted under the Act of the Indian Legislature, known as the Indian Divorce Act, 1869, and confirmed or made absolute under the provisions of that Act for the dissolution of a marriage the parties to which were at the time of the commencement of the proceedings domiciled in England or in Scotland, and any order made by the Court in relation to any such decree shall, if the proceedings were commenced before the passing of this Act, be as valid and be deemed always to have been as valid in all respects as though the parties to the marriage had been domiciled in India [including Burma and Aden.]²

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¹ Substituted for the words "the foregoing provisions" by Government of India (Adaptation of Laws of Parliament) Order, 1937.

² Inserted by *ibid.*

NOTES.

Court before it does so, must clearly be of

opinion that, because of the reasons referred to in S. 1, sub-S. (1) (d), the petitioner cannot effectively prosecute his suit for divorce in the Court of his domicile. Further, the Court, must be satisfied that the interests of justice demand that the suit should be decided in India. 1935 A.L.J. 1025=1935 All. 763.

Short title.

4. This Act may be cited as THE INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, 1926.

RULES UNDER THE INDIAN AND COLONIAL DIVORCE JURISDICTION ACT (1926).

[Published in the Gazette of India, dated 26th August, 1927.]

HOME DEPARTMENT (16th August, 1927.)

RULES UNDER SECTION 1 (4), INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, 1926.

1. *Short title and commencement.*—(1) These rules may be called the Indian (Non-domiciled Parties) Divorce Rules, 1927. (2) They shall come into force on the 27th day of July, 1927.

2. *Appointment of Judges.*—(1) As soon as may be after the coming into force of these rules the Chief Justice of each of the High Courts referred in sub-section (1) of section 1 of the Indian and Colonial Divorce Jurisdiction Act, 1926, hereinafter called "the Act," shall submit to the Lord Chancellor through the Secretary of State for India the names of such number of Judges of the Court (including, if he thinks fit, the name of the Chief Justice himself) not exceeding six, as he may consider necessary for the purpose of exercising jurisdiction under the Act and these rules.

(2) Upon the approval of the Lord Chancellor to any nomination so submitted being signified to the Chief Justice by the Secretary of State for India, the Chief Justice shall cause the names so approved to be notified in the local Official Gazette (or, in the case of the High Court of Judicature at Calcutta, in the *Gazette of India*) as Judges appointed to exercise jurisdiction under the Act, and the Judges whose names shall have been so notified shall thereupon have power to exercise jurisdiction accordingly.

(3) At any time after the first nominations under these rules have been approved, the Chief Justice may propose the name or names of a further Judge or Judges to take the place of, or to exercise jurisdiction in addition to, the Judge or Judges for the time being having powers under the Act: and when such further nominations are approved they shall be notified as aforesaid.

3. Every petition under the Act shall be heard by a single Judge nominated and approved as hereinbefore provided, sitting without a jury and, subject to the provisions of the Indian Limitation Act, an appeal shall lie to a bench of two other Judges who have been similarly nominated and approved against any decree or order which would be appealable if it had been passed in proceedings under the Indian Divorce Act, 1869, and shall be disposed of accordingly. Each such Bench shall be constituted by the Chief Justice as occasion may arise.

4. Nothing in these rules shall be deemed to prevent the exercise of any ultimate right of appeal to His Majesty in Council.

5. *Petition.*—All proceedings under the Act shall be commenced by filing a petition to which shall be attached a certificate of the marriage.

6. (1) In the body of a petition praying for the dissolution of a marriage shall be stated—

(i) the place and date of the marriage and the name, status and domicile of the wife before the marriage;

(ii) the status of the husband and his domicile at the time of the marriage and at the time when the petition is presented, and his occupation and place or places of residence of the parties at the time of institution of the suit;

(iii) the principal permanent addresses where the parties have cohabited, including the address where they last resided together in India;

(iv) whether there is living issue of the marriage, and, if so, the names and dates of birth or ages of such issue;

(v) whether there have been in the Divorce Division of the High Court of Justice in England or in the Court of Session in Scotland or in any Court in India any and, if so, what previous proceedings with reference to the marriage by or on behalf of either of the parties to the marriage, and the result of such proceedings;

(vi) the matrimonial offences charged, set out in separate paragraphs, with the times and places of their alleged commission;

(vii) the claim for damages, if any;

(viii) the grounds on which the petitioner claims that in the interests of justice it is desirable that the suit should be determined in India.

(2) The petition shall conclude with a prayer setting out particulars of the relief claimed, including the amount of any claim for damages and any order for custody of children if sought, and shall be signed by the petitioner.

7. *Verification of petition.*—The statements contained in every petition under these rules shall be verified by the petitioner or some other competent person in manner required by the Code of Civil Procedure for the time being in force for the verification of plaints, and in cases where the petitioner is seeking a decree of dissolution of marriage the verification shall include a declaration authenticated in like manner that no collusion or connivance exists between the petitioner and the other party to the marriage, and that neither the petitioner nor within the knowledge of the petitioner the other party to the marriage has instituted proceedings which are still pending for the dissolution of the marriage in England or Scotland.

8. *Co-respondents are interveners.*—In every petition presented by a husband for the dissolution of his marriage, the petitioner shall make the alleged adulterers co-respondents in the suit, unless the Court shall otherwise direct.

9. Where a husband is charged with adultery with a named person, a certified copy of the pleading containing such charge shall, unless the Court for good cause shown otherwise directs, be served upon the person with whom adultery is alleged to have been committed, accompanied by a notice that such person is entitled, within the time therein specified, to apply for leave to intervene in the cause.

10. *Service of petitions and notices.*—Every petition or notice referred to in these rules shall be served on the party to be affected thereby, either within or without British India, in the manner prescribed by the Code of Civil Procedure for the time being in force for the service of summonses:

Provided that, unless the Court for good cause shown otherwise directs, service of all such petitions and notices shall be effected delivery of the same to the party to be affected thereby, and the Court shall record that it is satisfied that service has been so effected.

11. *Answers and subsequent pleadings.*—A respondent or co-respondent, or a woman to whom leave to intervene has been granted under rule 9, may file in the Court and answer to the petition.

12. (1) Any answer which contains matter other than a simple denial of the facts stated in the petition shall be verified in respect of such matter by the respondent or co-respondent, as the case may be, in the manner required by the rules for the verification of petitions, and when the respondent is husband or wife of the petitioner, the answer shall contain a declaration that there is not any collusion or connivance between the parties.

(2) Where the answer of a husband alleges adultery and prays relief, a certified copy thereof shall be served upon the alleged adulterer, together with a notice to appear in like manner as a petition. When in such case no relief is claimed, the alleged adulterer shall not be made a co-respondent, but a certified copy of the answer shall be served upon him together with a notice as under Rule 9 that he is entitled within the time therein specified to apply for leave to intervene in the suit, and upon such application he may be allowed to intervene, subject to such direction as shall then be given by the Court.

13. (1) If it appears to the Court that proceedings for the dissolution of the marriage have been instituted in England or Scotland before the date on which the petition was filed in India, the Court shall either dismiss the petition or stay further proceedings thereon until the proceedings in England or Scotland have terminated, or until the Court shall otherwise direct.

(2) If it appears that such proceedings were instituted after the filing of the petition in India, the Court may proceed, subject to the provisions of the Act, with the trial of the suit.

14. *Showing cause against a decree nisi.*—The Governor-General in Council in the case of the High Court of Judicature at Calcutta and the Local Government in other cases shall appoint a person to exercise within the jurisdiction of each of the High Courts referred to in section 1 of the Act the duties assigned to His Majesty's Proctor by Ss. 181 and 182 of the Supreme Court of Judicature (Consolidation) Act, 1925, and the name of the person so appointed shall be notified in the *Gazette of India* or in the local Official Gazette, as the case may be, by the designation of Proctor. Every Proctor so appointed shall, in the exercise of his functions act under the instructions of the Advocate-General or other Chief Law Officer of the province.

15. (1) If any person during the progress of the proceedings or before the decree *nisi* is made absolute gives information to the Proctor of any matter material to the due decision of the case, the Proctor may take such steps as he considers necessary or expedient.

(2) If in consequence of any such information otherwise the Proctor suspects that any parties to the petition are or have been in collusion for the purpose of obtaining a decree contrary to the justice of the case, he may after obtaining the leave of the Court intervene and produce evidence to prove the alleged collusion.

16. (1) When the Proctor desires to show cause against making absolute a decree *nisi* he shall enter an appearance in the suit in which such decree *nisi* has been pronounced and shall within a time to be fixed by the Court file his plea setting forth the grounds upon which he desires to show cause as aforesaid, and a certified copy of his plea shall be served

upon the petitioner or person in whose favour such decree has been pronounced or his advocate. On entering an appearance the Proctor shall be made a party to the proceedings, and shall be entitled to appear in person or by advocate.

(2) Where such plea alleges a petitioner's adultery with any named person a certified copy of the plea shall be served upon each such person omitting such part thereof as contains any allegation in which the person so served is not named.

(3) All subsequent pleadings and proceedings in respect of such plea shall be filed and carried on in the same manner as is hereinbefore directed in respect of an original petition, except as hereinafter provided.

(4) If the charges contained in the plea of the Proctor are not denied or if no answer to the plea of the Proctor is filed within the time limited or if an answer is filed and withdrawn or not proceeded with, the Proctor may apply forthwith for the rescission of the decree *nisi* and dismissal of the petition.

17. Where the Proctor intervenes or shows cause against a decree *nisi* in any proceedings for divorce, the Court may make such order as to the payment by other parties to the proceedings of the costs incurred by him in so doing, or as to the payment by him of any costs incurred by any of the said parties by reason of his so doing, as may seem just.

18. Any person other than the Proctor wishing to show cause against making absolute a decree *nisi* shall, if the Court so permits, enter an appearance in the suit in which such decree *nisi* has been pronounced, and at the same time file affidavits setting forth the facts upon which he relies. Certified copies of the affidavits shall be served upon the party or the advocate of the party in whose favour the decree *nisi* has been pronounced.

19. The party in the suit in whose favour the decree *nisi* has been pronounced may within a time to be fixed by the Court file affidavits in answer, and the person showing cause against the decree *nisi* being made absolute may within a further time to be so fixed file affidavits in reply.

20. *Decree absolute.*—No decree *nisi* for the dissolution of a marriage under the Act shall be made absolute till after the expiration of six months from the pronouncing thereof, if no appeal has been filed within that period, or if any appeal (including an appeal to His Majesty in Council) has been filed, until after the decision thereof.

21. (1) Application to make absolute a decree *nisi* shall be made to the Court by filing a petition setting forth that application is made for such decree absolute, which will thereupon be pronounced in open Court at a time appointed for that purpose. In support of such application it must be shown by affidavit filed with the said petition that no proceedings for the dissolution of the marriage have been instituted and are pending in England or Scotland, and that search has been made in the proper books at the Court up to within six days of the time appointed, and that at such time no person had intervened or obtained leave to intervene in the suit, and that no appearance has been entered nor any affidavits filed on behalf of any person wishing to show cause against the decree *nisi* being made absolute; and in case leave to intervene had been obtained, or appearance entered or affidavits filed on behalf of such person, it must be shown by affidavits what proceedings, if any, have been taken thereon.

(2) If more than twelve calendar months have elapsed since the date of the decree *nisi*, an affidavit by the petitioner, giving reasons for the delay, shall be filed.

22. *Alimony, maintenance and custody of children.*—Proceedings relating to alimony, maintenance, custody of children, and to the payment, application or settlement of damages assessed by the Court shall be conducted in accordance with the provisions of the Indian Divorce Act, 1869, and of the rules made thereunder:

Provided that when a decree is made for the dissolution of a marriage the parties to which are domiciled in Scotland, the Court shall not make an order for the securing of a gross or annual sum of money:

Provided further that no Court in India shall entertain an application for the modification or discharge of an order for alimony, maintenance or the custody of children, unless the person on whose petition the decree for the dissolution of the marriage was pronounced is at the time the application is made resident in India.

23. *Certifying Officer.*—A certificate referred to in sub-section (3) of section 1 of the Act shall be in the form set out in the schedule and shall be signed by a Registrar or Prothonotary of the High Courts to which the Act applies and sealed with the seal of the Court.

24. *Procedure generally.*—Subject to the provisions of these rules all proceedings under the Act between party and party shall be regulated by the Indian Divorce Act and the rules made thereunder.

NOTES.

Rule 24 must be construed as extending only to matters of procedure and not as

affecting jurisdiction. 42 Bom.L.R. 1083 = I.L.R. (1940) Bom. 183 = 1941 Bom. 61.

25. The forms set forth in the schedule to the Indian Divorce Act, with such variation as the circumstances of each case and these rules may require, may be used for the respective purposes mentioned in the Schedule.

SCHEDULE.

(See Rule 23.)

I, A. B. Registrar
Prothonotary of the High Court of Judicature at hereby
certify that the foregoing is a true copy of a decree
order made by the aforesaid High Court
acting in exercise of the matrimonial jurisdiction conferred by the Indian and Colonial
Divorce Jurisdiction Act, 1926 Suit No.....of.....
in which the above-named C. D. was petitioner and the above-named E. F. was respondent
and the above-named G. H. was co-respondent.
intervener.

(Signed)
Registrar.

Prothonotary.

THE COMMERCIAL DOCUMENTS EVIDENCE ACT (XXX OF 1939).

[26th September, 1939.]

An Act to amend the Law of Evidence with respect to certain commercial documents.

WHEREAS it is expedient to amend the Law of Evidence with respect to certain commercial documents;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE COMMERCIAL DOCUMENTS EVIDENCE ACT, 1939.

(2) It extends to the whole of British India.

2. Notwithstanding anything contained in the Indian Evidence Act, 1872, statements of facts in issue or of relevant facts made in any document included in the Schedule as to matters usually stated in such document shall be themselves relevant facts within the meaning of that Act.

Presumption as to genuineness of documents.

3. For the purposes of the Indian Evidence Act, 1872, and notwithstanding anything contained therein, a Court—

(a) shall presume, within the meaning of that Act, in relation to documents included in Part I of the Schedule, and

(b) may presume, within the meaning of that Act, in relation to documents included in Part II of the Schedule,—

that any document purporting to be a document included in Part I or Part II of the Schedule, as the case may be, and to have been duly made by or under the appropriate authority, was so made and that the statements contained therein are accurate.

THE INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, 1940.

An Act to explain and amend the Indian and Colonial Divorce Jurisdiction Act, 1926.

[10th July, 1940.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Removal of Doubts as to effect of Matrimonial Causes Act, 1937, on divorce jurisdiction under Indian and Colonial Divorce Jurisdiction Act 1926. 16 & 17 Geo. V, c. 40.

1. (1) For the removal of doubts it is hereby declared that in considering for the purposes of the Indian and Colonial Divorce Jurisdiction Act, 1926 (hereafter in this Act referred to as "the principal Act")—

(a) What are the grounds on which a decree for the dissolution of any marriage may be granted by the High Court in England according to the law for the time being in force in England; and

(b) What are the principles and rules on which, in the exercise of its jurisdiction to make decrees for the dissolution of a marriage, and, as incidental thereto, to make orders as to damages, alimony or maintenance, custody of children and costs, the High Court in England for the time being acts and gives relief, the amendments of the law relating to divorce effected by sections 1 to 4, 6 and 8 to 10 of the Matrimonial Causes Act, 1937¹, have to be taken into account and that references in the principal Act to a decree for the dissolution of a marriage include references to such a decree of presumption of death and of dissolution of a marriage as is authorised by the said section 8.

(2) A decree for the dissolution of a marriage granted under the principal Act before the appointed day shall not be invalid by reason only that regard has not been had to the provisions of section 1 of the Matrimonial Causes Act, 1937, and where before the appointed day a petition under the principal Act has been dismissed which would not have been dismissed if the principal Act had been construed in the manner specified in sub-section (1) of this section, the dismissal of the petition shall not prejudice the bringing of a new petition upon the same, or substantially the same, facts.

Amendment of certain conditions precedent to the granting of relief.

2. (1) For proviso (c) to sub-section (1) of section 1 of the principal Act there shall, as from the appointed day, be substituted the following proviso—

"(c) no such Court shall grant any relief under this Act except in cases where the petitioner resided in India at the time of presenting the petition and the place where the parties to the marriage last resided together was in India, or make any decree of dissolution of marriage on the ground of adultery, cruelty or any crime except where the marriage was solemnized in India or the adultery, cruelty, or crime complained of was committed in India."

(2) For the removal of doubts it is hereby declared that the provision in the said proviso (c) as originally enacted that no Court shall make any decree of dissolution of marriage except where either the marriage was solemnized in India or the adultery or crime was committed in India did not operate so as to prevent the making of such a decree on grounds other than adultery or crime where the marriage was solemnized in India; and where before the appointed day a petition for the dissolution of a marriage has been dismissed on the ground that the said provision did so operate, the dismissal of the petition shall not prejudice the bringing of a new petition upon the same, or substantially the same, facts.

3. Where a wife has been deserted by her husband, and the husband was

Jurisdiction under the principal Act in case of husband's change of domicile.

immediately before the desertion domiciled in England or Scotland but has changed his domicile since the desertion, a High Court in India shall as from the appointed day, have the same jurisdiction under the principal Act as it would have if the change had not taken place; but, in any such case, the power conferred on the Court by proviso (d) to sub-section (1) of section 1 of the principal Act to require the petitioner to show that she is prevented from taking proceedings in the Court of the country in which she is domiciled shall

¹ 1 Edw. 8 and 1 Geo. 6 C. 57.

include power to require her to show that she is similarly prevented from taking proceedings in the High Court in England, or, as the case may be, the Court of Session.

Registration in England and Scotland of decrees and orders under principal Act.

4. (1) The following sub-section shall, as from the appointed day, be substituted for sub-section (2) of section 1 of the principal Act :—

“(2) Where a decree or order is made under this section, the proper officer of the Court making the decree or order shall transmit a certified copy thereof—

(a) if the parties to the marriage are domiciled in England, for registration in the High Court in England ;

(b) If the parties to the marriage are domiciled in Scotland, for registration in the books of council and session, and upon receipt of a copy of a decree or order purporting to be so certified and transmitted, the decree or order shall be registered accordingly.”

(2) In sub-section (3) of the said section 1 for the words down to “have the same force and effect, and ” there shall, as from the appointed day, be substituted the words “Where a decree or order has been registered in accordance with the last preceding sub-section”, and at the end of the said sub-section (3), the following words, shall, as from the appointed day, be inserted—

“and

(iii) nothing in this sub-section shall be construed as preventing the taking of any proceedings in India under or in relation to any decree or order under sub-section (1) of this section at any time after the making thereof.”

Application to Burma and Colonies.

5. The foregoing provisions of this Act shall, with the necessary adaptations, apply in relation—

(a) to Burma;

(b) to any part of His Majesty's dominions to which the provisions of section 1 of the principal Act apply by virtue of an Order in Council under section 2 thereof, whenever made, as they apply in relation to India.

6. (1) A High Court in India on which jurisdiction is conferred by sub-section (1) of section 1 of the principal Act shall, on and after the appointed day, exercise that jurisdiction if, and only if, the parties to the marriage last resided together, or at the date of the presentation of the petition each reside, in the appropriate area.

Areas for which the various High Courts in India are to act.

(2) In this section, the expression “the appropriate area” means in relation to any Court, the area with reference to which that Court is for the time being a High Court for the purposes of the Indian Law known as the Indian Divorce Act, 1869, or such other area as the Governor-General may from time to time by public notification specify in relation to that Court as the appropriate area for the purposes of this section.

(3) The functions of the Governor-General under this section shall be deemed, for the purposes of the Government of India Act, 1935¹ to be included among the functions which he is, by or under that Act, required to exercise in his discretion, and so much of section 18-A of the Interpretation Act, 1889,² as provides that the expression “Governor-General” shall, in relation to the period between the commencement of Part III of the Government of India Act, 1935, and the establishment of the Federation of India, mean the Governor-General in Council, shall not apply to this section.

Meaning of appointed day.

7. In this Act, the expression “the appointed day” means the first day of January nineteen hundred and forty-one.

8. This Act may be cited as the INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, 1940, and the principal Act and this Act may be cited together as the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940.

Short title and citation.

¹ 26 Geo. V & Edw. 8 C. 2.

² 52 & 53 Vic. Ch. 63.

4. In the Schedule the expression "recognised Chamber of Commerce" means a Chamber of Commerce recognised by the Government of its country as being competent to issue certificates of origin, and includes any other association similarly recognised.

THE SCHEDULE.
(See sections 2 and 3.)

PART I.

Documents in relation to which the Court "SHALL presume".

1. Lloyd's Register of Shipping.
2. Lloyd's Daily Shipping Index.
3. Lloyd's Loading List.
4. Lloyd's Weekly Casualty Reports.
5. Certificate of delivery of goods to the Manchester Ship Canal Company.
6. Official log book, Supplementary Official log book and official wireless log kept by a British ship.
7. Certificate of Registry, Safety Certificate, Safety Radio-Telegraphy Certificate, Exemption Certificate, Certificate of Survey, Declaration of Survey, International Load Line Certificate, British India Load Line Certificate, Report of Survey of a ship provisionally detained as unsafe, Report of Survey to be served upon the master of a ship declared unsafe upon survey, Docking Certificate, Memorandum issued under Article 56 of the International Convention for the Safety of Life at Sea, 1929.
8. Certificates A and B issued under the Indian Merchant Shipping Act, 1923.
9. The following documents relating to marine insurance, namely, insurance policy, receipt for premium, certificate of insurance and insurance cover note.
10. Certificate concerning the loss of country craft issued by the appropriate authority under Department of Commerce, Mercantile Marine Department Circular No. 2 of 1938.
11. Protest made before a Notary Public or other duly authorised official by a master of a ship relating to circumstances calculated to affect the liability of the ship-owner.
12. Licence or permit for radio-telegraph apparatus carried in ships or aircraft.
13. Certificate of registration of an aircraft granted by the Government of the country to which the aircraft belongs.
14. Certificate of airworthiness of an aircraft granted or validated by, or under the authority of, the Government of the country to which the aircraft belongs.
15. Licences and certificates of competency of aircraft personnel granted or validated by, or under the authority of, the Government of the country to which the personnel belongs.
16. Ground Engineer's Licence issued by a competent authority authorised in this behalf by Government.
17. Consular Certificate in respect of goods shipped or shut out, consular certificates of origin and consular invoice.
18. Certificate of origin of goods issued (but not merely attested) by a recognised Chamber of Commerce, or by a British Consular officer or British or Indian Trade Commissioner or Agent.
19. Receipt for payment of customs duty issued by a Customs authority.
20. Schedule issued by a Port, Dock, Harbour, Wharfage or Warehouse authority, or by a Railway company, showing fees, dues, freights or other charges for the storage, transport or other services in connection with goods.
21. Tonnage schedule and schedule of fees, commission or other charges for services rendered, issued by a recognised Chamber of Commerce.
22. The publication known as the Indian Railway Conference Association Coaching and Goods Tariffs.
23. Copy, certified by the Registrar of Companies, of the memorandum or the articles of association of a company, filed under the Indian Companies Act, 1913.
24. Protest, noting and certifying the dishonour of a bill of exchange, made before a Notary Public or other duly authorised official.

PART II.

Documents in relation to which the Court "MAY presume".

1. Survey Report issued by a competent authority—
 - (i) in respect of cargo loaded; or
 - (ii) certifying the quantity of coal loaded; or
 - (iii) in respect of the security of hatches.
2. Official log book, Supplementary Official log book and official wireless log kept by a foreign ship.
3. Dock certificate, dock chalan, dock receipt or warrant, Port Warehouse certificate or warrant, issued by, or under the authority of, a Port, Dock, Harbour or Wharfage authority.
4. Certificate issued by a Port, Dock, Harbour, Wharfage or other authority having control of acceptance of goods for shipping transport or delivery, relating to the date or time of shipment of goods, arrival of goods for acceptance, arrival of vessels or acceptance or delivery of goods, or to the allocation of berthing accommodation to vessels.
5. Export Application issued by a Port authority showing dues paid, weight and measurement and the shutting out of a consignment.
6. Certificate or receipt showing the weight or measurement of a consignment issued by the official measurer of the Conference Lines, or by a sworn or licensed measurer, or by a recognised Chamber of Commerce.
7. Reports and publications issued by a Port authority showing the movement of vessels, and certificates issued by such authority relating to such movements.
8. Certificate of safety for flight signed by a licensed Ground Engineer.
9. Aircraft Log Book, Journey Log Book and Log Book, maintained by the owner or operator in respect of aircraft.
10. Passenger List or Manifest of Goods carried in public transport aircraft.
11. Passenger ticket issued by a steamship company or air transport company.
12. Air Consignment Note and Baggage Check, issued by an air transport company in respect of goods carried by air, and the counterfoil or duplicate thereof retained by the carrier.
13. Aircraft Load Sheet.
14. Storage warrant of a warehouse recognised by a Customs, Excise, Port, Dock, Harbour or Wharfage authority.
15. Acknowledgment receipt for goods granted by a Port, Dock, Harbour, Wharfage or Warehouse authority or by a Railway or Steamship company.
16. Customs or Excise pass and Customs or Excise permit or certificate, issued by a Customs or Excise authority.
17. *Force majeure* certificate issued by a recognised Chamber of Commerce.
18. Receipt of a Railway or Steamship company granted to a consignor in acknowledgment of goods entrusted to the company for transport.
19. Receipt granted by the Posts and Telegraphs Department.
20. Certificate or survey award issued by a recognised Chamber of Commerce relating to the quality, size, weight or valuation of any goods, count of yarn or percentage of moisture in yarn and other goods.
21. Copy, certified by the Registrar of Companies, of the Balance Sheet, Profit and Loss Account, and audit report of a company, filed with the said Registrar under the Indian Companies Act, 1913, and the rules made thereunder.

THE INDIAN COMPANIES ACT (VII OF 1913).

INTRODUCTORY.—“Company” is an association of a number of individuals for the purpose of carrying on a legitimate business, a number of persons united for the same purpose, or in a joint concern, as a company of merchants. The word is applicable to private partnerships, or incorporated bodies of men; hence it may signify a firm, house or partnership or a corporation. Association is included within the meaning of the term; in fact “Company” and “Association” are frequently considered as synonymous.

Suppose a number of persons intend to combine for the purpose of carrying on some business. If there are only a few of them they will probably form a partnership; but if their numbers are at all large, and particularly if they wish to limit their individual liability for losses, they will most probably decide to form or “promote” a company limited by shares under the Companies Act. This proceeding is in outline very simple. They must first decide upon certain essential particulars. The object which the company is to carry out must be agreed upon in the first instance. The name of the company, the place where the business is to be carried on, how far each member undertakes to be responsible for losses, and the amount of funds which they consider necessary to carry on the business properly,—these things also must first be decided upon. Their decision on these points

is embodied in a short document called a Memorandum of Association, which must be signed by at least certain number of persons, fixed by the Act who must each agree to take one or more shares in the company. The memorandum so signed is taken to an official called "The Registrar of Joint Stock Companies" a fee is paid, the Registrar enters the new company on the register and prepares a certificate of incorporation, and the formation of the company is complete. The Companies Act is intended to regulate the incorporation and the running of the business of companies. *James, L.J.*, said with reference to the English Companies Act of 1862: "The Act was intended to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting, and were put to great difficulty and expense, which was a public mischief to be repressed." (*Smith v. Anderson*, 15 Ch.D. 273). The same remarks will hold good in the case of the Indian Companies Act also. The law on the subject of Joint Stock Companies in India was contained in the Indian Companies Act, 1882, which was modelled closely on the English law in force in 1877. The object of the new Companies Act is to revise and consolidate the Indian law on the subject of Joint Stock Companies on the lines of English legislation. Since 1882 the Indian law had been added to by a large number of amending Acts, namely, the Indian Companies (Amendment) Act, 1887; the Indian Companies (Memorandum of Association) Act, 1895; the Indian Companies (Branch Registers) Act, 1900; and the Indian Companies (Amendment) Act, 1910. The substantial additions, however, which had been made to the English law by the long series of Acts passed between 1879 and 1908 had not with the exception of the matters dealt with in the four small amending Acts abovementioned, been adopted in the Indian law. The more important of those English Acts were the Companies Act, 1879; the Companies Act, 1880; the Companies (Winding up) Act, 1890; the Directors Liability Act, 1890; the Companies Act, 1907; and the Companies (Consolidation) Act, 1908. The English Companies Consolidation Act, 1908, consolidated the English law into a convenient Code and this Code had been taken as the model for the Indian Companies Act, 1913. The Indian Companies Act, 1913, follows the English Act not merely in its general principles but in its detailed arrangement and expression, wherever possible, as it is considered a matter of the first importance to have the Indian law as uniform as possible with the English law except where local circumstances demand a modification in substance. Among the new and important provisions introduced into the Indian Company Law by the Companies Act of 1913 are those relating to (a) the preparation of a statutory report by a company limited by shares before the first general meeting (Cl. 81); (b) the appointment and advertisement of directors (Cls. 88 and 89); (c) the prospectus and statement in lieu of prospectus (Cls. 96 to 104); (d) restrictions on proceeding to allotment (Cls. 105 to 106); (e) restrictions on commencing business (Cl. 107); (f) the appointment, remuneration and duties of auditors (Cls. 142 and 143); (g) the registering of information regarding certain kinds of mortgages and charges (Cls. 113 to 128); and (h) the registering of information regarding companies situated outside British India but operating therein (Cl. 310).

It has been considered necessary to depart from English law on the subject of the winding up of companies by order of the Court, and in place of the provisions introduced into English law by the Companies (Winding up) Act, 1890, the procedure of existing Indian law has been in the main retained. The procedure leaves the discretion in the matter of winding up in the hands of the Court, whereas in the English law important functions are exercised by the Board of Trade, by Official Receivers, and by Committees of Inspection. On the subject of the annual balance-sheet the provisions of the existing Indian law have been retained where these appeared more complete than the provisions of the English law, and the prescribed form of balance-sheet has also been retained. In order to make inspection in the interest of shareholders without difficulty where a case for such inspection has been made out, the Registrar of Joint Stock Companies has been empowered to demand from any company an explanation of anything that is not clear in its balance-sheet or other return submitted to him, and the company will be liable, to a penalty, if it fails to provide a full and true statement to the Registrar, when called upon. A report from the Registrar will form a ground on which the Local Government may order an inspection of the affairs of a company. In regard to the qualifications of auditors, a matter on which the English law imposes no restriction, a provision has been inserted authorizing Local Governments to issue certificates for the auditing of companies' account to approved persons in accordance with rules to be framed for the purpose and restricting the audit of companies' accounts to persons holding such certificates. It has not been thought necessary to include the provision of the English Act (S. 40) whereby a company is empowered to return accumulated profits in reduction of paid-up share capital. (See Statement of Objects and Reasons to the Companies Act, VII of 1913).

AMENDING ACT XXII OF 1936.—The following extracts from the Statement of Objects and Reasons would show the necessity for the amending enactment of 1936 and the broad lines on which the amendments have proceeded:—

"For some considerable time Government has had under consideration the overhaul of the law relating to companies.

Substantial material has accumulated in the form of communications and suggestions from Local Governments, public bodies and individuals, supplemented by publications in the press, indicating unanimity of opinion that the Indian Companies Act requires fairly extensive changes. The opinions received disclose a demand for power to deal with mushroom and fraudulent companies, for changes in the provisions relating to the issue and contents of prospectuses, for increased disclosure to shareholders of the financial position of companies and for increased rights to shareholders in connexion with the management of companies, for modification of the present law applicable to managing agents, for changes in the provisions applicable to winding up, for special provisions to govern banking companies and for numerous other improvements.

The Indian Companies Act, 1913, was based on the English Companies Consolidation Act of 1908, and followed generally the provisions of that Act. Its revision in order to overtake subsequent developments in the law is overdue.

The English Act of 1908 was examined by a committee presided over by Lord Wrenbury in 1918, and again by a committee presided over by Mr. Greene, K.C., in 1926. The latter committee made extensive recommendations many of which were subsequently incorporated with or without modification in the Companies Consolidation Act, 1929. The guidance afforded by that Act is now available in the task of revising the company law of British India.

In September, 1934, the Government of India placed a lawyer with experience in the administration of company law on special duty to examine the material collected and to make proposals for the amendment of the Indian law. Those proposals were further discussed by a small committee of business experts specially convened for the purpose. Out of these proposals and discussions there have crystallized the amendments now proposed.

The revision of the law in England took the form of a consolidating Act which completely replaced the Act of 1908. This course has not been followed here. The arrangement adopted in the new English Act has attracted unfavourable criticism to an extent which does not encourage its adoption, and there are manifest advantages in retaining the form of the existing Indian Act with the administration of which the Courts are now familiar, even though the additions to it by this Bill are extensive.

In the amendments proposed, the lines followed in the overhaul of the English law have in accordance with the policy followed in the past been adopted in the amendments now proposed where the problems dealt with are problems common to India and England, India has however problems peculiar to itself, for example, those connected with the managing agency system.

The special provisions relating to banking companies have been included, because there is no immediate prospect of legislation dealing solely with this subject undertaken. The recommendations of the Central Banking Enquiry Committee have been carefully considered in drafting these provisions."

The amending Act XXII of 1936 came into force on the 15th January, 1937.

REPEALS AND AMENDMENTS.

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| S. 2, am., Act XXII of 1936; A.O., 1937. | Ss. 84, 85, am.; Ss. 86-A, 86-B, 86-C, inserted, Act XXII of 1936. |
| S. 2-A, inserted, A.O., 1937. | S. 86-D, inserted, Act XXII of 1936; am., Act II of 1938. |
| S. 3, am., A.O., 1937. | Ss. 86-E, 86-F, 86-G, 86-H, inserted, Act XXII of 1936. |
| S. 4, am., Act XXII of 1936; A.O., 1937. | S. 86-I, inserted, Act XXII of 1936; am., Act II of 1938. |
| Ss. 6, 7 and 8, am., A.O., 1937. | S. 87, substituted; Ss. 87-A, 87-B inserted, Act XXII of 1936. |
| S. 9, substituted; S. 10, am., Act XXII of 1936. | S. 87-C, inserted, Act XXII of 1936; am., A.O., 1937. |
| S. 11, am., Act XXII of 1936; A.O., 1937. | S. 87-D, inserted, Act XXII of 1936; am., Act II of 1938. |
| S. 12, am., Act XXII of 1936. | Ss. 87-E to 87-I, inserted; S. 90, am., Act XXII of 1936. |
| S. 17, am., Act XXII of 1936; Act II of 1938. | S. 91-A, inserted, Act XI of 1914; am., Act XXII of 1936. |
| S. 19, am.; S. 20-A, inserted; S. 25, am.; S. 25-A, inserted, Act XXII of 1936. | S. 91-B, inserted, Act XI of 1914; am., Act XLII of 1920; Act XXXII of 1936. |
| S. 26, am., Act XXXIII of 1926; Act XXII of 1936; A.O., 1937. | Ss. 91-C, 91-D, inserted, Act XI of 1914; am., Act XXII of 1936. |
| S. 31-A, inserted; S. 32, am., Act XXII of 1936. | S. 93, am., Act XXII of 1936; Act XX of 1937. |
| S. 34, substituted, Act XXII of 1936; am., Act II of 1938. | Ss. 96, 97, 98, am.; S. 98-A, inserted; S. 101, am., Act XXII of 1936. |
| Ss. 36, 37 and 39, am., Act XXII of 1936. | |
| S. 42-A, inserted, A.O., 1937. | |
| Ss. 43, 50, 53, 54, am.; S. 54-A, inserted; Ss. 55, 56, 57, am.; S. 66-A, inserted; S. 71, am.; Ss. 72, 76, 77, substituted; S. 78, am.; S. 79, substituted; Ss. 81, 82, am., Act XXII of 1936. | |
| S. 83, am., Act XXII of 1936; Act XXXIV of 1939. | |
| Ss. 83-A, 83-B, inserted, Act XI of 1914; am., Act XXII of 1936. | |

S. 102, am., Act XXII of 1936 ; Act II of 1938.
 S. 104, am., Act XXVI of 1941.
 Ss. 104, 105, am.; Ss. 105-A, 105-B, 105-C, inserted, Act XXII of 1936.
 S. 107, am., A.O., 1937 ; Act XXXIV of 1939.
 S. 109, am., Act XXII of 1936 ; A.O., 1937.
 S. 109-A, inserted; Ss. 116, 119, 120, am.; S. 121, substituted; Ss. 122, 123, am., Act XXII of 1936.
 S. 130, substituted, Act XXII of 1936 ; am., Act II of 1938.
 S. 131, am.; S. 131-A, inserted; S. 132, am.; S. 132-A, inserted; S. 133, am., Act XXII of 1936.
 S. 134, am., Act XXII of 1936 ; Act II of 1938.
 Ss. 135, 136, am., Act XXII of 1936.
 S. 137, am., Act XXII of 1936 ; A.O., 1937.
 Ss. 138, 139, am., A.O., 1937.
 S. 141, am., Act XXII of 1936 ; A.O., 1937.
 S. 141-A, inserted, Act XXII of 1936 ; am., A.O., 1937.
 S. 142, am., A.O., 1937.
 S. 144, am., Act XIX of 1930 ; Act I of 1932 ; Act XXII of 1936 ; A.O., 1937.
 Ss. 145, 146, am., Act XXII of 1936.
 S. 151, am., A.O., 1937.
 S. 152, am., Act X of 1940 ; Act XXXII of 1940.
 S. 153, am., Act XXII of 1936.
 S. 153-A, inserted, Act XXII of 1936 ; am., Act II of 1938.
 S. 153-B, inserted; S. 154, substituted; Ss. 159, 160, 163, am., Act XXII of 1936.
 S. 166, am., Act XXII of 1936 ; A.O., 1937.
 Ss. 170, 171, am., Act XXII of 1936.
 S. 171-A, inserted, Act XXII of 1936 ; am., A.O., 1937.
 S. 172, am., Act XXII of 1936 ; A.O., 1937.
 Ss. 175, 176, am.; Ss. 177-A, 177-B, inserted; S. 178, am.; S. 178-A, inserted; Ss. 182, 183, 188, 189, 203, 204, am., Act XXII of 1936.
 S. 206, am., A.O., 1937.
 S. 207, substituted, Act XXII of 1936 ; am., Act XXXIV of 1939.

Ss. 208, 208-A to 208-E, 209, 209-A to 209-H, 210 to 218, substituted, Act XXII of 1936 ; Act XXXII of 1940.
 S. 230, am.; S. 230-A, inserted, Act XXII of 1936.
 S. 232, am., Act XXII of 1936 ; A.O., 1937.
 S. 235, am., Act XXII of 1936.
 S. 237, substituted, Act XXII of 1936 ; am., A.O., 1937 ; Act II of 1938.
 S. 238-A, inserted; S. 244, am.; S. 244-A, inserted, Act XXII of 1936.
 S. 244-B, inserted, Act XXXVI of 1940.
 S. 245, am., A.O., 1937.
 S. 246, am., Act XI of 1915 ; Act XXII of 1936.
 Ss. 247, 248, 249, am., A.O., 1937.
 S. 249-A, inserted, Act XXII of 1936.
 Ss. 253, 255, 256, 260, 266, 267, 270, am., A.O., 1937.
 S. 271, am., Act XXII of 1936.
 S. 277, am., Act XXII of 1936 ; Act II of 1938.
 Ss. 277-A to 277-C, inserted, Act XXII of 1936.
 Ss. 277-D, 277-E, inserted, Act XXII of 1936 ; am., Act II of 1938.
 S. 277-F, inserted, Act XXII of 1936 ; am., Act II of 1938.
 S. 277-G, inserted, Act XXII of 1936 ; am., A.O., 1937.
 Ss. 277-H to 277-K, inserted, Act XXII of 1936.
 Ss. 277-L, 277-M, inserted, Act XXII of 1936 ; am., Act II of 1938.
 S. 277-N, inserted; S. 281, substituted; Ss. 282-A, 282-B, inserted, Act XXII of 1936.
 S. 282-B, am., Act XXVI of 1941.
 S. 284, substituted, Act II of 1938.
 S. 286, am.; S. 289-A, inserted, A.O., 1937.
 First Schedule, am., Act X of 1914 ; Act XXII of 1936 ; Act II of 1938.
 Second Schedule, substituted, Act XXII of 1936 ; am., Act II of 1938.
 Third Schedule, am., Act XXII of 1936 ; Act II of 1938.

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THE INDIAN COMPANIES ACT (VII OF 1913).¹

[27th March, 1913.]

An Act to consolidate and amend the law relating to Trading Companies and other Associations.

WHEREAS it is expedient to consolidate and amend the law relating to Trading Companies and other Associations ;

It is hereby enacted as follows :—

PART I.

PRELIMINARY.

Short title, commencement and extent.

1. (1) This Act may be called THE INDIAN COMPANIES ACT, 1913.

LEG. REF.

¹ For Statement of Objects and Reasons, see Gazette of India, 1912, Pt. V, p. 151 ; for Report of the Select Committee, see *ibid.*, 1913, Pt. V, p. 45 ; and for Proceedings in Council, see *ibid.*, 1912, Pt. VI, p. 586, and *ibid.*, 1913, Pt. VI, pp. 6, 106 and 300.

NOTES.

Sec. 1: APPLICATION OF ACT (*see* Ss. 250-252).—Act does not create new rights, but only regulates rights under the Common Law. 1928 M.W.N. 442=111 I.C. 225=1928 M. 571. Procedure prescribed in Act should be strictly followed. 6 P. 132=1927 P. 182. As Act is copied from the English Act, it should be given the same meaning as in the parent Act. 97 I.C. 783=1926 L. 624=8 L. 549.

CONSTRUCTION.—English precedents and decisions must be given great respect and weight in construction of Act. 7 R. 514=1930 R. 20. Where a Life Insurance Company is registered under this Act, it is subject to the provisions of this Act, although it may also be subject to the Life Insurance Companies Act. 37 C.W.N. 1159=1934 C. 63.

ENGLISH LAW.—The Legislature has adopted the English Act as the model for drafting the Amending Act of 1936, and

decisions of the Superior Courts or the provisions of the English Companies Act, though not binding decisions in Indian Courts, are yet decisions that demand great weight and respectful consideration in construing analogous provisions of the Indian Companies Act. 1930 Rang. 20.

DECISIONS ON REPEALED PROVISIONS OF THE ACT, HOW FAR GUIDE IN CONSTRUCTION OF THE ACT.—The Indian Companies (Amendment) Act of 1936 effects large changes in the Law as it stood before the Amendment. A number of new sections are added, several sections have been wholly repealed. Numerous and important alterations have been made in the existing sections. To consider how far the provisions of and the decisions under the older law would afford any guidance for the interpretation of the amended or consolidating Act, the rule laid down by Lord Herschell in *Bank of England v. Vagliano*, (1891) A.C. 107, 144, may well be followed. His Lordship speaking with reference to the Bills of Exchange Act, 1882 (which consolidated the law relating to bills of exchange), said: "I think the proper course is, in the first instance, to examine the language of the statute, and to ask, what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood,

- (2) It shall come into force on the first day of April, 1914; and
 (3) It extends to the whole of British India including British Baluchistan and the Sonthal Parganas.

Definitions.

¹[2. (1).] In this Act, unless there is anything repugnant in the subject or context,—

(1) “articles” means the articles of association of a company as originally framed or as altered by special resolution, including, so far as they apply to the company, the regulations contained (as the case may be) in ²Table B in the Schedule annexed to Act No. XIX of 1857 or in ³Table A in the First Schedule annexed to the Indian Companies Act, 1882, or in Table A in the First Schedule annexed to this Act :

(2) “company” means a company formed and registered under this Act or an existing company :

(3) “the Court” means the Court having jurisdiction under this Act:

(4) “debenture” includes debenture stocks:

(5) “director” includes any person occupying the position of a director by whatever name called :

(6) “District Court” means the principal Civil Court of original jurisdiction in a district, but does not include a High Court in the exercise of its ordinary original civil jurisdiction :

(7) “existing company” means a company formed and registered under the ⁴Indian Companies Act, 1866, or under any Act or Acts repealed thereby, or under the Indian Companies Act, 1882 :

(8) “Insurance company” means a company that carries on the business of insurance either solely or in common with any other business or businesses :

⁵[(9) “manager” means a person who subject to the control and direction of the directors has the management of the whole affairs of a company, and includes a director or any other person occupying the position of a manager by whatever name called and whether under a contract of service or not :

LEG. REF.

¹ This section was re-numbered by S. 2 of Act of XXII 1936.

² See Appendix I, *infra*.

³ See Appendix II, *infra*.

⁴ Repealed by Act VI of 1882, which was in turn repealed by this Act.

⁵ These clauses were substituted by S. 2 of Act XXII of 1936.

NOTES.

and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.” See also per Chitty, L.J., in *Thomas Conservators v. Smeed, Dean & Co.*, (1897) 2 Q.B. 334, 346 (C.A.).

Applying this principle to the amending Act of 1936, which has to a very great extent retained the wording of the earlier Act of 1913, it is obvious that there is and must be ample scope for reference to the decisions on those Acts, and the right thus to refer is well settled.

Thus in the *Mersey Dock case*, 11 H.L. C. 443, Blackburn, J., on p. 480, in delivering the opinion of the majority of the Judges, said:—“Where an Act of Parlia-

ment has received a judicial construction putting a certain meaning on its words, and the Legislature in a subsequent Act, in *pari materia*, uses the same words, there is a presumption that the Legislature uses these words intending to express the meaning which it knew has been put upon the same words before; and unless there is something to rebut that presumption, the Act should be so construed, even if the words were such that they might originally have been construed otherwise.”

Hence it may be taken that in retaining the provisions of the earlier Companies Act, the Legislature has not disturbed the decided cases bearing on those provisions, and that those decided cases are still to be treated as relevant and available for the interpretation of the new Act, in so far as any questions as to its meaning may arise in the future. It by no means follows, however, that the new Act is to be taken to adopt and affirm a construction erroneously placed on the former Acts. *Colonial Bank v. Whinney*, (1885) 30 Ch.D. 261, furnishes a good illustration.

The application of a decision may however be excluded by a change in the language of the new Act. *Thomas v. United Butter Cos. of France*, (1909) 2 Ch. 484.

Sec. 2, Cl. (9): ‘MANAGER’ AMENDMENT BY ACT XXII OF 1936.—The reason for the amendment was stated as follows:—“The existence of many special provisions apply-

(9-A) "managing agent" means a person, firm or company entitled to the management of the whole affairs of a company by virtue of an agreement with the company, and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement and includes any person, firm or company occupying such position by whatever name called :

Explanation.—If a person occupying the position of a managing agent calls himself a manager he shall nevertheless be regarded as managing agent and not as manager for the purposes of this Act.]

(10) "memorandum" means the memorandum of association of a company as originally framed or as altered in pursuance of the provisions of this Act :

(11) "officer" includes any director, ¹[managing agent,] manager or secretary but, save in sections 235, 236 and 237, does not include an auditor :

(12) "prescribed" means, as respects the provisions of this Act relating to the winding up of companies, prescribed by rules made by the High Court, and, as respects the other provisions of this Act, prescribed by the Central Government :

²[(13) "private company" means a company which by its articles—

(a) restricts the right to transfer the shares, if any ; and

(b) limits the number of its members to fifty not including persons who are in the employment of the company ; and

(c) prohibits any invitation to the public to subscribe for the shares, if any, or debentures of the company :

Provided that where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this definition, be treated as a single member :]

LEG. REF.

¹ These words were inserted by S. 2 of Act XXII of 1936.

² This clause was substituted, *ibid.*

NOTES.

ing to managing agents (introduced by the Amending Act of 1936) renders it advisable that the terms ('manager' and 'managing agents') should be separately defined. We have evolved definitions intended to differentiate 'managing agents' from 'managers,' instead of merely including the former in the definition of the latter." (See *Report of the Select Committee. Notes on Cl. 2.*)

Person who is not in charge of the *entire* business of company but who is entrusted with the business of a branch is not a manager. 47 P.R. 1917 (Cr.)=43 I.C. 791=19 Cr.L.J. 215.

Sec. 2, Cl. (9-A): 'MANAGING AGENTS' AMENDMENT BY ACT XXII OF 1936.—As by the Amending Act a series of new sections dealing with managing agents has been added to the Act, it was thought necessary to define the 'term' separately with a view to differentiate the same from the term 'managers'. The idea that managing agents are to be under the control of the directors generally has been brought out specifically

in this definition. Now, except to the extent to which the directors might themselves delegate their functions to the agents, the agents would be under their control and direction. (See also Notes under 'manager' *supra.*)

Sec. 2, Cl. (11).—As to the position of auditor, see 1929 A. 826=121 I.C. 693. Auditor's liability for deliberately passing over accounts. 1929 A. 826. Qualifications of an auditor. 140 I.C. 128. As to the position of a broker, see (1937) 2 M.L.J. 820=1938 M. 154=I.L.R. (1938) M. 192.

Sec. 2, Cl. (13): AMENDMENT BY ACT XXII OF 1936.—The present definition has been substituted for the old one, following the definition contained in S. 26 of the English Act, with some slight alterations. In respect of the alterations from the English Act effected by this definition the Select Committee states in its Report as follows:—"We consider it unnecessary to provide for the inclusion among the members of a private company of persons who have left the employment of the company, and consider that such a provision might enable the number of members to be undesirably enlarged. The other amendment takes into consideration the fact that some private companies have no share capital."

¹[(13-A) "public company" means a company incorporated under this Act or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act, repealed thereby, which is not a private company :]

(14) "prospectus" means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of a company ²[but shall not include any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed :]

(15) "the registrar" means a registrar or assistant registrar performing under this Act the duty of registration of companies : and

(16) "share" means share in the share capital of the company, and includes stock except when a distinction between stock and shares is expressed or implied :

³[(17) "trading corporation" means a trading corporation within the meaning of item 33 in List I in the Seventh Schedule to the Government of India Act, 1935.]

⁴[(2) Where the assets of a company consist in whole or in part of shares in another company, whether held directly or through a nominee and whether that other company is a company within the meaning of this Act or not, and

(a) the amount of the shares so held is at the time when the accounts of the holding company are made up more than fifty per cent. of the issued share capital of that other company or such as to entitle the company to more than fifty per cent. of the voting power in that other company, or

(b) the company has power (not being power vested in it by virtue only of the provisions of a debenture trust deed or by virtue of shares issued to it for the purpose in pursuance of those provisions) directly or indirectly to appoint the majority of the directors of that other company, that other company shall be deemed to be a subsidiary company within the meaning of this Act, and the expression "subsidiary company" in this Act means a company in the case of which the conditions of this sub-section are satisfied and includes a subsidiary company of such company :

Provided that where a company the ordinary business of which includes the lending of money holds shares in another company as security only, no account shall, for the purpose of determining under this section whether that other company is a subsidiary company, be taken of the shares so held.]

LEG. REF.

¹ This clause was inserted by Act XXII of 1936.

² These words were added, *ibid*.

³ This paragraph was inserted by A.O., 1937.

⁴ This sub-section was added by S. 2 of Act XXII of 1936.

NOTES.

Sec. 2, Cl. (13-A): "PUBLIC COMPANY".—This sub-section has been newly introduced by the Amending Act (1936). All associations which come under the definition of 'company' in this Act, and which are not 'private companies' as defined in this Act, are denoted by the term 'public company'.

Sec. 2, Cl. (14): "PROSPECTUS".—The amendment of 1936 excludes from the scope of the term, any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed. This amendment was necessitated by the decision in 52 C. 440=29 C.W.N. 523=1925 C. 714, where a director was convicted for not filing with the Registrar a copy of an advertisement intimating that a prospectus has been issued and filed, and that shares could be had on the basis thereof. It was never the intention of the legislature to place such an advertisement in the same category as a 'prospectus', and the same has been rendered

clear in the amending Act, by specifically excepting such publications from the scope of the definition.

Sec. 2, Cl. (16): "SHARE".—The word 'share' denotes a right to receive a certain proportion of the profits of a company and of the capital of the company when it is wound up, and the total amount of the shares constitutes the capital of the company. Unlike debentures, which do not constitute any part of the capital of the company, shares cannot be issued at a discount, except under the circumstances and conditions mentioned in S. 105-A of this Act. Shares may be of different classes, *viz.*, (i) Preference shares, (ii) Ordinary shares, and (iii) Deferred shares. (*See Companies Act, M.L.J. Ed., pp. 9-10.*)

"STOCK".—'Stock' is the aggregate of fully paid-up shares legally consolidated and portions of which aggregate may be transferred and split up into fractions of any amount, without regard to the original amount of the shares. *Morrice v. Aylmer*, (1875) L.R. 7 H.L. 717.

"UNDERWRITE SHARE," MEANING OF.—36 L.W. 590=1932 P.C. 212=62 M.L.J. 533 (P.C.). As to the effect of informal transfer of shares, *see* 31 I.C. 865.

¹[2-A. Notwithstanding anything in the last preceding section, a company which was immediately before the separation of Burma and Aden from India a company as defined by the said section, being a company the registered office whereof is in Burma or Aden,—

Provisions as to companies registered in Burma or Aden before separation from India.

(a) shall be deemed for the purposes of this Act to be a company registered and incorporated outside British India, and

(b) shall not, unless the subject-matter or context so requires, be included in the expressions 'company,' 'existing company,' 'public company,' and 'private company' :

Provided that—

(i) for the purposes of section 277 of this Act such a company shall, for a period of six months from the separation, be deemed to be a company incorporated and registered in British India ;

(ii) the separation of Burma and Aden from India shall not render valid any mortgage or charge which, immediately before that date, was void against the liquidator or creditors of such a company.]

3. (1) The Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate :

Jurisdiction of the Courts.

Provided that the ²[Central Government] may, by notification in the Official Gazette and subject to such restrictions and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction by this Act conferred upon the Court, and in that case such District Court shall, as regards the jurisdiction so conferred, be the Court in respect of all companies having their registered offices in the district.

(2) For the purposes of jurisdiction to wind up companies, the expression 'registered office' means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up.

(3) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court.

LEG. REF.

¹ This section was inserted by A.O., 1937.

² These words were substituted for the words 'Local Government', *ibid.*

NOTES.

Sec. 3: INTERFERENCE BY COURT.—Court will not generally interfere with the internal management of the affairs of a company. If majority of the shareholders consider that a particular contract of employment should be terminated, Court would not as a rule consider the matter at the instance of the minority of the shareholders. 36 Bom.L.R. 907=1934 B. 427. Where an action is brought by shareholders, plaintiff should distinctly allege not only the illegality of the act complained of but also the impossibility of getting the company itself to impeach its validity. Mere irregularities committed by the directors cannot give a cause of action to shareholders, and they should appeal to the company. The supremacy of the majority of shareholders is subject, however to certain exceptions, *viz.*, (a) where the act complained of is *ultra*

vires the company, (b) where the act is a fraud on the minority, and (c) where there is absolute necessity to waive the rule in order that there may not be a denial of justice. 36 Bom.L.R. 483=151 I.C. 1082=1934 B. 243. Where the main point involved is the interpretation of a certain clause in the memorandum relating to the application of the assets of the company, it is not a matter of mere internal management. A single member can therefore maintain a suit against the company for a declaration as to the true construction of the article in question, and the company cannot be excused from being impleaded in such an action. 160 I.C. 24=1935 L. 792.

HIGH COURT.—The expression 'High Court' in this Act includes both the Original and the Appellate Sides of that Court. 29 C.W.N. 404=86 I.C. 910=1925 C. 606. Applications under this Act relating to companies doing business in the mufassil should be made to the Original Side of the High Court. 29 C.W.N. 404; 29 C.W.N. 403=86 I.C. 833=52 C. 586.

PART II.

CONSTITUTION AND INCORPORATION.

4. (1) No company, association or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other ¹[Indian law] or of Royal Charter or Letters Patent.

(2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other ¹[Indian law] or of Royal Charter or Letters Patent.

LEG. REF.

¹ These words were substituted for the words "Act of the Governor General in Council" by the A.O., 1937.

NOTES.

DISTRICT JUDGE, JURISDICTION AND POWERS.—The District Judge, empowered under this section, has jurisdiction to order payment of arrears of calls under S. 186, and to adjudicate on disputes under S. 216, in respect of companies situated within his jurisdiction, even if some of the contributories reside outside British India. 15 L. 302=147 I.C. 739=1934 L. 362. The District Court, while exercising jurisdiction under this Act is in the capacity only of a District Court and not of a High Court, and as such, it is subordinate and subject to the revisional jurisdiction of the High Court, under S. 115, C. P. Code, 57 A. 810=1935 A.L.J. 527=1935 A. 310.

The existing jurisdiction of the District Courts over cases which began before the commencement of the new Act of 1913 is preserved by S. 284. 20 P.R. 1915=29 I.C. 272.

JURISDICTION, WHEN OBJECTED TO AT BEGINNING.—S. 3 (3) has not the effect of validating proceedings taken in the District Court to enforce orders passed by the High Court of that Province, if the objection as to jurisdiction of the District Court was taken at the very commencement and at the proper time. 53 M. 147=1930 M. 74=57 M.L.J. 723; 6 P. 132=1927 P. 182.

Sec. 4: COMPANIES AUTHORIZED TO REGISTER.—As to companies capable of being registered under this Act, see Part VIII, S. 253 of the Act.

Sec. 4, Cl. (2): APPLICABILITY.—For S. 4 (2) of the Act to apply it is necessary that, (1) there should be either a company, association or partnership consisting of more than twenty persons; (2) such company, association or partnership must be formed for the purpose of carrying on business other than the business of banking; (3) that business must have for its object the acquisition of gain either to the company, association or partnership, or to the individual members thereof. 38 Bom.

L.R. 408.

ASSOCIATION OR PARTNERSHIP.—An association contemplated by this section can only carry on business either by a trustee or by an agent or officers or directors. Where the business is carried by each of the members of a pool entirely in an independent manner, there is neither an association nor a partnership, notwithstanding that there is a provision for sharing the profits. Such an arrangement cannot be rendered illegal on the ground that it is not registered under the Companies Act. The members of the pool might constitute a trade association formed, no doubt, with the ultimate object of gain to the members; but it cannot be said to be an association formed for the purpose of carrying on business. 38 Bom.L.R. 408. There can be no partnership where there is no common business, common to all the members of an association or a so-called partnership. In the absence of community of business, a mere provision for sharing profits would not constitute a partnership. 38 Bom.L.R. 408.

"PERSON".—The term denotes generally individuals and does not include unregistered body of individuals. 50 M. 175=51 M.L.J. 667=1927 M. 123. See also 10 N.L.R. 98=26 I.C. 613. The word has not been defined in this Act. The question whether a syndicate of ten persons was really composed of more than 20 persons is a question of fact to be decided on the evidence and not on a mere allegation. 32 Bom.L.R. 389=126 I.C. 305=1930 B. 431. Where the total number of persons constituting a partnership of four unregistered firms, carrying on business, consisted of 22 persons, it was held that such a partnership was illegal. 34 C.W. N. 1107=59 M.L.J. 435=1930 P.C. 300 (P.C.); 10 N.L.R. 98=26 I.C. 613. Even in the case of joint Hindu families if the various individual members of one or more of such joint families form an agreement of partnership among themselves, then each individual member must be reckoned 'a person' for the purposes of this section. But, if there has been no agreement of partnership but merely a family partnership created by the operation of law, so that the individual members are governed by the principles of the

NOTES.

Hindu Law and not by the Contract Act, then the individual members are merely sub-partners in any agreement made on behalf of the family, and the joint family consisting of these persons should be reckoned as only one person for the purposes of this section. 30 N.L.R. 219=1934 N. 45; 46 A. 509=22 A.L.J. 487=1924 A. 414. See now new subsection (3) added by Act XXII of 1936. A trading association to be within S. 4, must be one formed on the basis of contract between its members. A joint family business concern, however, which by its nature descends from father to son, in which interests are acquired by the succeeding generations not by an act of party but by the law of inheritance, is not an association of persons in this sense, and does not, therefore, come within the scope of that section. 1939 C. 187=I.L.R. (1938) 2 Cal. 368. Share certificates are not negotiable instruments, so as to make the person in whose name they stand the sole owner of the shares; when the shares are held by a joint Hindu family, it cannot be said that the members other than the member in whose name they stand have no right or interest in them. 16 Mys. L.J. 115=43 Mys.H.C.R. 58. Sub-partners are not members of a firm or a company, and the existence of sub-partners would not affect the number of members of a firm for purposes of S. 4 of the Companies Act. 38 Bom.L.R. 486=1936 B. 246.

"BUSINESS", WHAT IS.—The word "business" is wider than the term 'trade', and must be construed in a reasonable manner so as to effectuate the intention of the legislature. The words 'any other business' show that what is contemplated by the Act is something which must be business in the same sense in which banking is, although impliedly described as business. The test of business is continuity and repetition of acts. But whether a repetition of acts amounts to business or not must depend upon the nature of the acts; and the act itself, if done singly, must be such as to be called business. If the act when done singly cannot amount to business, then merely because twenty persons or more than twenty persons are repeating the same act, it can hardly be said that they are carrying on business. 38 Bom.L.R. 408.

"CARRYING ON BUSINESS".—The expression "carrying on business" is an elastic one and is not capable of being clearly defined. 18 B. 294=21 I.A. 13 (P.C.). This may be said to exist only where there is a joint relation of persons for the common purpose of performing jointly a succession of acts, and not where the relation exists for the purpose which is to be completed by the performance of one act. (Halsbury, Vol. V, 101.) In a case of a partnership agreement between a larger firm consisting of 16 persons and 3 other firms of 8 persons forming an association or syndicate for the purchase and sale of bales of yarn in different lots and for the division of the

profits or losses arising out of the proceeds of such sales, it was held that it constituted a contract of *partnership business* consisting of more than 20 members and not merely a single venture, and that consequently it required registration under this section. 36 Bom.L.R. 786=152 I.C. 580=1934 B. 361. But a pool arrangement formed between the owners of ginning factories of a particular place under which they agreed that each one of them should contribute his earning to the common pool for the purpose of stifling competition and distribute the same in certain shares among them, each member of the pool being allowed to carry on his business in an unrestricted manner and being responsible to the pool whether his constituent paid or not, is not an association formed for the purpose of carrying any business as contemplated by S. 4 of the Act. Such an arrangement is a mere scheme for collecting the earnings of all the members for the purpose of distribution among them. It is not an agreement of partnership, and even if it were held to be an association, does not fall within the prohibition of S. 4, even when the members of the pool number more than twenty. 38 Bom.L.R. 408. The term 'carrying on business' implies some continuous control of the business by the association. Where an agreement does not provide for any control by the association, as such, and all that it does is to impose certain restrictions on the business to be carried on by each partner in consideration of his getting a share in the profits and the agreement makes no provision for the sharing of losses the parties to it are in the relationship of debtor and creditor and do not come under this section. 16 L. 574=1934 L. 882; 65 I.C. 368=1922 N. 67. Where an association was formed of 100 persons, and each member was to pay Rs. 10 as subscription, and the amount subscribed was to be paid to one of the members by drawing lots until all the members had their turn, and the association had to remain in existence for 100 months, it was held that it was doubtful whether such association required registration and whether a claim for refund of subscriptions would have been legally maintainable against the secretary and treasurer. 143 I.C. 580=1933 L. 121.

"TRADE ASSOCIATION".—A Trade Association cannot be said to be unlawful, merely because it has not been registered in conformity with the provisions of this Act. 53 A. 316=1931 A.L.J. 84=1931 A. 83.

PARTNERSHIP.—Creditors paid by share of profits having no right in the management and having no agreement *inter se* are not partners. 65 I.C. 368.

FOREIGN CORPORATIONS.—Foreign Corporations, though they have more than 20 members, do not come under this section. *Bateman v. Service*, (1881) 6 A.C. 386.

"CHIT FUND".—A chit fund does not create any legal relation involving joint and mutual rights and obligations between the

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subscribers *inter se* but only as between the manager and the subscriber. In such a case, although the number of subscribers may be more than twenty in number, no registration is required for the chit fund under this section, and the manager can sue and be sued. 11 Bur.L.T. 255=50 I.C. 513; 20 M. 68=7 M.L.J. 26; 29 M. 477=16 M. L.J. 385. But if there is a joint relation between the subscribers giving rise to rights and obligations *inter se* among them, then it will fall under this section if there were more than 20 subscribers. 1 M.L.T. 106.

COMPANY FORMED IN NATIVE STATE—NOT GOVERNED BY ACT.—Where a business is conducted in a Native State, and it is not shown that the company formed for the purpose of carrying on business would be illegal according to the law prevailing in that State, the company or the members forming it do not commit an illegal act. 53 B. 652=31 Bom.L.R. 1187=1930 B. 5.

OBJECT, HOW DETERMINED.—The object of the association is to be determined with reference to the primary and original object of the association, and no regard should be paid to the circumstances that may have developed later on. Hence, if a perfectly legal association has been formed, and if later on, some of the members of the association should commit a breach of trust, this fact would not render the original association an illegal one. 52 A. 325=1930 A. L.J. 337=1930 A. 186.

"GAIN".—The word "gain" does not mean an ultimate pecuniary gain by the company. It refers to all cases where the business started brings in profits. A company may be formed for several objects and if one of the objects be the acquisition of gain, the mere fact that the members of the company either singly or jointly, propose to dispose of the gain on some charitable object, will not exclude the company from falling within the purview of this section. 52 A. 325=1930 A.L.J. 337=1930 A. 186; 10 R. 490=1932 R. 167. An unregistered society of 124 members was formed with the primary object of aiding the Chinese who may be indigent and under temporary financial embarrassments. Every earning member was required to pay a monthly subscription of one rupee. Subsequently by a resolution of the Society, it was required that its members should pay one or more annas per day and form a fund out of which any Chinese person could get a loan at 2 per cent. per mensem in his difficulty, that such contribution was to continue for three years after which period the amount contributed was to be returned to the members, and the interest accrued thereon by lending was to be spent in charity. The object of this Society was held to amount to acquisition of gain by individual members thereof, and that it therefore fell under this section. 10 R. 490=140 I.C. 467=1932 R. 167. It is not necessary that the gain should be for the

company. It is sufficient if the gain is intended for the individual members thereof. Mutual insurance companies, mutual loan societies and building societies fall under this section since the object of such societies is the acquisition of gain by the individual members thereof. *Re Padstow Total Loss and Collision Assurance Association*, (1882) 20 Ch.D. 137 C.A.; *Greenberg v. Cooperstein*, (1926) Ch. 657; *Re Ilfracombe Permanent Mutual Benefit Building Society*, (1901) 1 Ch. 102.

"UNLESS IT IS REGISTERED AS A COMPANY UNDER THIS ACT"—EFFECT OF NON-REGISTRATION.—Where an association which is required to be registered under this section is not registered, it can have no legal recognition as a jural unit and it cannot sue or be sued as a corporate body nor can it enter into a contract as such. 53 A. 316=1931 A.L.J. 84=1931 A. 83; I.L.R. (1938) 2 Cal. 368. S. 4 on its true construction governs not only the first formation of the company, association or partnership, but rules its continuance. An association formed for trading may be perfectly legal at its formation, if the original members be not more than ten in number, in the case of a banking business and twenty in other businesses, but if the number increases later on and exceeds the maximum allowable, the association becomes an illegal one, if no registration is effected. I.L.R. (1938) 2 Cal. 368. The members of a partnership or company or association hit by S. 4, can have beneficial interest in property. I.L.R. (1938) 2 Cal. 368. In order to constitute an association within the meaning of S. 4, the existence of the legal relation between more than twenty persons giving rise to joint rights or obligations or mutual rights and duties is absolutely necessary. (29 Mad. 477, Rel. on.) But where the object is to form a company it does not and there is no need to show the existence of a legal relation between the persons forming the company. Where a person starting an unregistered company for carrying on business having acquisition of gain as its object collects money from its subscribers who number more than twenty, then the moment money is collected the bargain is clinched and turned into an actual contract by acceptance and the subscribers become shareholders as such because they must be deemed to have paid the money for the very object of the company and the mere fact that share certificates are not issued does not make them any less shareholders and hence the case comes under sub-S. (2) of S. 4. 40 Cr.L.J. 799=1939 Rang. 273.

SUBSEQUENT REGISTRATION AND SUBSEQUENT REDUCTION OF MEMBERS.—Where an association is illegal by reason of the fact that, though it consists of more than 20 members, it is not registered, its character of illegality cannot be cured by subsequent reduction in number. It retains that

¹[(3) This section shall not apply to a joint family carrying on joint family trade or business and where two or more such joint families form a partnership, in computing the number of persons for the purposes of this section, minor members of such families shall be excluded.

(4) Every member of a company, association or partnership carrying on business in contravention of this section shall be personally liable for all liabilities incurred in such business.

LEG. REF.

¹ These sub-sections were added by S. 3, Act (XXII of 1936).

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character until registration or dissolution. But subsequent registration may cure the previous omission to register. 7 R. 540=120 I.C. 902=1930 R. 21.

SUIT BY OR AGAINST ILLEGAL COMPANY BY THIRD PARTIES.—A suit by an association which is an illegal one by reason of the fact of non-registration, is not maintainable. See also 1931 All. 83; I.L.R. (1938) 2 Cal. 368. The illegality of a company affords no reason why it should not be sued. No doubt, it cannot be sued by a person who, being aware of all the facts, seeks to enforce a demand arising out of a transaction tainted with the illegality which affects the company. But the illegality of a company does not *per se* afford any answer to a demand against it arising out of a transaction to which it is a party, and which transaction is legal in itself. Unless the person dealing with the company is *particeps criminis*, there can be no *turpis causa* to bring him within the operation of the rule *ex turpi causa non oritur actio*; and he not being implicated in any illegal act himself, cannot be prejudiced by the fact that the persons with whom he was dealing or illegally associated in company. 53 B. 652=31 Bom.L.R. 1187=1930 B. 5; 16 L. 574=1934 L. 882. Where a firm consisting of less than twenty partners is subsequently converted into a joint-stock company with additional partners so as to consist of more than twenty partners, it must be registered under the Companies Act; if it is not so registered, no suit can be maintained in respect of that partnership. But when a person who was a partner in the firm and was, as such, entitled to a share of the profits when the membership of the firm was below twenty, is not allotted any share in the newly formed company, he being totally unaware of the increase in the members and of the conversion, he cannot be made to lose his right to a share of the profits because the number of partners had increased beyond twenty without his knowledge. A suit by him for a declaration that there has been a dissolution of the partnership, and for accounts cannot be dismissed on the ground of non-registration under S. 4 (2) of the Companies Act. 1937 M.W.N. 1189=1938 Mad. 151.

RIGHTS OF SUBSCRIBERS TO AN ILLEGAL

COMPANY.—The subscribers to an illegal company, i.e., a company which should have been registered under S. 4 (2) of the Act and which has not been so registered, and formed for a lawful purpose are not entitled to claim an account of the dealings and transactions of the company and of the profits made thereby. But still, they have a right to have their subscriptions returned, and can maintain a suit for enforcing the same. This right is not lost even though the monies subscribed have been laid out in the purchase of lands and other things for the purpose of the company. In such a case, the subscribers are entitled to have those lands and things reconverted into money and to have it applied as far as it would go in payment of the debts and liabilities of the company, and then in repayment of the subscriptions. In such cases no illegal contract is sought to be enforced, but on the contrary, the continuance of what is illegal is sought to be prevented. But where the purpose of the company itself is illegal or where any claim is made for sharing the profits of, or for partition of the existing assets of a company which is illegal for want of registration, no Court of law or equity will lend its assistance. 1930 R. 21=7 R. 540=120 I.C. 902. In the case of an unregistered association of more than 20 members, where a member sues for dissolution, for taking accounts and for partition, none of the reliefs could be granted, but he may be granted a declaration that the association is illegal. 48 A. 735=24 A.L.J. 777=1926 A. 591; 49 A. 319=25 A.L.J. 146=1927 A. 487; 92 I.C. 640=1926 N. 241.

UNREGISTERED COMPANY—CLAIM OF INCOME-TAX AGAINST.—A company carrying on business without complying with the provisions of the law as to the mode of its constitution cannot plead its illegal constitution against a claim for income-tax made on it. The fact that in S. 3 of the Income-tax Act, the legislature drew a distinction between a company and a firm and other associations of individuals clearly shows that the provisions of the Companies Act do not prevent an association formed for the purpose of doing business from being made liable to income-tax on its profits even if it has not been registered in accordance with the law relating to the incorporation of companies. 32 P.L.R. 335=1931 L. 376.

LIMITATION.—Where an association consists of more than 20 persons but it is not registered, and the members bring a suit for

(5) Any person who is a member of a company, association or partnership formed in contravention of this section shall be punishable with fine not exceeding one thousand rupees.]

Memorandum of Association.

5. Any seven or more persons (or, where the company to be formed will be a private company, any two or more persons) associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability (that is to say), either—

Mode of forming incorporated company.

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the return of subscription money paid to the promoter after conversion of the property of the association into cash into which the said money was changed, such suit is governed by Art. 120 of the Limitation Act, and not by Art. 62. 7 R. 540=1930 R. 21. In a suit for declaration by the heirs of one of the members that the partnership was illegal under this section, and for the recovery of capital contributed by their ancestor, it was held that the cause of action accrued as soon as the money was paid and that there was no continuing cause of action in plaintiffs' favour. 19 A.L.J. 836=64 I.C. 447.

Secs. 4 (5) and 283.—Offences under—Case sent up by Police after investigation—Jurisdiction of Magistrate. 1939 Rang. 273.

Sec. 5: CONSTRUCTION OF MEMORANDUM.—A memorandum of association, like any other document, must be read fairly and its import derived from a reasonable interpretation of the language which it employs. There is no specially rigid canon of construction to be applied to it. The purpose of the memorandum is to enable shareholders, creditors and those who deal with the company to know what its permitted range of enterprise is, and for this information they are entitled to rely on the constituent documents of the company. But the intention of the framers of the memorandum must be gathered from the language in which they have chosen to express it, and not from the antecedent transactions of the company to which the shareholders, creditors and others have no access and which they have no means of knowing. 1931 A.L.J. 565=62 M.L.J. 163=1931 P.C. 182 (P.C.). Except in respect of matters as must, by statute, be provided for by the memorandum, it should be read in conjunction with the articles of the association; and, at all events, so far as may be necessary to explain any ambiguity appearing in the terms of the memorandum or to supplement it upon any matter as to which it is silent. 38 L.W. 957=65 M.L.J. 785=1935 P.C. 89 (P.C.). The memorandum of association does not constitute a contract between the company and a third party who may be named therein. 36 Bom. L.R. 907=1934 B. 427.

LAWFUL PURPOSE.—If, as expressed on the face of the instrument of incorporation, the purpose for which the corporation is formed is not necessarily unlawful, it will be presumed that it was for a purpose for which companies might lawfully be formed. The formation of companies is not permitted where the real purpose of the incorporation is to cloak an illegal object or an unlawful business; but in such a case the fiction of the existence of a corporation or company will be disregarded by a Court of justice when the question arises in a proper proceeding, and the acts of the real parties will be dealt with as though no such corporation had been formed; and the same is true for stronger reasons where an illegal purpose is expressed in the articles. Where the proprietors of a zamindari who were numerous and whose interests were minute formed themselves into a company for the management of the property, and where the means adopted therefor were beneficial, it was held that the purpose was not unlawful. 16 C.W.N. 297=13 I.C. 673.

"OTHERWISE".—This word denotes that the signing by two persons in the case of private companies and of 7 persons in the case of other companies is as much a preliminary condition of registration as any other requirements of the Act. 16 C.W.N. 947=23 M.L.J. 215=39 I.A. 237 (P.C.).

"UNDERTAKE TO CONTRIBUTE TO THE ASSETS OF THE COMPANY".—The undertaking in the memorandum limits the liability. *Re Bangor and North Wales, etc., Association*, (1899) 2 Ch. 593; *Pedlar v. Road Block Gold Mines*, (1905) 2 Ch. 427; *Re Kingsbury Collieries*, (1907) 2 Ch. 259.

"SEVEN OR MORE PERSONS"—"ONE MAN COMPANY".—The Act enacts nothing as to the extent or degree of interest, which may be held by each of the seven, or as to the proportion of interest or influence, possessed by one or the majority of the shareholders over others. It is not necessary that the subscribers to the memorandum should be independent or unconnected, or that they or any of them should take a substantial interest in the undertaking, or that they should have a mind and will of their own, or that there should be anything like a balance of power in the constitution of the company. All the signatories may be the nominees of

(i) a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in this Act termed a company limited by shares); or

(ii) a company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed a company limited by guarantee); or

(iii) a company not having any limit on the liability of its members (in this Act termed an unlimited company).

Memorandum of company limited by shares.

6. In the case of a company limited by shares—

(1) the memorandum shall state—

(i) the name of the company, with “Limited” as the last word in its name;

(ii) the province in which the registered office of the company is to be situate;

(iii) the objects of the company, ¹[and, except in the case of trading corporations, the territories to which they extend];

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¹ These words were inserted by the A.O., 1937.

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one person. A frequent practice is for an individual desiring to turn his business into a company having a limited liability to get a sufficient number of dummies—persons who are under his control and who have no individual responsibility—to unite with him and thus to furnish the requisite number of signatures to the instrument of association. It seems that such a concern is to be regarded as a company, and that a man may thus turn himself into a company, by committing a plain fraud on the law, so as to defeat his unsecured creditors. *Salomon v. Salomon & Co.*, (1897) A.C. 22=66 L.J.Ch. 35; *Commissioners of Inland Revenue v. Sanson*, (1921) 2 K.B. 492=90 L.J.K.B. 627; 51 B. 372=102 I.C. 49=1927 B. 371.

“PERSONS”.—“Persons” includes ‘company’. So one limited company may take shares in another. *Re Barned’s Banking Co.*, (1867) L.R. 3 Ch. 105=37 L.J. Ch. 81; *Royal Bank of India’s case*, L.R. 4 Ch. 252. The term includes infants, *Re Nassau Phosphate Co.*, (1876) 2 Ch.D. 610=45 L.J. Ch. 584; *Re Laxon & Co.*, (1892) 3 Ch. 555=61 L.J. Ch. 667. As to incorporation of foreigners, see *Reuss (Princess of) v. Bos*, (1871) 5 H.L. 176=40 C.L.J. Ch. 655.

EFFECT OF ORDER TERMINATING EXISTENCE OF COMPANY.—Where a company has ceased to exist by an act of the country by whose acts and under whose laws it was made a juristic entity, it must be treated as non-existent by all Courts administering English law. 54 L.W. 610=196 I.C. 414=1941 P.C. 88 (P.C.).

Sec. 6.—Detailed powers are not required to be and ought not to be specified in the memorandum. In the case of a trading company, the memorandum should only de-

fine the trade and not the various acts which it should be within the power of the company to do in carrying on the trade. *Cotman v. Brougham*, 1918 A.C. 514. So, where the memorandum of a company stated it to be one of its objects that it should carry on the business of manufacturers of and dealers in salt; soda, iodine, etc., and that it may do so in any part of the world, it was held that the business included in ordinary mercantile parlance, the sale of salt to purchasers abroad, even without any express mention of exportation. 1931 A.L.J. 561=62 M.L.J. 163=1931 P.C. 182 (P.C.). Where among the objects for which a company was established, it was provided that it could “raise money, by the issue of shares, debentures, bonds and other securities and to invest monies so raised, or any part thereof, upon the investments specified in this memorandum”, a restrictive meaning cannot be put upon the clause so as to make it read as if the company was restricted to the raising of debentures only to invest and not otherwise. The clause should be read as an enabling and not a limiting clause; and the real meaning is that the company was empowered to raise money by issue of debentures, and that, if it so desired, to invest the money so raised or any part of it; i.e., the company has an option to invest the money so raised by debentures either wholly or in part or not at all. 57 C. 328=1930 C. 536. See also 160 I.C. 24=1935 L. 792. The alteration of the memorandum is not so easy as the alteration of the articles. Therefore the convenient statement in the memorandum with reference to the capital will be in the following terms: “The shares forming the capital (original or increased) of the company shall be divided into such classes, with such preferential and other rights, privilege and conditions; and shall be held in such terms as may be prescribed by the articles of association of

(iv) that the liability of the members is limited :

(v) the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount :

(2) no subscriber of the memorandum shall take less than one share :

(3) each subscriber shall write opposite to his name the number of shares he takes.

Memorandum of company
limited by guarantee.

7. In the case of a company limited by guarantee—

(1) the memorandum shall state—

(i) the name of the company with “ Limited ” as the last word in its name ;

(ii) the province in which the registered office of the company is to be situate ;

(iii) the objects of the company, ¹[and, except in the case of trading corporations, the territories to which they extend] ;

(iv) that the liability of the members is limited ;

(v) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount :

(2) if the company has a share capital—

(i) the memorandum shall also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount ;

(ii) no subscriber of the memorandum shall take less than one share ;

(iii) each subscriber shall write opposite to his name the number of shares he takes.

Memorandum of unlimited
company.

8. In the case of an unlimited company—

(1) the memorandum shall state—

(i) the name of the company ;

(ii) the province in which the registered office of the company is to be situate ;

(iii) the objects of the company, ¹[and, except in the case of trading corporations, the territories to which they extend] :

(2) if the company has a share capital—

(i) no subscriber of the memorandum shall take less than one share ;

(ii) each subscriber shall write opposite to his name the number of shares he takes.

Printing and signature of
memorandum.

²[9. The memorandum shall—

(a) be printed,

(b) be divided into paragraphs numbered consecutively, and

(c) be signed by each subscriber (who shall add his address and description) in the presence of at least one witness who shall attest the signature.]

LEG. REF.

¹ These words were inserted by the A.O., XXII of 1936).

² This section was substituted by S. 4 of Act

Restriction on alteration of memorandum.

10. A company shall not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this Act :

¹[Provided that any provision in the memorandum relating to the appointment of a manager or managing agent and other matters of a like nature incidental or subsidiary to the main objects of the company, shall not be deemed to be such condition.]

11. (1) A company shall not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires.

(2) If a company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a company in existence is previously registered, or so nearly resembling it as to be calculated to deceive, the first-mentioned company may, with the sanction of the registrar, change its name.

²[(3) Except with the previous consent in writing of the Central Government, no company shall be registered by a name which—

(a) contains any of the following words, namely, 'Crown,' 'Emperor,' 'Empire,' 'Empress,' 'Federal', 'Imperial', 'King,' 'Queen', 'Royal', 'State', 'Reserve Bank', 'Bank of Bengal', 'Bank of Madras', 'Bank of Bombay' or any word which suggests or is calculated to suggest the patronage of His Majesty or of any member of the Royal Family or any connection with His Majesty's Government or any department thereof; or

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¹This proviso was added by S. 5 of Act XXII of 1936.

²This sub-section was substituted by S. 6, *ibid.*

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the company for the time being." 64 M.L.J. 277=1933 A.L.J. 405=1933 P.C. 39 (P.C.).

Sec. 10: "CONDITIONS".—The conditions referred to in this section are not confined to those which are essential to be stated in the memorandum under this Act. Even such conditions which are not required by this Act to be inserted in the memorandum, cannot be altered except in the cases and in the mode and to the extent for which express provision is made in the Act. *Ashbury v. Watson*, (1885) 30 Ch.D. 376 C.A. Where, however, when a clause in the memorandum only *empowered* the company to enter into a contract of agency with a particular firm, and did not form a vital part or condition of the constitution of the company, it was held that it did not come under the word "condition" within the meaning of this section. 59 B. 218=36 Bom.L.R. 907=156 I.C. 80=1934 B. 427. As to "conditions"; see also 18 L.W. 304=1923 M.W.N. 568=74 I.C. 966. To vary the conditional rights and privileges given to various classes of shares by following strictly the procedure laid down in the articles and the memoran-

dum, does not amount to an alteration of the conditions contained in the memorandum; *where one of the conditions in the memorandum itself is that the rights and privileges are subject to variation*. To hold otherwise would be to ignore the condition in the memorandum providing for such terms. To determine the rights attaching to such particular class of shares, the memorandum must be read and given effect to as a whole, unless any particular provision of the same violates an express provision of the Act, in which case that particular provision will be treated as invalid. 57 A. 810=1935 A.L.J. 527=1935 A. 310. With reference to the circumstances under and the extent to which variation of shareholder's rights could be effected, provision has been made now in S. 66-A inserted by the Amending Act XXII of 1936.

Sec. 11.—The present sub-section (3) has been substituted in place of the previous one. The alterations made have been suggested by the wording of S. 17 of the English Act. This amendment prohibits the use of some name, *viz.*, "Federal", "State" or any other word suggesting patronage of His Majesty or of any member of the Royal Family or any connection with His Majesty's Government or any department thereof; and "Municipal" or "Chartered" or any other word which suggests or is calculated to suggest connection with any Municipality or local authority or with any society or body incorporated by Royal Charter.

(b) contains the word 'Municipal' or 'Chartered' or any word which suggests or is calculated to suggest connection with any municipality or other local authority or with any society or body incorporated by Royal Charter :

Provided that nothing in this sub-section shall apply to companies registered before the commencement of this Act.]

(4) Any company may, by special resolution and subject to the approval of the ¹[Central Government] signified in writing, ²[* * * *], change its name.

(5) Where a company changes its name, the registrar shall enter the new name on the register in place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case. On the issue of such a certificate, the change of name shall be complete.

(6) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company ; and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.

12. (1) Subject to the provisions of this Act, a company may, by special resolution, alter the provisions of its memorandum so as to change the place of the registered office from one province to another, or with respect to the objects of the company, so far as may be required to enable it—

- (a) to carry on its business more economically or more efficiently ; or
- (b) to attain its main purpose by new or improved means ; or
- (c) enlarge or change the local area of its operations ; or
- (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company ; or
- (e) to restrict or abandon any of the objects specified in the memorandum ;

³[or

LEG. REF.

¹ These words were substituted for the words "Local Government" by A.O., 1937.

² The words "under the hand of one of the Secretaries to such Government" were omitted, *ibid.*

³ This word and cls. (f) and (g) were added by S. 7 of Act XXII of 1936.

NOTES.

Sec. 12: AMENDMENT BY ACT XXII OF 1936.—Two new clauses (f) and (g) have been added to sub-S. (1) of this section. In certain decisions it was doubted whether in the absence of express provision in the memorandum a company was competent to alter its objects so as to enable it to sell or dispose of the whole or any part of the undertaking of the company, or to amalgamate with any other company. Express provision for these purposes is contained in S. 5 of the English Act, and the same has been adopted by the present amendment.

Sec. 12, Cl. 1: "OBJECTS OF THE COMPANY".—Revoking the appointment of an agent is not one relating to the objects of the company. 18 L.W. 304=1923 M.W.N. 568=74 I.C. 966. As to alteration of memorandum by addition of new clauses, *see* 52 C. 586; by changing place of registered office, *see* 96 I.C. 753=1926 A. 649; by modification of preferential rights, *see* 110 I.C. 649=30 Bom.L.R. 598. A general meeting is not a condition precedent to make a proposal to

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alter the memorandum or articles of a company. *See* 30 Bom.L.R. 197=108 I.C. 465=1928 B. 80. It is not necessary for the company to take proceedings to alter the memorandum or articles, before the Court can sanction a scheme involving the alteration thereof. *See* 30 Bom.L.R. 197=108 I.C. 465=1928 B. 80. A memorandum of association can be altered only by a special resolution of the company. 33 M. 36=1 I.C. 803. There is a very clear distinction between the relation of a shareholder to a company in regard to his shares and his rights against the company in regard to other contracts. Although the regulations contained in a company's Articles of Association are revocable by special resolution, a special contract may be made with the company in the terms of or embodying one or more of the Articles, and a company cannot break its contracts by altering its Articles. When dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting his share, care must be taken not to assume that the contract involves as one of its terms an Article which is not to be altered. If the Court sees that a contract involves as one of its terms that an article is not to be altered, then the company is not at liberty to alter that Article so as to break that contract. 43 Mys. H.C. R. 396=16 Mys.L.J. 448.

(f) to sell or dispose of the whole or any part of the undertaking of the company; or

(g) to amalgamate with any other company or body of persons.]

(2) The alterations shall not take effect until and except in so far as it is confirmed by the Court on petition.

(3) Before confirming the alteration, the Court must be satisfied—

(a) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and

(b) that, with respect to every creditor who in the opinion of the Court is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Court:

Provided that the Court may, in the case of any person or class, for special reasons, dispense with the notice required by this section.

13. The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper.

Power of Court when confirming alteration.

14. The Court shall, in exercising its discretion under sections 12 and 13, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members; and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement:

Exercise of discretion by Court.

Provided that no part of the capital of the company may be expended in any such purchase.

15. (1) A certified copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, shall, within three months from the date of the order, be filed by the company with the registrar, and he shall register the same, and shall certify the registration under his hand, and the certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the memorandum so altered shall be the memorandum of the company.

Procedure on confirmation of the alteration.

(2) Where the alteration involves a transfer of the registered office from one province to another, a certified copy of the order confirming such change shall be filed by the company with the registrar in each of such provinces, and each of such registrars shall register the same, and shall certify under his hand the registration thereof, and the registrar for the province from which such office is transferred shall send to the registrar for the other province all documents relating to the company registered or filed in his office.

(3) The Court may by order at any time extend the time for the filing of documents with the registrar under this section for such period as the Court thinks proper.

NOTES.

PRACTICE.—Application for alteration must be made on the original side of the High Court, and not on the appellate side. 41 C.L.J. 191=29 C.W.N. 403.

Sec. 13: "COURT'S POWERS".—The Court has power to confirm the resolution regarding the alteration of the memorandum of

association, only where such alterations relate to matters referred to in sub-section (1) of this section. 18 L.W. 304=74 I.C. 966=1924 M. 126.

Sec. 14.—Court is not always bound to confirm alteration. 18 L.W. 304=74 I.C. 966.

16. No such alteration shall have any operation until registration thereof has been duly effected in accordance with the provisions of section 15, and if such registration is not effected within three months next after the date of the order of the Court confirming the alteration, or within such further time as may be allowed by the Court in accordance with the provisions of section 15, such alteration and order and all proceedings connected therewith shall, at the expiration of such period of three months or such further time, as the case may be, become absolutely null and void :

Provided that the Court may, on sufficient cause shown, revive the order on application made within a further period of one month.

Articles of Association.

17. (1) There may, in the case of a company limited by shares, and there shall, in the case of a company limited by guarantee or unlimited, be registered with the memorandum, articles of association signed by the subscribers to the memorandum and prescribing regulations for the company.

(2) Articles of association may adopt all or any of the regulations contained in Table A in the First Schedule, ¹[and shall in any event be deemed to contain regulations identical with or to the same effect as regulation 56, regulation 66, regulation 71, regulations 78, 79, 80, 81 and 82, regulation 95, regulation 97, regulation 105, regulation 107 and regulations 112, 113, 114, 115 and 116 contained in that Table :

Provided that ²[regulations 78, 79, 80, 81 and 82] shall not be deemed to be included in the articles of any private company except a private company which is the subsidiary company of a public company :

Provided further that regulation 107 shall be deemed to require that a statement of the reasons why of the whole amount of any item of expenditure which may in fairness be distributed over several years, only a portion thereof is charged against the income of the year, shall be shown in the profit and loss account, unless the company in general meeting shall determine otherwise.]

(3) In the case of an unlimited company or a company limited by guarantee, the articles, if the company has a share capital, shall state the amount of share capital with which the company proposes to be registered.

(4) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital, the articles shall state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration.

18. In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or, if articles are registered, in so far as the articles do

LEG. REF.

¹ These words and figures were added by S. 8 of Act XXII of 1936.

² These words and figures were substituted for the word and figure "regulation 78" by S. 2 of Act II of 1938.

NOTES.

Sec. 17: AMENDMENT BY ACT XXII OF 1936.—This amendment has substituted the present sub-section for the old one. Previously it was left to the option of the companies to adopt or not all or any of the provisions of the regulations contained in Table A of I Schedule of the Act. It was thought desirable to make generally applicable certain provisions usually made by the articles of properly managed companies as

to polls, absence of restrictions on form of proxies, retirement of directors by rotation, inspection of accounts, details shown in profit and loss accounts restriction as to the amount of dividend that may be declared by the company, and the giving of notice to members. This amendment makes the adoption of the model regulations on these subjects contained in Table A compulsory.

Sec. 17, Cl. (2): "DIRECTOR'S LIABILITY".—It was held in 154 I.C. 33=1934 A. 855 that there was nothing in the Act to prevent such a clause being inserted in the articles of association as would seriously limit the liability of a director or officer of the company. But it may no longer be possible in view of S. 86-C which has been introduced by the amending Act of 1936.

not exclude or modify the regulations in Table A, in the First Schedule, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles.

Form and signature of articles.

19. Articles shall—

- (a) be printed ;
- (b) be divided into paragraphs numbered consecutively ; and
- (c) be signed by each subscriber of the memorandum ¹[(who shall add his address and description)] of association in the presence of at least one witness who must attest the signature.

20. (1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles, and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution.

(2) The power of altering articles under this section shall, in the case of any company formed and registered under Act No. XIX of 1857 and ²Act No. VII of 1860 or either of them extend to altering any provisions in Table B³ annexed to Act XIX of 1857, and shall also, in the case of an unlimited company formed and registered under the said Acts or either of them, extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding that those regulations are contained in the memorandum.

⁴[20-A. Notwithstanding anything in the memorandum or articles of a company, no member of the company shall be bound by an alteration made in the memorandum or articles after the date on which he became a member if and so far as the alteration requires him to take or subscribe for more shares than the number held by him at the date on which the alteration is made, or in any way increases his liability as at that date to contribute to the share capital of, or otherwise to pay money to, the company :

Provided that this section shall not apply in any case where the member agrees in writing either before or after the alteration is made to be bound thereby.]

LEG. REF.

¹ These brackets and words were inserted by S. 9 of Act XXII of 1936.

² This Act was repealed by Act X of 1866, which again was repealed by Act VI of 1882, which was also repealed by this Act.

³ For Table B of Act XIX of 1857, see Appendix I to this Act.

⁴ This section was inserted by S. 10 of Act XXII of 1936.

NOTES.

Sec. 19: AMENDMENT BY ACT XXII OF 1936.—In cl. (c) after the word 'memorandum' the words "*who shall add his address and description*", have been added by the amendment. This amendment merely provides for what is generally done in practice. A similar addition has been made in S. 9 by the Amending Act (1936).

Sec. 20.—It is not for the Court to decide whether the alteration or addition is for the benefit of the company as a whole, but it is to be determined by the shareholders acting *bona fide*. *Shuttleworth v. Cox Brothers*, (1927) 2 K.B. 9. As to what amounts to alteration of articles, see 1930 A. 661. Necessity for special resolution for alteration. 33 M. 36. See also 52 C. 239. Alteration of terms of debentures.

1927 P.C. 62=101 I.C. 897. Alteration of director's qualifications. 105 I.C. 541=1927 B. 609=29 Bom.L.R. 1362. An article of association of a company provided that until otherwise determined by a general meeting the number of directors should be not less than three or more than seven. *Held*, that a resolution at a general meeting that the number of directors should be increased to more than seven was valid and no special resolution was necessary. 190 I.C. 551=1940 Sind 87. Where a company amends the articles of association under S. 20 by a special resolution without mentioning in the notice under S. 81 that the question of amendment of articles was to come up for decision in the meeting, the irregularity is fatal to the proceedings and makes the amendment invalid and *ultra vires*. 190 I.C. 819=1940 Lah. 243. There is nothing in the Companies Act which requires that articles of association must be rigid and may not in themselves provide for varying sets of circumstances. 190 I.C. 551=1940 Sind 87.

Sec. 20-A: AMENDMENT BY ACT XXII OF 1936.—This section has been newly inserted by the amending Act. This section limits, on the lines of S. 22 of the English Act,

General Provisions.

21. (1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

NOTES.

the liability of a member of a company under alterations made in the memorandum after he has become a member of the company. This is a salutary provision meant for the protection of the minority against the oppression by the majority. Alteration in the Articles effected after the resolution of expulsion of a member could not in any way be binding upon him if notice of the meeting at which the alteration was made was withheld from him. 52 L.W. 741=1941 Mad. 354=(1940) 2 M.L.J. 721.

Sec. 21, Cl. (1): ARTICLES ARE CONTRACTS.—Although the articles of association can neither constitute a contract between the company and an outsider, nor give any individual member special contractual rights beyond those of the members generally, yet they do in fact constitute a contract between the company and its members in respect of their ordinary rights as members. 52 B. 477=30 Bom.L.R. 549=1928 B. 252. According to S. 21, the articles of association are binding on the company as well as on the members thereof. The articles constitute a contract *inter se* amongst the shareholders and where the articles have been acted upon by the company and the members, the articles constitute an implied contract between the members and the company. Therefore, where in pursuance of certain articles acted upon by the company, a member was appointed Managing Director of the Bank and acted for eleven years in that capacity, the articles constitute an implied contract between the member and the company; a suit for performance of which lies in a Civil Court. 190 I.C. 819=1940 Lah. 243. Though the memorandum and articles of association of a company do not constitute a contract, an implied contract may be proved by the acts of the parties on the terms set out in the articles of association. 43 P.L.R. 619=1941 Comp. C. 301. Where the articles of association required that the Board of managing directors should consist of a certain number, but as a matter of fact a lesser number only is appointed, they are not entitled to exercise the functions of the Board of managing directors and any resolutions passed by them are not valid. 1939 A.L.J. 950=1939 All. 739. A contractual right of inspection does not of itself imply a right to take copies, any more than a statutory right would do. In the case of a

statutory right of inspection the Court will not imply a right to take copies unless the statutory right would otherwise be of no avail, or practically useless. The Court is bound by a stricter rule when a question of implying a term in a contract arises than in the case of a statute. S. 21 of the Companies Act merely converts the Articles of Association into a contract between the company and its members. If the Articles give to its members a right to inspect the minutes and there is nothing to show that the intention was to give a right to take copies of the minutes, the Articles must be construed to mean that the members, though given a right to inspect the minutes, could only take copies of them if that were permissible under their common law rights. If the interests of members are sufficiently protected by the common law, there is no necessity for implying any greater rights in their contract. The members are not entitled under their common law right to take copies of the minutes if their interest is not different from that of their fellow members, and if they have no special object of their own. 42 C.W.N. 161=1938 Cal. 89.

Sec. 21, Cl. (2): "DEBT DUE".—A person owing money to a registered company, when he becomes a shareholder and bound by the articles of association, becomes also bound by the provision (if it exists) in the articles by which any debt due by the shareholder to the company is made a first charge on the share. 7 L.W. 114=43 I.C. 508. The liability of the shareholders in respect of the balance due on their shares is undoubtedly a debt due from them to the company; and this liability commences from the time when they first take up their shares. But this liability is not enforceable against the shareholders until a valid call has been made in accordance with the provisions of the articles of association and of the Act. 59 C. 1186=36 C.W.N. 589=1932 C. 716. The mere passing of a resolution by the directors cannot be regarded as a valid call, and service of notice is necessary for its validity unless dispensed with by the articles. So, in the absence of a valid call, the mortgagee purchaser of the rights of a company cannot enforce by suit the liability of the shareholders for the unpaid portion of their shares and a mere demand by him after his auction-purchase cannot take the place of a valid call. 59 C. 1186. Though money becomes a debt when it is due under the arti-

22. The memorandum and the articles (if any) shall be filed with the registrar for the province in which the registered office of the company is stated by the memorandum to be situate, and he shall retain and register them.

Registration of memorandum and articles.

23. (1) On the registration of the memorandum of a company, the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited.

Effect of registration

(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

24. (1) A certificate of incorporation given by the registrar in respect of any

NOTES.

cles of association and memorandum, it does not become due simply because the signatories to the articles and memorandum of association have undertaken to purchase certain number of shares and pay for them. It is only money which is presently due that can be described as a debt. 1939 A.L.J. 950=1939 All. 739.

STATUTORY RIGHT OF AMALGAMATION.—See 26 Bom.L.R. 987=90 I.C. 580=1925 B. 49.

Sec. 22.—The discretion of Registrar can be exercised even in the matter of the registration of special and extraordinary resolutions under S. 82 of the Act, altering articles of the association. 36 L.W. 942=63 M.L.J. 917=1933 M. 129. All persons dealing with the company must take the articles of association to be such as appear at the office of the Registrar of Companies, to be in force. 45 C.L.J. 96=100 I.C. 875=1927 C. 299. So, if the directors propose to do something in excess of their powers thereunder, he is not entitled to assume that their powers have been extended by a special resolution, for such a resolution, if passed, would be registered. 1927 C. 299.

Sec. 23: REGISTRATION.—As to discretion of registrar, see 63 M. L. J. 917 (*Illegal articles*).

EFFECT OF REGISTRATION.—A registered corporate body is a legal entity distinct from its members. A 'firm' though it can sue and be sued is not such a legal entity. 33 Bom.L.R. 111=130 I.C. 598=1931 B. 178. Where a duty is imposed upon a company in such a way that a breach thereof amounts to a disobedience of the law, then, where there is nothing in the statute expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the company. 11 R. 162=145 I.C. 710=1933 R. 70. Where a company is convicted under the Companies Act, an appeal against the conviction should be preferred by the company through a properly authorized

agent. An individual such as a managing director of the company cannot as such file the appeal. 37 C.W.N. 1159=147 I.C. 848=1934 C. 63. Effect of registration on persons dealing with the company. See 45 C.L.J. 96=100 I.C. 875.

LIABILITY OF MEMBERS FOR COMPANY'S DEBTS.—The effect of incorporation of an association is to make that body corporate a separate legal entity or "*persona*" and if a man trusts a corporation, he trusts that legal *persona* and must look to its assets for payment. He can call on individual members to contribute *only in cases where the Charter or Act has so provided*. Neither under this Act nor under the Co-operative Societies Act is there any statutory provision which in any way entitles the creditor of a company to proceed direct against a member for the debts of the society, whether the society is of limited or unlimited liability. The question of the liability of the company being limited or unlimited can only affect the members when they come to contribute to the liabilities of the society in the winding up. Not until there is a winding up can the creditor come face to face with the individual member. 11 P. 174=12 Pat.L.T. 619=1931 P. 321 (F.B.).

Sec. 24: "CONCLUSIVE EVIDENCE".—A certificate of incorporation is conclusive as to the fact of incorporation and as to the observance of all the previous requisites of the Act in respect of signing, registration, etc. 40 C. 1=16 C. W. N. 937=39 I.A. 237=23 M.L.J. 215 (P.C.). And no evidence to the contrary is admissible. 26 A.L.J. 347=108 I.C. 451. Under S. 30, a person shall be deemed to have agreed to become a member of the company on his subscribing to the memorandum, and on its registration is properly entered as a member. He cannot plead that he subscribed to the memorandum subject to any reservation. (*Ibid.*)

Conclusiveness of certificate of incorporation. association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under this Act.

(2) A declaration by an advocate, attorney or pleader entitled to appear before a High Court who is engaged in the formation of a company, or by a person named in the articles as a director, manager or secretary of the company, of compliance with all or any of the said requirements shall be filed with the registrar, and the registrar may accept such a declaration as sufficient evidence of compliance.

25. (1) Every company shall send to every member, ¹[at his request and within fourteen days thereof] on payment of one rupee or such less sum as the company may prescribe, a copy of the memorandum and of the articles (if any).

Copies of memorandum and articles to be given to members.

(2) If a company makes default in complying with the requirements of this section, it shall be liable for each offence to a fine not exceeding ten rupees.

Alteration of memorandum or articles to be noted in every copy.

²[25-A. (1) Where an alteration is made in the memorandum or articles of a company, every copy of the memorandum or articles issued after the date of the alteration shall be in accordance with the alteration.

(2) If, where any such alteration has been made, the company at any time after the date of the alteration issues any copies of the memorandum or articles which are not in accordance with the alteration, it shall be liable to a fine not exceeding ten rupees for each copy so issued and every officer of the company who is knowingly and wilfully in default shall be liable to the like penalty.]

Associations not for Profit.

26. (1) Where it is proved to the satisfaction of the ³[Central Government] that an association capable of being formed as a limited company has been or is about to be formed for promoting commerce, art, science, ⁴[religion], charity, or any other useful object, and applies or intends to apply its profits (if any) or other income in promoting its objects, and to prohibit the payment

Power to dispense with "limited" in name of charitable and other companies.

LEG. REF.

¹ These words were substituted for the words "at his request, and" by S. 11 of Act XXII of 1936.

² This section was inserted by S. 12, *ibid.*

³ These words were substituted for the words "Local Government" by A.O., 1937.

⁴ This word was inserted by S. 2 of Act XXXIII of 1926.

NOTES.

Sec. 25: AMENDMENT BY ACT XXII OF 1936.—In sub-section (1), the words "*and within 14 days thereof*" have been added with a view to provide for a time limit for compliance with the request. A power to regulate a right cannot be used to abrogate it. If a member has under the Articles of Association a contractual right of inspection of the minutes of the committee of the association, the right cannot be reduced by the power given under the Articles to the committee to make rules, into a mere right to claim inspection subject to the committee's approval. No matter how limited the grounds for refusing inspection might be, making the right of inspection a matter of discretion of the committee, fundamentally alters the Articles for, a contractual right

of inspection, just as a statutory right of inspection, can be exercised whatever the motive or interest of the member may be. 42 C.W.N. 161=1938 Cal. 89. See also 1936 A.L.J. 748.

Sec. 25-A: AMENDMENT BY ACT XXII OF 1936.—This section has been newly added; and it makes it obligatory for all companies to keep the memorandum and articles up-to-date by inserting therein all alterations which may be made from time to time. This follows S. 24 of the English Act. Similar provision was contained in sub-sections (3) and (4) of S. 50, and sub-sections (2) and (3) of S. 71 of this Act, and consequent on the insertion of this S. 25-A, here, those sub-sections have been repealed by this Amending Act. The insertion of the words "*knowingly and wilfully*" has been made to ensure that an unintentional default is not to be penalised.

Sec. 26: AMENDMENT BY ACT XXII OF 1936.—The words in brackets have been substituted for the words "and of filing lists of members and directors and managers with the Registrar", by the amendment. This amendment follows S. 18 of the English Act.

of any dividend to its members, the ¹[Central Government] may, by license under the hand of one of its Secretaries, direct that the association be registered as a company with limited liability, without the addition of the word "Limited" to its name, and the association may be registered accordingly.

(2) A license by the ¹[Central Government] under this section may be granted on such conditions and subject to such regulations as the ¹[Central Government] thinks fit, and those conditions and regulations shall be binding on the association, and shall, if the ¹[Central Government] so directs, be inserted in the memorandum and articles, or in one of those documents.

(3) The association shall on registration enjoy all the privileges of limited companies, and be subject to all their obligations, except those of using the word "Limited" as any part of its name, and of publishing its name, ²[and of sending lists of members to the registrar].

(4) A license under this section may at any time be revoked by the ¹[Central Government], and upon revocation the registrar shall enter the word "Limited" at the end of the name of the association upon the register, and the association shall cease to enjoy the exemptions and privileges granted by this section :

Provided that, before a license is so revoked, the ¹[Central Government] shall give to the association notice in writing of its intention, and shall afford the association an opportunity of submitting a representation in opposition to the revocation.

Companies limited by guarantee.

27. (1) In the case of a company limited by guarantee and not having a share capital, and registered after the commencement of this Act, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

(2) For the purpose of the provisions of this Act relating to the memorandum of a company limited by guarantee and of this section, every provision in the memorandum or articles, or in any resolution, of any company limited by guarantee and registered after the commencement of this Act, purporting to divide the undertaking of the company into shares or interests, shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby.

PART III.

SHARE CAPITAL, REGISTRATION OF UNLIMITED COMPANY AS LIMITED, AND UNLIMITED LIABILITY OF DIRECTORS.

Distribution of share Capital.

28. (1) The shares or other interest of any member in a company shall be movable property, transferable in manner provided by the articles of the company.

(2) Each share in a company having a share capital shall be distinguished by its appropriate number.

LEG. REF.

¹ These words were substituted for the words "Local Government" by A.O., 1937.

² These words were substituted for the words "and of filing lists of members and directors and managers with the registrar" by S. 13 of Act XXII of 1936.

NOTES.

Sec. 28: ALLOTMENT OF SHARES.—If a Secretary of a company makes fraudulent misrepresentations to induce persons to take shares in the company, the company would

not be bound by them. The Secretary could not validly agree to any terms which were not contemplated by the Articles of Association or ran counter to them. 39 P.L.R. 293. A person who subscribes for shares in the memorandum of association of a company must, by S. 30 (1), be deemed to have agreed to become a member of the company, and on registration his name must be entered as a member in the register of members. But an express allotment of shares is necessary in order to give rise to a liability to

29. A certificate, under the common seal of the company, specifying any shares or stock held by any member, shall be *prima facie* evidence of the title of the member to the shares or stock therein specified.

30. (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company.

NOTES.

pay up the value of the shares. The fact that the prospectus published and issued contains a statement that a certain number of shares of certain value have been subscribed for by the signatories to the memorandum is not sufficient to show that there was any "allotment" of shares, where there is no record in the Minutes Book of the Board of Directors of any resolution allotting shares. 49 L.W. 537=1939 Mad. 498=(1939) 1 M. L.J. 534.

TRANSFER OF SHARE HOW MADE.—[See S. 34 *infra*.] Where the law prescribes a mode of transfer for shares in a limited company, compliance with that mode is necessary before property can pass so as to confer title on the transferee as against third persons. A transfer of shares in a company otherwise than as is provided by the Act and the Articles of Association may confer a right in equity on the transferee to compel the vendor to execute a proper conveyance, and the transaction evidenced by the transfer can be regarded as an agreement to convey, capable of being perfected into an absolute conveyance by compliance with the prescribed formalities. Until then the transfer is inchoate and the transferee cannot claim priority over a Court auction-purchaser of the shares. 45 M. 537=42 M.L.J. 449=1923 M. 241. But see contra 31 B. 76. A share cannot be transferred without the sanction of the company. 101 I.C. 568=1927 L. 797. Until the name of the transferee is entered in the company's register, the transfer is incomplete, and such a transfer does not operate as a declaration of trust. 48 C. 986=66 I.C. 586. The provision in the Articles of Association that no transfer would be valid and recognised unless registered in the books, and that the company could refuse to register a transfer without assigning reasons is one intended for the protection of the company, and it does not prevent the passing of title as between the transferor and the transferee. 1924 L. 173=71 I.C. 814. So far as the parties to the transfer are concerned, the transfer is complete on the day the deed is signed by both the parties. 1924 L. 173.

'RESTRICTION ON TRANSFER'.—Shares are *prima facie* transferable. While there is C.C.M.—198

no bar which precludes the shareholders from contracting for value that they shall each submit to any reasonable restriction which they choose to agree to, a restriction which precludes a shareholder altogether from transferring may be invalid, but a restriction which does no more than give a right of pre-emption is valid. 30 Bom.L.R. 1329=111 I.C. 337=1928 P.C. 291 (P.C.).

COURT SALE OF SHARES.—Directors of a company in a *bona fide* discretion vested in them under the Act and the Articles of Association can refuse to recognise the purchaser of the shares of the company in a Court auction, as a shareholder of the company. 45 M. 537=42 M.L.J. 449=1923 M. 241.

TRANSFER WHEN COMPLETE.—See 71 I.C. 814; 48 C. 986; 45 M. 537; 115 I.C. 616; 28 L.W. 932=1928 M. 571 (Execution sale). In the absence of anything in the Articles of Association forbidding the same, a sale by Court of shares held by a member has the effect of transferring the shares to the purchaser. If it is contended that on a sale by the Court the shares do not pass to the purchaser, the burden is on those who put forward such contention to establish the same by reference to some provision in the Memorandum of Articles of Association. 28 L. W. 932=1928 M. 571.

NECESSITY FOR REGISTRATION.—To say that the registration of the transferee's name is not a part of the contract between the transferor and the transferee, is not the same thing as saying that the sale can take place even without registration. 50 A. 695=26 A.L.J. 627=1928 A. 481.

SANCTION OF THE COMPANY.—1927 L. 797=101 I.C. 568. Agreement not to pay cash for shares. 201 P.L.R. 1914=25 I.C. 672. See also 36 B. 577; agreement to purchase shares on condition that shareholder need not pay unless the company made a profit. See 39 B. 557.

Sec. 30: MEMBERSHIP, WHEN ARISES.—A distinction is made by the section between the subscribers to the memorandum of the company, and persons who afterwards agree to become members. In the case of the former, by the mere fact of subscription to the memorandum, he becomes a member and as soon as the company is incorporated by the Registrar an irrevocable agreement is created

Register of members.

31. (1) Every company shall keep in one or more books a register of its members, and enter therein the following particulars :—

(i) the names and addresses, and the occupations, if any, of the members and, in the case of a company having a share capital, a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member ;

(ii) the date at which each person was entered in the register as a member ;

(iii) the date at which any person ceased to be a member.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues ; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

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for him to take from the company the number of shares placed against his signature. 55 A. 417=1933 A.L.J. 233=1933 A. 344. See also 35 A. 538=21 I.C. 915. His name is to be automatically entered in the Register of members. His membership does not depend on his name being entered in the Register nor upon the allotment of any shares to him. 48 A. 580=95 I.C. 927=1926 A. 550. See also 1939 Mad. 498=49 L.W. 537=(1939) 1 M.L.J. 534. Cited under S. 28 *supra*. Nor does the fact that he was not allotted any shares or that he has ceased to be treated as a member for a long time relieve him from his liability as member. 149 I.C. 869=1934 S. 39.

AGREEMENT IMPLIED BY CONDUCT.—Where a person has been given shares, or shares have been transferred to him as qualification for a directorship, such a transfer makes the transferee a member of the company. And if such person holds out that he is a shareholder and member of the company, he is estopped from denying that he is a member or a shareholder, where the company goes into liquidation, on the ground that the transfer was a mere colourable transaction. 1936 L. 480.

SUITS BY MEMBERS.—The Court has jurisdiction to entertain a suit by shareholders in respect of an infringement of their individual rights as shareholders when the interests of justice so require. A single shareholder can maintain a suit regarding enforcement of his right to vote. 61 M. L.J. 724=34 L.W. 746=1932 M. 100. But where a shareholder brought a suit for a declaration that certain shares issued and allotted to others were void and hence they were not competent to act as shareholders, it was held that the suit was not maintainable under S. 42 of the Specific Relief Act. 36 C.W.N. 638=1932 C. 714.

"MINOR MEMBERS".—There is nothing in this Act to prevent a minor from taking shares in a limited company. An agreement by him to take shares, is no doubt voidable at his choice when he attains majority. But a shareholder who was a minor at the time

of allotment and who on attaining majority received dividends and raised no objection to his name being included in the Register of members is estopped from denying as between himself and the company's representative that he is a shareholder. 39 B. 331=27 I.C. 335=16 Bom.L.R. 730. Ss. 30 and 184—Signatories to memorandum of association—Liability to be included in list of contributories—Actual entry in register of shares or actual allotment of shares not condition precedent. 32 S.L.R. 167=1938 Sind 187.

S. 30 (2)—Scope—Non-compliance—Effect of. Per Trial Judge, *Rupchand, A. J.C.*—S. 30 (2) merely lays down a rule of procedure and does not purport to declare that a failure to comply with its provisions shall relieve a signatory to the memorandum of association of his liability to pay for his shares, which according to S. 30 (1) he is deemed to have agreed to have purchased and to pay for. A director is bound to see if the allotment of shares is made. He cannot avoid his liability to pay for the shares by pleading his own default or negligence in making the allotment of shares to himself. 32 S.L.R. 167=1938 Sind 187.

Sec. 31: REGISTER OF MEMBERS—LOCALITY OF SHARES.—When transfer of shares in a company must be effected by a change in the register, the place where the register is to be kept according to law determines the locality of the shares. 59 M.L.J. 214=1930 P.C. 10 (P.C.).

ALLOTMENT OF SHARES—WHEN CONTRACT IS CONCLUDED.—It is not correct to state that there can be no concluded contract until after allotment in fact. There may be a valid executory contract for the allotment of shares constituted by offer and communicated acceptance before allotment is made. If, however, the only facts are that there is application for shares to a company and nothing further is done by the company but allotment, there is no concluded contract until the allotment is communicated to the applicant. 34 C.W. N. 865=1930 P.C. 134=59 M.L.J. 61 (P.C.).

¹[31-A. (1) Every company having more than fifty members shall, unless the register of members is in such a form as to constitute in itself an index, keep an index of the names of the members of the company and shall within fourteen days after the date on which any alteration is made in the register of members make any necessary alteration in the index.

(2) The index, which may be in the form of a card index, shall in respect of each member contain a sufficient indication to enable the account of that member in the register to be readily found.

(3) If default is made in complying with this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.]

32. (1) Every company having a share capital shall ²[within eighteen months from its incorporation and thereafter] once at least in every year make a list of all persons who, on the day of the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of the first return) of the incorporation of the company.

(2) The list shall state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or (in the case of the first return) of the incorporation of the company by persons who are still members and persons who have ceased to be members respectively and the dates of registration of the transfers, and shall contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—

(a) the amount of the share capital of the company, and the number of the shares into which it is divided;

(b) the number of shares taken from the commencement of the company up to the date of the return;

(c) the amount called up on each share;

(d) the total amount of calls received;

(e) the total amount of calls unpaid;

LEG. REF.

¹ This section was inserted by S. 14 of Act XXII of 1936.

² These words were inserted by S. 15, *ibid.*

NOTES.

Sec. 31-A.—It follows S. 96 of the English Act. The words "*knowingly and wilfully*" have been inserted to ensure that an unintentional default is not to be penalised.

Sec. 32: AMENDMENT BY ACT XXII OF 1936.—The amendments made in this section are as follows:—

(i) The words "within 18 months from its incorporation and thereafter" have been inserted after the word "shall" in sub-S. (1). The section, as it previously stood, was not clear as to when the first statement was to be filed. Thus, if a company was incorporated towards the end of a year (*e.g.*, in Nov. 1934), it could be said under that section that the statement has got to be filed in 1934 itself. This amendment removes that uncertainty, and lays down a definite time limit for the submission of the first annual list, without making the same depend upon the date of the annual general meeting, the holding of which may for various reasons be

delayed.

(ii) Cl. (f) of sub-section (2) has been amended so as to cause disclosure of the amount of discount allowed in respect of shares also; and particulars as to the amount of sums paid or allowed by way of commission or discount on debentures or shares, and which has not been written off at the date of the return. This amendment was introduced, having regard to the provision made in this amending Act for the issue of shares also at a discount. (*Vide* S. 105-A.)

(iii) In Cl. (l) of sub-section (2), for the words "managers of the company" in the old Act the words "Managers or Managing Agents of the Company" have been substituted by this amendment.

(iv) In sub-section (3), the words "seven days" have been altered to "twenty-one days".

(v) Sub-section (4) of the old Act was renumbered by this amending Act as sub-section (5); and a new sub-section (4) has been introduced. This amendment provides for the inclusion of some additional items in the summary, and incorporates the provisions of S. 111 of the English Act relating to private companies.

(f) the total amount of the sums (if any) paid by way of commission in respect of any shares or debentures, or allowed by way of discount ¹[in respect of any shares or debentures], since the date of the last return ²[or so much thereof as has not been written off at the date of the return.];

(g) the total number of shares forfeited ;

(h) the total amount of shares or stock for which share-warrants are outstanding at the date of the return ;

(i) the total amount of share-warrants issued and surrendered respectively since the date of the last return ;

(k) the number of shares or amount of stock comprised in each share-warrant ;

(l) the names and addresses of the persons who at the date of the return are the directors of the company and of the persons (if any) who at the said date are ³[the managers or managing agents of the company and the changes in the personnel of the directors, managers and managing agents since the last return together with the dates on which they took place] ; and

(m) the total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act.

(3) The above list and summary shall be contained in a separate part of the register of members, and shall be completed within ⁴[twenty-one days] after the day of the first or only ordinary general meeting in the year, and the company shall forthwith file with the registrar a copy signed by a director or by the manager or the secretary of the company, together with a certificate from such director, manager or secretary that the list and summary state the facts as they stood on the day aforesaid.

⁵[(4) A private company shall send with the annual return required by sub-section (1) a certificate signed by a director or other officer of the company that the company has not, since the date of the last return or, in the case of a first return, since the date of the incorporation of the company, issued any invitation to the public to subscribe for any shares or debentures of the company, and where the annual return discloses the fact that the number of members of the company

LEG. REF.

¹ These words were substituted for the words "in respect of any debentures" by S. 15 of Act XXII of 1936.

² These words were added, *ibid.*

³ These words were substituted for the words "the managers of the company," *ibid.*

⁴ These words were substituted for the words "seven days," *ibid.*

NOTES.

Sec. 32 (5) : LIABILITY OF COMPANY AND OFFICER.—Any company which makes default in compliance with the provisions of this section *ipso facto*, renders itself liable to the penalties mentioned therein. The position is different as regards officers of the company, who are liable only in cases of knowing and wilful authorization or permission of the default. 37 C.W.N. 1159=147 I.C. 848=1934 C. 63. See also 54 L.W. 726=(1941) 2 M.L.J. 487.

"DEFAULT".—The fact that no meeting has been held during the year is no defence where the accused has been a party to the default, *Park v. Lawton*, (1911) 1 K.B. 588. Mere arithmetical mistake, if punishable. See 138 I.C. 317=35 L.W. 661.

"KNOWINGLY AND WILFULLY".—These

words connote intentional default. Where the evidence disclosed that the default was due to mere inadvertence, the accused should not be convicted under this section. 10 L. 521=1929 L. 836; 35 L.W. 661=1932 M. 497. Where in a case in which a general meeting of the company was not held during the year, the Managing Director is prosecuted under S. 32 for wilful default in submitting the information required by that section, it is necessary for the Magistrate to come to a finding that he was responsible for the default in connection with the failure to hold the meeting, assuming that he cannot put forward as a defence the impossibility of complying with the section if the failure to hold the meeting was due to his own default. It is doubtful if the accused could be convicted without the Magistrate coming to an independent finding that he was responsible for such default even if he had been previously convicted under S. 76 of the Act for such default. 45 C.W.N. 1130=74 C. L.J. 367. See also (1941) 2 M.L.J. 487.

"PERMITS THE DEFAULT".—To constitute the offence under this section, specific authorization by the officer is not necessary. If he is aware of non-compliance with the

exceeds fifty, also a certificate so signed that the excess consists wholly of persons who under sub-clause (b) of clause 13 of sub-section (1) of section 2 are not to be included in reckoning the number of fifty.]

¹[(5)] If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

Trusts not to be entered on register.

33. No notice of any trust, expressed, implied or constructive, shall be entered on the register, or be receivable by the registrar.

²[34. (1) An application for the registration of the transfer of shares in a company may be made either by the transferor or the transferee, provided that where such application is made

Transfer of shares.

by the transferor no registration shall in the case of partly paid shares be effected unless the company gives notice of the application to the transferee and subject to the provisions of ³[sub-section (7)] the company shall, unless objection is made

LEG. REF.

¹ This sub-section was inserted and the original sub-section (4) re-numbered (5) by S. 15 of Act XXII of 1936.

² This section was substituted by S. 16 Act XXII of 1936.

³ These words, brackets and figure were substituted for the word, brackets and figure "sub-section (4)" by S. 3 of Act (II of 1938).

NOTES.

requirements of the section, and takes no steps to have them complied with, he can be safely held to have "permitted the defaults". The offence is complete if the officer concerned knew of the defaults and permitted them. In such a case, the fact that the officer was away from the office and that the company was in charge of others at the time the defaults occurred would not absolve him from liability. 39 C.W.N. 1152=162 I.C. 282=1936 C. 237.

Sec. 33: SCOPE AND APPLICABILITY OF SECTION.—Though the company may be precluded from recognizing a trust, that would not prevent the Court from considering the rights as between the parties and the propriety of the dealing by the company after notice given by the plaintiff of his interest in the shares. 33 Bom.L.R. 250=133 I.C. 241=1931 B. 269. Where the articles of association of a company provided that the company shall have a first charge on every share for all debts due from the holder thereof, the company cannot in respect of monies becoming due from the shareholders to the company after notice of the deposit of the shares by the shareholders with the mortgagee, claim priority over advances by the mortgagee made after such notice. The company is not protected by the provisions of S. 33, or other provisions in the articles of association to the same effect. 33 Bom. L.R. 184.

Sec. 34: AMENDMENT BY ACT XXII OF 1936.—The Act as it stood previously did not lay down the procedure for the transfer

of shares, and the same was generally left to be provided for in the articles of the company. Undue restrictions upon transfers and undue delay in registering transfers were not uncommon. This section now introduced, while leaving a discretion with the directors to refuse to transfer, requires for transfer an application either by the transferor or the transferee, notice to the transferee in the case of an application by the transferor in respect of partly paid up shares, the use of the proper instrument of transfer, and the communication of the refusal to transfer to the parties. It also prescribes the time limit within which an objection by a transferee of partly paid up shares should be made, and the refusal by the company to register a transfer should be communicated to the transferor and the transferee. It also contains the procedure and presumption regarding the notice to be served on the transferee. [*Vide* sub-section (2).] It further makes it clear by sub-section (6) that there is no intention in anything contained in the section to affect the right of a company to refuse to register a transfer of shares, where that right exists by virtue of the articles.

"REFUSAL TO TRANSFER".—Where the directors refuse to consent to the assignment of a shareholder of his shares to a transferee, they are not bound to state their reasons, and no presumption of bad faith can be drawn from that. 33 Bom.L.R. 184. *See also* 16 B. 80; 36 B. 334. In order to vitiate the exercise of their powers and in order to justify the interference by the Court, it must be clearly made out that the directors have been acting from some improper motive, or arbitrarily and capriciously. 33 B. L.R. 184. Where there is provision in the articles of association of a company enabling the directors to refuse to recognise any transfer without assigning any reasons for the same, and the directors in exercise of that power refuse to recognize a transfer and assign no reasons for their refusal, the Courts would be powerless to grant any re-

by the transferee within two weeks from the date of receipt of the notice, enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for registration was made by the transferee.

(2) For the purposes of sub-section (1) notice to the transferee shall be deemed to have been duly given if despatched by prepaid post to the transferee at the address given in the instrument of transfer and shall be deemed to have been delivered in the ordinary course of post.

(3) It shall not be lawful for the company to register a transfer of shares in or debentures of the company unless the proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company along with the scrip :

Provided that, where it is proved to the satisfaction of the directors of the company that an instrument of transfer signed by the transferor and transferee has been lost, the company may, if the directors think fit, on an application in writing made by the transferee and bearing the stamp required by an instrument of transfer, register the transfer on such terms as to indemnity as the directors may think fit.

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lief against the company, as there would be no materials for them to decide upon. It is only in cases where the articles lay down certain conditions under which a transfer may be refused to be recognized by the company, or where the directors, although empowered to refuse without assigning reasons, nevertheless assign their reasons in support of their refusal, it will be possible for the Courts to scrutinise the conditions and the reasons alleged to exist, and if they appear to be non-existent or wrong, to direct registration of the transfer. In a suit for compelling registration of a transfer; the company pleaded justification for the refusal and relied on the articles of association which reserved to the company the right of refusing any transfer if it appeared to be against the interests of the company. It was held that the burden of proof in such matters was on the plaintiff and not on the defendant company. 69 M.L.J. 239=1935 M. 784. The articles of association of a company provided that the company was to have a first and paramount lien upon all the shares *other than fully paid up shares*, and that the Board could refuse to register any transfer of shares while the shareholder executing the transfer was indebted to the company. This was interpreted to mean that the Board was not empowered to refuse to register a transfer of *fully paid up shares* although the transferor was indebted to the company, and that their right to refuse could be exercised only where the shares were not fully paid up, and the transferor was indebted to the company. 57 M. 955=67 M.L.J. 599=1934 M. 476. As to effect of transfer, see 71 I.C. 814=1924 L. 173. As to competition between prior private purchaser not conforming to the Act and the Articles of Association and subsequent auction-purchaser, see 45 M. 537=15 L. W. 470=42 M. L. J. 449. Where the articles of association empowered the Board to refuse

to transfer shares in the register, only in cases where the same would be against the interest of the company, and where certain shares were transferred by the owner and all necessary documents properly executed were presented to the company, the Board could not refuse registration of the transfer on a mere subsequent instruction from the transferor that he had been made to part with the shares by misrepresentation. The proper course for the Board would be to have the transfer registered and to ask the transferor to have a suit instituted for getting the transfer set aside. 152 I.C. 1005=1935 L. 123. Where a discretion is given to the Directors of a company by its Articles of Association, to refuse to register the transfer of shares to any person whom they think it undesirable to be admitted to membership of the company, it is certainly open to the directors to refuse to register a transfer on that ground without giving any further reasons. But if a shareholder challenges this undoubted right of the Directors to use their discretion in such a matter, the burden lies heavily on him to allege with particularity and to prove such *mala fides* on the part of the Directors as amounts to arbitrary and wanton conduct. The Directors are not to be exposed to suspicion of *mala fides* by reason merely of the fact that they have chosen to withhold their reasons and which they are not bound to give. In such a matter the opinion of the shareholders is quite irrelevant. So long as a Board of Directors exists and particular powers are vested in them by the articles, then they are entitled to exercise those powers without interference by other shareholders. If they are dissatisfied they can always remove the Directors. 1941 A.L.J. 483=1941 All. 360. The transferee, in cases of transfers in blank of shares in a company, has the right to fill in the necessary particulars, including his own name as transferee and the date of the transfer, after the death of the original

(4) If a company refuses to register the transfer of any shares or debentures, the company shall, within two months from the date on which the instrument of transfer was lodged with the company, send to the transferee and the transferor notice of the refusal.

(5) If default is made in complying with sub-section (4) of this section, the company and every director, manager, secretary or other officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

(6) Nothing in sub-section (3) shall prejudice any power of the company to register as share-holder or debenture holder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of law.

(7) Nothing in this section shall prejudice any power of the company under its articles to refuse to register the transfer of any shares.]

35. A transfer of the share or other interest of a deceased member of a company made by his legal representative shall, although the legal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer.

36. (1) The register of members, commencing from the date of the registration of the company ¹[and the index of members] shall be kept at the registered office of the company, and except when closed under the provisions of this Act, shall during business hours (subject to such reasonable restrictions, as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member gratis, and to the

LEG. REF.

¹ These words were inserted by S. 17 of Act XXII of 1936.

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transferor. 45 C.W.N. 1109. Under S. 34 (3) it is not lawful to register a transfer of shares in the absence of proper instrument of transfer duly stamped and executed by the transferor and the transferee, and an addition of an Article purporting to confer power on the directors to transfer shares in the absence of an instrument of transfer is *ultra vires* of S. 34 of the Companies Act. 52 L.W. 741=(1940) 2 M.L.J. 721.

NOMINAL TRANSFER.—The company, and the liquidator of the company in liquidation, are not concerned with the person paying the consideration for a transfer of shares, but with the person who has signed the transfer form as purchaser of the shares and whose name is entered in the share register as owner of the shares. 37 Bom.L.R. 904=1936 B. 24. Even though a person entered as transferee happens to be a nominee of the transferor, if the company is not informed of it, and if the shares have been entered in his name with his knowledge and consent, *prima facie*; the transferee is the contributory who is liable in respect of those shares unless the transferee proves that his name was entered in the register fraudulently or without sufficient cause. 37 B.L.R. 904.

IRREGULARITY AND DELAY IN REGISTERING

TRANSFER.—Where the transferor and the transferee of shares had complied with all the requirements of the law to effect a valid transfer, and had applied to the company for the transfer being effected, any delay or irregularity in the registration of the same, would not vitiate the transfer, when it was once acquiesced in by the parties. If the company should go into liquidation thereafter, the transferee would be legally liable to the company as contributory in respect of the shares standing in his name in the Register. 37 Bom.L.R. 904=1936 B. 24. A slight delay in according sanction to a transfer of shares would not justify a payment of dividends to a person not yet entered as a member on the books of the company. Such a delay would not make the company liable to an action for damages on account of payment of the dividend to the transferor whose name appeared on the books of the company at the time. 159 I.C. 766=1936 L. 207.

Sec. 36: AMENDMENTS BY ACT XXII OF 1936.—(i) In sub-section (1) provision has been made for the keeping of 'the index of members' also at the registered office. This amendment was consequential on S. 31-A having been newly added to the Act.

(ii) Sub-section (2) has been amended, whereby a time-limit has been laid down, within which the requirement by a member must be complied with. This is in accordance with S. 98 (2) of the English Act.

(iii) Sub-section (3) provides a penalty

inspection of any other person on payment of one rupee, or such less sum as the company may prescribe, for each inspection. ¹[Any such member or other person may make extracts therefrom.]

(2) Any member or other person may require a copy of the register, or of any part thereof, or of the list and summary required by this Act, or any part thereof, on payment of six annas for every hundred words or fractional part thereof required to be copied ¹[and the company shall cause any copy so required by any person to be sent to that person within a period of ten days, exclusive of non-working days and days on which the transfer books of the company are closed, commencing on the day next after the day on which the requirement is received by the company.]

²[(3) If any inspection required under this section is refused or if any copy required under this section is not sent within the proper period the company and every officer of the company who is in default shall be liable in respect of each offence to a fine not exceeding twenty rupees and to a further fine not exceeding twenty rupees for every day during which the refusal or default continues and the Court may by an order compel an immediate inspection of the register and index or direct that copies required shall be sent to the persons requiring them.]

37. A company may, on giving ³[seven days' previous] notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situate, close the register of members for any time or times not exceeding in the whole ⁴[forty-five] days in each year ⁵[but not exceeding thirty days at a time.]

Power of Court to rectify register.

38. (1) If—

(a) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members of a company ; or

LEG. REF.

¹ These words were added, by S. 17, Act XII of 1936.

² This sub-section was substituted, *ibid.*

³ These words were inserted by S. 18 *ibid.*

⁴ This word was substituted for the word "thirty," *ibid.*

⁵ These words were added, *ibid.*

NOTES.

for non-observance of the provisions of the section.

INHERENT POWER OF COURT.—The Court has inherent jurisdiction to direct a company to deliver a copy of the register of the members of the company to a shareholder of the company. 1936 A. 568=1936 A.L.J. 748. As to right of inspection *see also* 42 C.W.N. 161=1938 Cal. 89.

Sec. 37: AMENDMENT BY ACT XXII OF 1936.—The amendment extends the time during which the register of members may be closed from 30 to 45 days, to make more generous allowance for those cases in which it is closed at two separate times during the year.

Sec. 38: SCOPE AND APPLICABILITY OF SECTION.—This section does not confer upon the Court jurisdiction to make a roving inquiry as to whether what has happened is desirable or even reasonable. Where under the articles of a company, it had right and a duty to recognize only the executors or administrators of the deceased member and a member died leaving behind him his

heir who under Hindu Law claimed to represent the deceased by right of survivorship. It was *held* that the company could rightly ask such claimant to produce a probate or a succession certificate and that the Court would not interfere under this section in such a matter. 1936 R. 52. This section does not exclude the jurisdiction of Civil Courts to decide questions falling under this section. 108 I.C. 192=1928 L. 234. A transferee of a share can apply under this section or institute a suit for rectification of the company's register and inclusion of his name therein. 28 L.W. 932=111 I.C. 225=1928 M. 571. In complicated cases involving serious question of title, the Court is not bound to decide the same on an application under this section. 1928 M. 571; 44 A. 151=19 A.L.J. 937=65 I.C. 291. *See also* 17 A.L.J. 783; 18 I.C. 481; 17 I.C. 640=14 Bom.L.R. 919. The striking out of the name of a shareholder from the register containing the names of the members amounts to an omission of his name from the register within the meaning of S. 38 (1) (a), and the shareholder whose name is so struck out can apply to the Court under S. 38 (1). 51 L.W. 741=(1941) 2 M.L.J. 721.

DISCRETIONARY JURISDICTION.—Power of Court to take summary action is discretionary. 110 P.L.R. 1915=29 I.C. 770; 18 I.C. 481; 12 Bur.L.T. 194=55 I.C. 751. The discretion of the Court under this section is unlimited and should be used accord-

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

(2) The Court may either refuse the application, or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved, and may make such order as to costs as it in its discretion thinks fit.

(3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and generally may decide any question necessary or expedient to be decided for rectification of the register:

Provided that the Court may direct an issue to be tried in which any question of law may be raised; and an appeal from the decision on such an issue shall lie in the manner directed by the Code of Civil Procedure, 1908, on the grounds mentioned in section 100 of that Code.

39. In the case of a company required by this Act to file a list of its members with the registrar, the Court, when making an order

Notice to registrar of rectification of register.

for rectification of the register, shall, by its order, direct notice of the rectification to be filed with the registrar ¹[within a fortnight from the date of the completion of the order].

LEG. FEF.

¹ These words were added by S. 19 of Act XXII of 1936.

NOTES.

ing to the circumstances of each case. 47 C. 901=60 I.C. 946; 12 Bur.L.T. 194=55 I.C. 751. *The proviso to this section must be read with reference to all the clauses of the section.* 41 B. 76=18 Bom. L.R. 982=37 I.C. 666. *See also* 23 Bom. L.R. 1104. (Resolution by directors to allot unissued shares to some directors—Interested directors also voting—Effect).

RECTIFICATION OF REGISTER.—The power to order the rectification of the register of a company, on an application under this section is entirely a matter of discretion for the Court. The Court will refuse to exercise such power when the only object of the application is to save the expenses of taking out Letters of Administration and of legal transfer of the shares to the applicant's name. 12 Bur.L.T. 194=55 I.C. 751. *See also* 11 Bur.L.T. 156=49 I.C. 288. An order for rectification of the company's register by putting the transferee's name therein cannot be passed in a proceeding under this section; when the transferor is not a party. 30 Bom.L.R. 1329=111 I.C. 337=1928 P.C. 291 (P.C.). Where a shareholder applies to have his name removed from the register, the mortgagee of the uncalled share capital can oppose the application. 47 C. 901=60 I.C. 946. A mere delay in making an application for rectification of the register under S. 38 is no ground in itself why the Court should not exercise its jurisdiction under the section. 20 Pat.L.T. 703=1939 Pat. 603. S. 38 gives a wide discretion to

the Court in the awarding of costs. 20 Pat. L.T. 703=1939 Pat. 603.

BURDEN OF PROOF.—According to S. 40, the register of members is *prima facie* evidence of any matters directed or authorised by the Act to be inserted therein. Where the names of certain persons are entered in the register as shareholders it can be taken for granted that such persons are qualified shareholders. Where an application by a company for reduction of its capital is opposed by a shareholder on the ground that certain persons who have voted for the resolution for the reduction of the capital of the company were not duly qualified as shareholders so to vote, or vote at all, by reason of their names not having been properly entered in the register or by reason of their names not having been on the register for a length of time sufficient to entitle them to vote, but no steps have been taken by the shareholder to have the register altered or rectified under S. 38, the burden is on the shareholder opposing the petition to substantiate his allegations, and where he fails to do so the application should be allowed. 1936 C. 327=63 C. 703=40 C. C.W.N. 661.

APPEAL.—A direction by the lower Court of an issue for trial involving a question of law, and a decision actually arrived at on such issue are necessary for a right of appeal from such decision under this section. The appeal can be based on the grounds mentioned in S. 100, C. P. Code. 41 B. 76=18 Bom.L.R. 982=37 I.C. 666. Order involving point of law is appealable. 44 A. 151=65 I.C. 291=1922 A. 258.

Sec. 39: AMENDMENT BY ACT XXII OF 1936.—The amendment provides a time

Register to be evidence.

40. The register of members shall be *prima facie* evidence of any matters by this Act directed or authorised to be inserted therein.

Power for company to keep branch register in the United Kingdom.

41. (1) A company having a share capital may, if so authorised by its articles, cause to be kept in the United Kingdom a branch register of members (in this Act called a British register).

(2) The company shall, within one month from the date of the opening of any British register, file with the registrar notice of the situation of the office where such register is kept and, in the event of any change in the situation of such office or of its discontinuance, shall within one month from the date of such change or discontinuance, as the case may be, file notice of such change or discontinuance.

(3) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

Regulations as to British register.

42. (1) A British register shall be deemed to be part of the company's register of members (in this section called the principal register).

(2) It shall be kept in the same manner in which the principal register is by this Act required to be kept, except that the advertisement before closing the register shall be inserted in some newspaper circulating in the locality wherein the British register is kept.

(3) The company shall transmit to its registered office in India a copy of every entry in its British register as soon as may be after the entry is made; and shall cause to be kept at such office, duly entered up from time to time, a duplicate of its British register, and the duplicate shall, for all the purposes of this Act, be deemed to be part of the principal register.

(4) Subject to the provisions of this section with respect to the duplicate register, the shares registered in a British register shall be distinguished from the shares registered in the principal register, and no transaction with respect to any shares registered in a British register shall, during the continuance of that registration, be registered in any other register.

(5) The company may discontinue to keep any British register, and thereupon all entries in that register shall be transferred to the principal register.

(6) Subject to the provisions of this Act, any company may, by its articles, make such regulations as it may think fit respecting the keeping of a British register.

Application of sections 41 and 42 to Burma.

¹[42-A. (1) The provisions of sections 41 and 42 shall apply in relation to Burma as they apply in relation to the United Kingdom.

LEG. REF.

¹ This section was inserted by A.O., 1937.

NOTES.

limit for a rectification of the register of members ordered by the Court. The use of the word "completion" instead of the word 'making' has been made to provide for the intermediate period which according to the practice in certain Courts elapses before the order made is really available to the company.

Sec. 40: EVIDENCE OF REGISTER AND BURDEN OF PROOF.—The register of shares of a company is not *absolutely* conclusive, but it is necessary not only from the point of view of the law, but as a matter of policy, to see that it is as conclusive as it can be made consistently with a proper interpreta-

tion of the Act. 37 Bom.L.R. 904=160 I.C. 638=1936 B. 24. See also 63 C. 703. A person whose name is entered in the register of members is presumed to be a member and the *onus* of proving that he is not a member is shifted on him by such entry. 147 I.C. 575=1933 L. 1016. See also 33 P.L.R. 973. The burden of proving conditions and failure to send notice of allotment is on the propounder. 27 P.L.R. 842=1926 L. 414. The mere entry of a shareholder's name in the company's register is insufficient to establish that an allotment of shares was in fact made. An application for shares like any other offer must not only be accepted but must be communicated to the person making the offer. 56 M. 391=64 M. L.J. 130=1933 M. 320.

(2) In the application of the said provisions to Burma, references to a British register shall be construed as references to a Burma register.]

43. ¹[(1)] A company limited by shares, if so authorised by its articles, may, with respect to any fully paid-up shares, or to stock, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares or stock therein specified, and may provide by coupons or otherwise, for the payment of the future dividends on the shares or stock included in the warrant, in this Act termed a share-warrant.

¹[(2) Nothing in this section shall apply to a private company.]

44. A share-warrant shall entitle the bearer thereof to the shares or stock therein specified, and the shares or stock may be transferred by delivery of the warrant.

45. The bearer of a share-warrant shall, subject to the articles of the company, be entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members; and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register the name of a bearer of a share-warrant in respect of the shares or stock therein specified without the warrant being surrendered and cancelled.

46. The bearer of a share-warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, either to the full extent or for any purposes defined in the articles, except that he shall not be qualified in respect of the shares or stock specified in the warrant for being a director or manager of the company, in cases where such a qualification is required by the articles.

47. (1) On the issue of a share-warrant, the company shall strike out of its register of members the name of the member then entered therein as holding the shares or stock specified in the warrant as if he had ceased to be a member, and shall enter in the register the following particulars, namely:—

- (i) the fact of the issue of the warrant;
- (ii) a statement of the shares or stock included in the warrant, distinguishing each share by its number; and
- (iii) the date of the issue of the warrant.

(2) If a company makes default in complying with the requirements of this section it shall be liable to fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully continues or permits the default shall be liable to the like penalty.

48. Until the warrant is surrendered, the above particulars shall be deemed to be the particulars required by this Act to be entered in the register of members; and, on the surrender, the date of the surrender shall be entered as if it were the date at which a person ceased to be a member.

LEG. REF.

¹ S. 43 was re-numbered as sub-S. (1) of that section and sub-S. (2) was added by S. 20 of Act XXII of 1936.

NOTES.

Sec. 43: AMENDMENT BY ACT XXII OF 1936.—Sub-section (2) has been newly inserted. The amendment has been consequential on the substitution of S. 2 (1) (13) for the old section and the introduction of the new S. 2 (1) (13-A) by this amending Act. The issue of a bearer share-warrants is

not compatible with the provision contained therein, relating to restriction of shares in the case of private companies. Hence the application of this section has been limited expressly by the amendment to companies other than private companies.

Sec. 48: "SURRENDER".—Surrender is good if it amounts to a forfeiture. It is not open to a shareholder to surrender his shares at will. Nor is it open to the company to accept surrender of shares unless the act of the company can be brought within the rules

Power of company to arrange for different amounts being paid on shares.

49. A company, if so authorised by its articles, may do any one or more of the following things, namely:—

(1) make arrangements on the issue of shares for a difference between the shareholders in the amounts and times of payment of calls on their shares;

(2) accept from any member who assents thereto the whole or a part of the amount remaining unpaid on any shares held by him although no part of that amount has been called up;

(3) pay dividend in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others.

Power of company limited by shares to alter its share capital.

50. (1) A company limited by shares, if so authorised by its articles, may alter the conditions of its memorandum as follows (that is to say), it may—

(a) increase its share capital by the issue of new shares of such amount as it thinks expedient;

(b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;

NOTES.

relating to forfeiture of shares. 1928 L. 240=107 I.C. 594; 1924 M. 703. There can be no valid surrender of shares that are not fully paid up, except where the shares are forfeited as it involves a reduction of capital. Before this can be done the sanction of the Court must be obtained. 149 I.C. 869=1934 S. 39. A shareholder who surrenders his share does not cease to be a member, while a shareholder whose shares are forfeited ceases to be so. 107 I.C. 594=1928 L. 240.

SURRENDER OF SHARES—VALIDITY—CONDITIONS.—Per Trial Judge, *Rupchand, A.J.C.*—There can be no valid surrender of shares in a limited company, which are not fully paid up, so as to exonerate a subscriber from his liability to pay for the shares agreed to be purchased by him in accordance with the memorandum, except where shares are forfeited as it involves a reduction of capital; before this can be done the sanction of the Court must be obtained. A surrender which has the effect of releasing a shareholder from further liability in respect of his shares is equivalent to a purchase of the shares of the company and is illegal, and null and void. Such a surrender can only be supported under circumstances which would justify a forfeiture of the shares. 32 S.L.R. 167=1938 Sind 187.

SHARES—FORFEITURE OF—STRICT FULFILMENT OF CONDITIONS—NECESSITY FOR.—In the matter of the forfeiture of shares, technicalities must be strictly observed. And it is not, merely the person whose shares are being forfeited who is entitled to insist upon the strict fulfilment of the conditions prescribed for forfeiture. For, the forfeiture of shares may result in a permanent reduction of the capital of a company. The creditors are therefore entitled to see that the power of forfeiting shares is exercised strictly. Where the power of a company to for-

feit shares has arisen, the Articles of Association usually contain provisions as to the sending of notices and the like that may be regarded as being inserted merely for the protection of the shareholder affected. Such provisions may properly be regarded as being directory only and capable of being waived by the individual shareholder. But no waiver by him can confer upon the company or its directors a power of forfeiture that they do not possess, as for example, a power to forfeit shares for non-payment of calls that are not yet due. 1938 P.C. 284=43 C. W. N. 205=(1939) 1 M. L. J. 98 (P.C.). See also 1940 M.W.N. 553=1940 Mad. 873. No forfeiture of shares could be made unless every condition precedent had been strictly and literally complied with. 45 C.W.N. 1075.

Sec. 49.—The powers given under this sub-section must be exercised with discretion. *Galloway v. Halle Concerts Society*, (1915) 2 Ch. 233.

Sec. 50: AMENDMENTS BY ACT XXII OF 1936.—(i) Under the Act as it stood before the amendment, alteration of capital could be effected by the directors, and it was only an alteration involving sub-division of shares that had to be made in general meeting. One consequence was that in the former case of any alteration of capital by directors, the Registrar's Office had no record of the same. According to S. 50 of the English Act, all these powers could be exercised only by the company in a general meeting. The amendments in this sub-section (2) have followed the English law, in the matter.

(ii) Sub-sections (3) and (4) of the old Act have been omitted in view of the new S. 25-A introduced by this amending Act.

(iii) New sub-section (4) has been inserted with a view that notice shall be given at an early date to the Registrar of any change in the memorandum relating to the sub-division or cancellation of shares.

(c) convert all or any of its paid-up shares into stock and re-convert that stock into paid-up shares of any denomination ;

(d) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived ;

(e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

(2) The powers conferred by this section ¹[* * * *] must be exercised ²[by the company in general meeting].

³[(3)] A cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of this Act.

³[(4) The company shall file with the registrar notice of the exercise of any power referred to in clause (d) or clause (e) of sub-section (1) within fifteen days from the exercise thereof.]

51. (1) Where a company having a share capital has consolidated and

Notice to registrar of consolidation of share capital, conversion of shares into stock, etc.

divided its share capital into shares of larger amount than its existing shares or converted any of its shares into stock, or re-converted stock into shares, it shall within fifteen days of the consolidation and division, conversion or re-conversion, file notice with the registrar of the same, specifying the share consolidated and divided, or converted, or the stock re-converted.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

52. Where a company having a share capital has converted any of its shares

Effect of conversion of shares into stock.

into stock, and filed notice of the conversion with the registrar, all the provisions of this Act which are applicable to shares only shall cease as to so much of the share capital as is converted into stock ; and the register of members of the company, and the list of members to be filed with the registrar, shall show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares hereinbefore required by this Act.

53. (1) Where a company having a share capital, whether its shares have

Notice of increase of share capital or of members.

or have not been converted into stock, has increased its share capital beyond the registered capital, and where a company not having a share capital has increased the number of its members beyond the registered number, it shall file with the registrar, in the case of an increase of share capital, within fifteen days after the passing, ⁴[* * * *] of the resolution authorising the increase, and in the case of an increase of members within fifteen days after the increase was resolved on or took place, notice of the increase of capital or members, and the registrar shall record the increase.

LEG. REF.

¹ The words "with respect to sub-division of shares" were omitted by S. 21 of Act XXII of 1936.

² These words were substituted for the words "by special resolution", *ibid.*

³ Original sub-Ss. (3) and (4) were omitted and sub-S. (5) was re-numbered (3) and sub-S. (4) was added, *ibid.*

⁴ The words "or in the case of a special resolution the confirmation" were omitted by S. 22, *ibid.*

¹[(2) The notice to be given as aforesaid shall include particulars of the classes of shares affected and the conditions (if any) subject to which the new shares are to be issued.]

¹[(3)] If a company makes a default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

54. (1) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganize its share capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes :

Reorganization of share capital.
Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class ²[* * * *] and every resolution so passed shall bind all shareholders of the class.

(2) Where an order is made under this section, a certified copy thereof shall be filed with the registrar within twenty-one days after the making of the order, or within such further time as the Court may allow, and the resolution shall not take effect until such a copy has been so filed.

Reduction of Share Capital.

Restrictions on purchase by company or loans by company for purchase of its own shares.
³[54-A. (1) No company limited by shares shall have power to buy its own shares or the shares of a public company of which it is a subsidiary company unless the consequent reduction of capital is effected and sanctioned in the manner provided by sections 55 to 66.]

LEG. REF.

¹ Sub-S. (2) was inserted and the original sub-S. (2) re-numbered (3) by S. 22 of Act XXII of 1936.

² The words "and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed" were omitted by S. 23, *ibid.*

³ This section was inserted by S. 24, *ibid.*

NOTES.

Sec. 54: AMENDMENT BY ACT XXII OF 1936.—The words referring to confirmation of the special resolution contained in the proviso to this sub-section (1), in the old section, have been omitted by this amendment. This was consequential on the substitution of the present sub-section (2) of S. 81 in the place of the old one.

SCOPE AND APPLICATION OF SECTION.—This section applies only to two modes of re-organizing share capital, *viz.*, (a) the consolidation of shares of different classes into shares of one class, and (b) the division of shares of one class into shares of different classes. It does not apply where the company proposes to abolish existing classes of shares and to create altogether new classes of shares. 30 Bom.L.R. 598=110 I.C. 649=1929 B. 38. A resolution which has the effect of sweeping away the rights and privileges attaching to the ordinary and deferred shares and which leaves two classes

of shares with precisely the same rights is perfectly valid and does not require sanction of Court. 57 A. 810=1935 A.L.J. 527=1935 A. 310. But where even after this resolution, a deferred share cannot be sold as an ordinary share, a proposal to make these two classes of shares into one class involves a consolidation of the different classes of shares and such consolidation modifies the condition of the memorandum, and as such requires an order of the Court. (*Ibid.*) Where a company's capital was divided into preference and ordinary shares, and the memorandum of association excluded the preference shareholders from participating in the surplus assets in the event of winding up, it was held that such exclusion conferred "a special privilege" on the ordinary shareholders of the company within the meaning of the proviso in the section. 30 Bom. L. R. 598=110 I.C. 649=1929 B. 38.

Sec. 54-A: AMENDMENT BY ACT XXII OF 1936.—This section introduces the provision contained in sub-section (1) of S. 55 of the Act, in a considerably modified form. The utilization of the funds of a company in the purchase of its own shares has the result of reducing its capital and was prohibited by sub-section (1) of S. 55 in the old Act. This prohibition was circumvented in some cases by advancing money out of the company's funds to their nominees

(2) No company limited by shares other than a private company, not being a subsidiary company of a public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company :

Provided that nothing in this section shall be taken to prohibit, where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business.

(3) If a company acts in contravention of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding one thousand rupees.

(4) Nothing in this section shall affect the right of a company to redeem any shares issued under section 105-B.]

55. ¹[(1)] Subject to confirmation by the Court, a company limited by shares, if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may—

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up ; or

LEG. REF.

¹ Original sub-S. (1) of S. 55 was omitted and sub-Ss. (2) and (3) were re-numbered as (1) and (2) respectively by S. 25 of Act XXII of 1936.

NOTES.

who acquired the shares; and there was no provision in the old Act to effectively prevent abuse. Hence, this section has been inserted, and it follows S. 45 of the English Act. The subterfuge mentioned above is no longer possible.

INCREASE OF SHARE CAPITAL—FRAUD UPON THE MINORITY—ACTS *ultra vires*—RIGHT OF SUIT, PRINCIPLES GOVERNING.—There can of course be suits by shareholders against the company for individual wrong done to them. Apart from individual wrong there may be suits to restrain acts *ultra vires*. Suits to restrain acts *ultra vires* and suits to restrain acts notwithstanding that they have the support of the majority of shareholders, are both exceptions to the rule that the Court will not interfere in the affairs of the company or with the decision of the majority. The Court interferes in cases of *ultra vires* acts, because it is not an act within the constitution. In the other class of cases the Court interferes upon a different basis. They have been referred to generally as cases of "fraud upon the minority". These cases, however, are only special examples of an action by the company for what is in theory regarded as a wrong done to the company; a special form of the suit being adopted as a matter of machinery to obtain relief under special and peculiar circumstances. If the wrongdoer has the balance of power, and therefore the company does not take action, there are two courses open. The minority may take the risk and boldly use the company's name. The other course, and the better course, where the wrongful act is supported by the majority, is for the minority shareholders

to sue in their own name or, as a matter of convenience, for a shareholder to sue on behalf of himself and all the other shareholders. If, however, the wrongdoers are also shareholders, these shareholders as a matter of course must be excluded from the category of the plaintiffs. In a suit so brought, it is not sufficient to plead simply the dominance of the majority of the shareholders or what may be called the secondary fraud. The primary fraud must be clearly indicated. It is the gist of the action, although no doubt the pleading or the particulars may be so framed as to stress the dominance of the majority and the effectuation of the fraud through that dominance. It is not sufficient to allege fraud against the company generally. The wrongdoers must be specified and made party defendants to the action. It may be sufficient to make them parties *qua* shareholders, although if the primary wrong is that of the directors, it is right and proper they should be sued *qua* directors. Where a decision of the directors is attacked on the ground that it is injurious to the company, the directors should be parties. Where that act of the directors so impeached has been confirmed and is still impeached on the basis that the directors have got that confirmation by controlling the majority, still those directors should be parties. The directors may be assailed if it is established first that the increase of capital is for the purpose of power and secondly that the passing of the company resolution confirming the increase was procured by their own power, by the power of their dependants or by any kind of device. I.L.R. (1941) 1 Cal. 30=72 C.L.J. 458=1941 Cal. 174.

Sec. 55: PROPOSAL RELATING TO REDUCTION OF SHARE CAPITAL—SANCTION TO PRINCIPLES APPLICABLE.—Where an application under S. 55 is presented to the Court by a company for its sanction to a proposal relating

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company, and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

¹[(2)] A special resolution under this section is in this Act called a resolution for reducing share capital.

56. Where a company has passed ²[* *] a resolution for reducing share capital, it may apply by petition to the Court for an order confirming the reduction.

Application to Court for confirming order.

LEG. REF.

¹ See footnote 1 at p. 1591.

² The words "and confirmed" were omitted by S. 26 of Act XXII of 1936.

NOTES.

to a reduction of the share capital of the company, the following principles are the principles applicable: (1) That a company has the power to reduce its capital much more so if the power is conferred by the Articles of Association. (2) Subject to confirmation by the Court which is the safeguard of the minority, the question of reducing capital is a domestic one for the decision of the majority. (3) The company is to determine the extent, the mode and incidence of the reduction. (4) The company may reduce the share capital of all its shareholders *pro rata* or may reduce the shares of any individual shareholder or any class of shareholders wholly or in part. (5) That the Court has to see that interests of the minority have been protected and no unfairness has been shown to it. (6) That in doing so the Court should keep in view the consideration that the decision has been arrived at by businessmen who are fully cognizant of their necessities and are the best custodians of their interests and should therefore be slow to interfere. 177 I.C. 368=1938 Pesh. 41. See also 1939 Rang. 417.

REDUCTION OF CAPITAL, WHEN INVALID.—No action resulting in the reduction of the capital of a company with limited liability should be permitted unless the reduction is effected under statutory authority or by forfeiture in strict accordance with the procedure, if any, laid down in that behalf in the Articles of Association. Any reduction of capital contrary to this principle is illegal and *ultra vires*. 54 B. 178=32 Bom.L.R. 87=1930 B. 267. The mere fact that the articles of association authorized the Board of Directors to accept surrender of shares cannot validate the surrender if it did not take place in circumstances which would have justified a forfeiture. 110 I.C. 421; 1928 L. 240; 1924 M. 703=20 L.W. 74=83 I.C. 94. Where by the articles of association, a limited company enabled persons

who had subscribed for shares of Rs. 100 to sever all connections with the company on payment of Rs. 84, it was held that the article was *ultra vires*, and as it involved the reduction of share-capital the assent of the Court was required for it. 52 M. 915=57 M.L.J. 814=1929 M. 773. A limited company, not in liquidation, cannot make any payment by way of return of capital to its shareholders except as a step in an authorized reduction of capital. 60 M.L.J. 320=1930 P.C. 302 (P.C.).

POWER OF COURT.—It is not always essential or necessary for the Court on a petition for reducing of capital to satisfy itself that there has been a loss of the capital. The only serious questions with which the Court is concerned is whether or not the company had duly passed its special resolution to the effect that the capital be reduced. Where, however, the reduction of the capital is based on the ground that capital has been lost and unrepresented by available assets, it is always prudent to proceed on some evidence. That is a sound procedure and one which ordinarily should be acted upon. Where the person opposing the petition accepts the statement of the company that there has been a loss of capital, the Court should act upon the assumption that there is evidence of loss of capital. 63 C. 703=165 I.C. 408=1936 C. 327.

Sec. 56: AMENDMENT BY ACT XXII OF 1936.—The words "and confirmed" in the old section have been omitted herein, since confirmation of special resolution has been abolished by the Amending Act. [Vide S. 81 (2).] This is a mere consequential amendment.

REDUCTION OF SHARE CAPITAL—CONFIRMATION—CONSIDERATIONS FOR COURT.—It is an elementary principle of law relating to joint stock company that the Court will not interfere with the internal management of a company acting within its own rights and in fact has no jurisdiction to do so. In an application under S. 56 the Court is only concerned to confirm the proposed reduction and not the resolution passed by the company. The validity of the resolution cannot therefore be questioned in such application. The

57. On and from the ¹[passing] by a company of a resolution for reducing share capital, or where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, then on and from ²[the making of the order confirming the reduction]; the company shall add to its name, until such date as the Court may fix, the words "and reduced" as the last words in its name, and those words shall, until that date, be deemed to be part of the name of the company:

Provided that, where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Court may, if it thinks expedient, dispense altogether with the addition of the words "and reduced."

58. (1) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital, or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction.

(2) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts, or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

59. Where a creditor entered on the list of creditors whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount (that is to say),—

(i) if the company admits the full amount of his debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim;

(ii) if the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.

60. The Court, if satisfied, with respect to every creditor of the company who under this Act is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has been

LEG. REF.

¹ This word was substituted for the word "confirmation" by S. 27, Act XXII of 1936.

² These words were substituted for the words "the presentation of the petition for confirming the reduction," *ibid.*

NOTES.

only questions to be considered by the Court are: (1) Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the company? (2) Is the reduction fair and equitable as between different classes of shareholders? Where the reduction is

shared by all and is designed to work justly and equitably and where it does not involve diminution of any liability in respect of the unpaid capital or payment to any shareholder of any paid up capital and there is evidence regarding the loss of capital and non-representation of available assets, there is nothing to prevent the Court from confirming such reduction. 1939 Rang. 417. See also 177 I.C. 368=1938 Pesh. 41.

Sec. 57: AMENDMENT BY ACT XXII OF 1936.—For the word "confirmation" the word "passing" has been substituted, consequent on the amendment of S. 81 (2) which dispenses with the necessity for the confirmation of any special resolution.

determined or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

61. (1) The registrar on production to him of an order of the Court confirming the reduction of the share capital of a company, and on the filing with him of a certified copy of the order and of a minute (approved by the Court) showing, with respect to the share capital of the company as altered by the order, the amount of the share capital, the number of shares into which it is to be divided and the amount of each share, and the amount (if any) at the date of the registration deemed to be paid up on each share, shall register the order and minute.

(2) On the registration, and not before the resolution for reducing share capital as confirmed by the order so registered shall take effect.

(3) Notice of the registration shall be published in such manner as the Court may direct.

(4) The registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requirements of this Act with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute.

62. (1) The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of the company, and shall be valid and alterable as if it had been originally contained therein, and shall be embodied in every copy of the memorandum issued after its registration.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

63. (1) A member of the company, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount paid, or (as the case may be) the reduced amount, if any, which is to be deemed to have been paid, on the share and the amount of the share as fixed by the minute :

Provided that, if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the provisions of this Act with respect to winding up by the Court, to pay the amount of his debt or claim, then—

(i) every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt, or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before that registration ; and

(ii) if the company is wound up, the Court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in a winding up.

(2) Nothing in this section shall affect the rights of the contributories among themselves.

64. If any officer of the company wilfully conceals the name of any creditor entitled to object to the reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor, or if any officer of the company abets any such concealment or misrepresentation as aforesaid, every such officer shall be punishable with imprisonment which may extend to one year, or with fine, or with both.

65. In any case of reduction of share capital, the Court may require the Company to publish as the Court directs the reasons for reduction, or such other information in regard thereto as the Court may think expedient with a view to give proper information to the public, and, if the Court thinks fit, the causes which led to the reduction.

66. A company limited by guarantee and registered after the commencement of this Act may, if it has a share capital and is so authorised by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of this Act.

¹ [Variation of Shareholders' Rights.]

¹[66-A. (1) If in the case of a company, the share capital of which is divided into different classes of shares, provision is made by the memorandum or articles for authorising the variation of the rights attached to any class of shares in the company, subject to the consent of any specified proportion of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares, and in pursuance of the said provision the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than ten per cent. of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation, may apply to the Court to have the variation cancelled, and where any such application is made the variation shall not have effect unless and until it is confirmed by the Court.

(2) An application under this section must be made within fourteen days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(3) On any such application the Court, after hearing the applicant and any other persons who apply to the Court to be heard and appear to the Court to be interested in the application, may, if it is satisfied having regard to all the circumstances of the case that the variation would unfairly prejudice the shareholders of the class represented by the applicant, disallow the variation and shall, if not so satisfied, confirm the variation.

(4) The decision of the Court on any such application shall be final.

(5) The company shall within fifteen days after the service on the company of any order made on any such application forward a copy of the order to the

LEG. REF.

¹ This heading and S. 66-A were inserted by S. 28, Act XXII of 1936.

NOTES.

Sec. 66-A: AMENDMENT BY ACT XXII OF 1936.—This section is new and adopts S. 61 of the English Act, with modification as to

the period fixed for the application, and as to the commencement of the period within which copy has to be forwarded to the registrar. Also the words "knowingly and wilfully" have been inserted in this amendment with a view to ensure that an unintentional default is not to be penalised.

registrar, and, if default is made in complying with this provision, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.

(6) The expression 'variation' in this section includes 'abrogation' and the expression 'varied' shall be construed accordingly.]

Registration of Unlimited Company as Limited.

67. (1) Subject to the provisions of this section, any company registered as unlimited may register under this Act as limited or any company already registered as a limited company may re-register under this Act, but the registration of an unlimited company as a limited company shall not affect any debts, liabilities, obligations or contracts incurred or entered into by, to, with or on behalf of, the company before the registration, and those debts, liabilities, obligations and contracts may be enforced in manner provided by Part VIII of this Act in the case of a company registered in pursuance of that Part.

(2) On registration in pursuance of this section, the registrar shall close the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company; but, save as aforesaid, the registration shall take place in the same manner and shall have effect as if it were the first registration of the company under this Act.

68. An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following things, namely:—

(a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the amount by which its capital is so increased shall be capable of being called up except in the event and for the purposes of the company being wound up;

(b) provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up.

Reserve Liability of Limited Company.

69. A limited company may by special resolution determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up, and thereupon that portion of its share capital shall not be capable of being called up except in the event and for the purposes aforesaid.

Unlimited Liability of Directors.

70. (1) In a limited company the liability of the directors or of any director may, if so provided by the memorandum, be unlimited.

(2) In a limited company in which the liability of any director is unlimited, the directors of the company (if any) and the member who proposes a person for election or appointment to the office of director shall add to that proposal a statement that the liability of the person holding that office will be unlimited and the promoters and officers of the company, or one of them, shall, before the person accepts the office or acts therein, give him notice in writing that his liability will be unlimited.

(3) If any director or proposer makes default in adding such a statement, or if any promoter or officer of the company makes default in giving such a notice, he shall be liable to a fine not exceeding one thousand rupees and shall also be liable for any damage which the person so elected or appointed may sustain from the default, but the liability of the person elected or appointed shall not be affected by the default.

Special resolution of limited company making liability of directors unlimited.

71. (1) A limited company, if so authorised by its articles, may, by special resolution, alter its memorandum so as to render unlimited the liability of its directors or of any director.

(2) Upon the ¹[passing] of any such special resolution, the provisions thereof shall be as valid as if they had been originally contained in the memorandum.
²[* * * * *]

PART IV.

MANAGEMENT AND ADMINISTRATION.

Office and Name.

³[72. (1) A company shall as from the day on which it begins to carry on business, or as from the twenty-eighth day after the date of its incorporation, whichever is the earlier, have a registered office to which all communications and notices may be addressed.

(2) Notice of the situation of the registered office and of any change therein shall be given within twenty-eight days after the date of the incorporation of the company or of the change, as the case may be, to the registrar who shall record the same.

(3) The inclusion in the annual return of a company of the statement as to the address of its registered office shall not be taken to satisfy the obligation imposed by this section.

(4) If a company carries on business without complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which it so carries on business.]

Publication of name by a limited company.

73. Every limited company—

LEG. REF.

¹ This word was substituted for the word "confirmation" by s. 29, Act XXII of 1936.

² Certain words in sub-S. (2) and sub-S. (3) of S. 71 were omitted, *ibid.*

³ This section was substituted by S. 30, *ibid.*

NOTES.

Sec. 71: AMENDMENT BY ACT XXII OF 1936.—Instead of the word "confirmation" in the old section, the word "passing" has been substituted. This was consequential on the amendment of S. 81 (2), by which confirmation of any special resolution is rendered unnecessary. The words in the old Act, after "memorandum", *viz.*, that "a copy thereof shall be embodied in or annexed to every copy of the memorandum issued after the confirmation of the resolution", and also the old sub-section (3) which provided a penalty for default have been omitted by the amendment, as being no longer necessary in view of the insertion of new S. 25-A in the Act.

Sec. 72: AMENDMENT BY ACT XXII OF 1936.—This section has been substituted for the old one, as it was defective in that it did not lay down any time within which the registered office was to be set up or notice of its situation or any change of its situation was to be given. This newly substituted section makes provision for the same, and adopts S. 92 of the English Act. S. 72

is merely permissive and not imperative; it only provides one of several methods whereby a communication or notice may be served on a company. 1941 Rang. 339 (S. B.).

REGISTERED OFFICE.—The object of requiring a company to have a registered office is to provide some definite place at which notices and other communications may be served on it. See S. 148, *infra*, which lays down that a document may be served on a company by leaving it at, or sending it by post to the registered office of the company. There are also other various provisions in the act, in relation to the registered office of the company such as provisions relating to the keeping of the registers of members, of directors, and of mortgages, accounts, minutes of proceedings, copies of registered documents, etc., as also provisions relating to the exercise of the right of inspection by members of certain books and documents kept at the registered office. Further, the situation of the registered office also fixes the domicile and also the *prima facie*, nationality of the company. It is further useful, with reference to the income-tax matters. For the change to take effect it is necessary that the notification should be given to the Registrar. It is not sufficient that there is a resolution to change the registered office of the company. 58 C. 716 = 133 I.C. 321 = 1931 C. 622.

(a) shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible and in English characters, and also, if the registered office be situate in a place beyond the local limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place ;

(b) shall have its name engraven in legible characters on its seal ;

(c) shall have its name mentioned in legible English characters in all bill-heads and letter paper and in all notices, advertisements and other official publications of the company, and in all bills of exchange, hundis, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts and letters of credit of the company.

74. (1) If a limited company does not paint or affix, and keep painted or affixed, its name in manner directed by this Act, it shall be liable to a fine not exceeding fifty rupees for not so painting or affixing its name, and for every day during which its name is not so kept painted or affixed, and every officer of the company, who knowingly and wilfully authorises or permits the default, shall be liable to the like penalty.

(2) If any officer of a limited company, or any person on its behalf, uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid, or issues or authorises the issue of any bill-head, letter paper, notice, advertisement or other official publication of the company, or signs or authorises to be signed on behalf of the company any bill of exchange, hundi, promissory note, endorsement, cheque or order for money or goods, or issues or authorises to be issued any bill of parcels, invoice, receipt or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a fine not exceeding five hundred rupees, and shall further be personally liable to the holder of any such bill of exchange, hundi, promissory note, cheque or order for money or goods, for the amount thereof, unless the same is duly paid by the company.

75. (1) Where any notice, advertisement or other official publication of a company contains a statement of the amount of the authorised capital of the company, such notice, advertisement or other official publication shall also contain a statement in an equally prominent position and in equally conspicuous characters of the amount of the capital which has been subscribed and the amount paid up.

(2) Any company which makes default in complying with the requirements of this section and every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding one thousand rupees.

NOTES.

Sec. 73.—S. 73 (a) is a penal provision and has to be construed strictly. The section has nothing to do with advertising the whereabouts of a company or affording facilities to members of the public in finding its place of business. The words "outside the office" cannot be construed as outside the premises or outside the compound, where the office is in a building with a compound. The requirements of the section would be satisfied by a board of the necessary conspicuousness and legibility outside the office room inside the building. The fact that the

company owns the whole premises makes no difference. Where an office is situated within a compound the law does not require the name of the company to be painted or affixed outside the compound as well as outside the office. I.L.R. (1941) Bom. 186=43 Bom.L.R. 105=1941 Bom. 97. As to the liability of company on a promissory note executed by a secretary signing it in his own name on a paper printed with the name of the company and bearing a stamp impression of the company, see 1923 B. 29=24 Bom.L.R. 355=67 I.C. 941.

Meetings and Proceedings.

¹[76. (1) A general meeting of every company shall be held within eighteen months from the date of its incorporation and thereafter once at least in every calendar year and not more than fifteen months after the holding of the last preceding general meeting.

(2) If default is made in holding a meeting in accordance with the provisions of this section, the company and every director or manager of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees.

LEG. REF.

¹ This section was substituted by S. 31 of Act XXII of 1936.

NOTES.

Sec. 76: AMENDMENT BY ACT XXII OF 1936.—This section has been substituted for the old one, so as to adopt the language of S. 112 of the English Act. Further, with a view to make provision in respect of companies which may be incorporated towards the end of a year, a definite time limit has been fixed for the first annual meeting, as in the case of the annual list and summary. [*Vide* S. 32 (1), *supra*.] S. 76 (1) demands that there shall be a general meeting held once at least in every year, i.e., one separate and distinct meeting every year. It does not mean that the same meeting can go on for several years being held once in each year. Where a meeting called and held on a day in one year is adjourned to a date in the next year and held on that date, the meeting held on the latter date, is not a different meeting from that which began on the former date; it is the same meeting and does not satisfy the requirements of S. 76. 47 L.W. 635=1938 Mad. 640=(1938) 1 M.L.J. 856.

OBJECT OF GENERAL MEETING.—A general meeting should be held once at least in every year. Rules relating to the proceedings of general meeting and as regards voting are contained in Rr. 49 to 67 of Table A of Sch. I of the Act. The members of a company or corporation, public or private, can do no corporate act of a constituent character, such as must be done at a general meeting of all the members or of a quorum of them, unless the meeting is duly assembled, in conformity with the law of its organization. It has been well-said that the act of a majority of the corporators does not bind the minority if it has not been expressed in the form pointed out by law, and accordingly that the act of a majority, expressed elsewhere than at a meeting of the shareholders, is not binding on the company, as where the assent of each one is given separately and at different times. The reason is that each member has the right of consultation with the others, and that the minority have the right to be heard. In the line of authority establishing the foregoing principles, no break has been discovered, although it should be added that an election

or other proceeding had at a meeting irregularly assembled may be valid if all attend and act or assent. Sub-section (3) enables the member of a company where there has been default in summoning a general meeting, to apply to the Court to direct the calling of the meeting. The order made by the Court has, however, not the effect of excusing the persons liable for default in summoning a general meeting. 61 C. 408=151 I.C. 693=1934 C. 624. *See also* S. 79 (3) introduced by the Amending Act XXII of 1936.

"GENERAL MEETING".—Where according to a requisition of certain shareholders an extraordinary meeting was held, it was held that such a meeting cannot be a "general meeting" within the meaning of this section. 25 Bom.L.R. 224=72 I.C. 349=1923 B. 194. But *see* 54 I.C. 494=21 Cr.L.J. 94.

"KNOWINGLY AND WILFULLY".—*See* notes under S. 32, *supra*; *see also* 21 C.W.N. 840=38 I.C. 437. The petitioner who was one of the managing directors of a company was charged and convicted under S. 76 (2). The evidence did not justify the conclusion that he was knowingly and wilfully a party to the default under S. 76 (1). *Held*, that he could not be convicted under S. 76 (2). 53 L.W. 680=(1941) 1 M.L.J. 702. Before an ordinary director of a company can be convicted of an offence under S. 76 (2) there must be evidence to show that he was knowingly and wilfully a party to the default under S. 76 (2). 1941 M.W.N. 959.

Ss. 76 (2) AND 131—SCOPE—DELAY IN HOLDING GENERAL BODY MEETING AND LAYING BALANCE SHEET—CONDONATION BY REGISTRAR.—Where the Registrar of joint stock companies condones the delay on the part of the directors of a company in holding a general body meeting, and thereby condones the delay in filing a balance sheet before the general body at its meeting, the directors cannot be convicted under Ss. 76 (2) and 131. *Quære*, whether the Registrar can condone the delay in holding a general meeting. 53 L.W. 660=1941 Mad. 504=(1941) 1 M.L.J. 419. *Quære*.—It is very doubtful if a meeting valid under the substantive law could be invalidated by an article of association. 190 I.C. 551=1940 Sind 87. In case of calling of a meeting on requisition, there is no presumption

(3) If default is made as aforesaid, the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company.]

¹[77. (1) Every company limited by shares and every company limited by guarantee and having a share capital shall, within a period of not less than one month nor more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company, which shall be called the statutory meeting.

(2) The directors shall, at least twenty-one days before the day on which the meeting is held, forward a report (in this Act referred to as the statutory report) certified as required by this section to every member of the company.

(3) The statutory report shall be certified by not less than two directors of the company or by the chairman of the directors if authorised in this behalf by the directors and shall state—

(a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted ;

(b) the total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid ;

(c) an abstract of the receipts of the company and of the payments made thereout up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company showing separately any commission or discount paid on the issue or sale of shares ;

(d) the names, addresses and descriptions of the directors, auditors, managing agents and managers, if any, and secretary of the company and the changes, if any, which have occurred since the date of the incorporation ;

(e) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification ;

(f) the extent to which underwriting contracts, if any, have been carried out ;

(g) the arrears, if any, due on calls from directors, managing agents and managers ; and

LEG. REF.

¹ This section was substituted by S. 32 of Act XXII of 1936.

NOTES.

in law that the requisition is received on the date it bears. 190 I.C. 551=1940 Sind 87.

Sec. 77: AMENDMENT BY ACT XXII OF 1936.—The present section has been substituted in the place of the old one. Under the old section, the obligation to hold a statutory general meeting was only upon the company limited by shares, and the present section imposes the obligation also upon "companies limited by guarantee and having a share capital". In sub-S. (6) of the old section no provision was made for penalty in respect of a company not holding the statutory general meeting in time. This was possibly due to an inadvertent omission.

All these defects have been remedied by the present section. Further, additional requirements to what were contained in the old Act, have been provided for in clauses (c), (d), (f) and (g), to sub-S. (3) of the present section. Provision has also been introduced in this section, authorising certification of the report by the Chairman of the Directors. This section has adopted the law in S. 113 of the English Act, with some modifications as to the times and periods fixed therein.

"KNOWINGLY AND WILFULLY"—"PERMITS THE DEFAULT".—(See notes under S. 32, *supra*). An offence punishable under the old Act but was omitted to be so punished cannot be dealt with after the repeal of the Act. See 41 I.C. 1008=18 Cr.L.J. 896=31 P.R. 1917 (Cr.).

(h) the particulars of any commission or brokerage paid or to be paid in connection with the issue or sale of shares to any director, managing agent or manager or a partner of the managing agent if the managing agent is a firm or if the managing agent is a private company a director thereof.

(4) The statutory report shall so far as it relates to the shares allotted by the company, and to the cash received in respect of such shares and to the receipts and payments of the company, be certified as correct by the auditors of the company.

(5) The directors shall cause a copy of the statutory report certified as required by this section to be delivered to the registrar for registration forthwith after the sending thereof to the members of the company.

(6) The directors shall cause a list showing the names, descriptions and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

(7) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed.

(8) The meeting may adjourn from time to time, and at any adjourned meeting any resolution of which notice has been given in accordance with the articles, either before or subsequently to the former meeting, may be passed, and the adjourned meeting shall have the same powers as an original meeting.

(9) If a petition is presented to the Court in manner provided by Part V for winding up the company on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just.

(10) In the event of any default in complying with the provisions of this section every director of the company who is guilty of or who knowingly and wilfully authorises or permits the default shall be liable to a fine not exceeding five hundred rupees.

(11) This section shall not apply to a private company.]

78. (1) Notwithstanding anything in the articles, the directors of a company which has a share capital shall, on the requisition of the holders of not less than one-tenth of the issued share capital of the company upon which all calls or

Calling of extraordinary general meeting on requisition.

NOTES.

Sec. 78: AMENDMENT BY ACT XXII OF 1936.—(i) Sub-S. (4) of the old Act has been omitted, consequential on the amendment of S. 81 (2), which has rendered the subsequent confirmation of any resolution unnecessary, and the old sub-section (5) has been re-numbered as sub-S. (4) in the present section. (ii) Sub-S. (5) has been newly inserted, on the lines of S. 114 (1) of the English Act. There was no provision in the old Act, corresponding to this sub-section. It was considered unreasonable to make the requisitionists incur expenditure and for the directors to go free where they fail to convene the meeting. Suitable provision has been made in this sub-section both for recompensing the requisitionists and penalising the defaulting directors, without any loss to the company itself. It is true that a shareholder is

entitled to be given adequate information as to the business to be transacted, as S. 78 in fact requires; but, it cannot be held that unless the notice of the meeting recites all facts necessary to meet every technical objection which may be raised to its validity, the meeting held in pursuance of such notice must be invalid. 190 I.C. 551=1940 Sind 87. Notice of an extraordinary general meeting of the shareholders of a company must disclose all facts necessary to enable the shareholders to determine in his own interest whether or not he ought to attend the meeting. The pecuniary interest of a director in the matter of a special resolution to be proposed at the meeting is a material fact for this purpose. 43 Mys. H.C.R. 396=16 Mys.L.J. 448. See also 52 L.W. 751=1941 Mad. 354=(1940) 2 M.L.J. 721. Order of Court for winding up based on opinion of majority of share-

other sums then due have been paid, forthwith proceed to call an extraordinary general meeting of the company.

(2) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3) If the directors do not proceed within twenty-one days from the date of the requisition being so deposited to cause a meeting to be called, the requisitionists, or a majority of them in value, may themselves call the meeting, but in either case any meeting so called shall be held within three months from the date of the deposit of the requisition.

¹[(4) Any meeting called under this section by the requisitionists shall be called in the same manner as nearly as possible, as that in which meetings are to be called by directors.

¹[(5) Any reasonable expenses incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration for their services to such of the directors as were in default.

²[79. (1) The following provisions shall have effect with respect to meetings of a company other than a private company not being a subsidiary of a public company and the procedure thereat, notwithstanding any provision made in the articles of the company in this behalf:—

LEG. REF.

¹ Sub-S. (4) was omitted, original sub-S. (5) was re-numbered as (4) and sub-S. (5) added by S. 33 of Act XXII of 1936.

² This section was substituted by S. 34, *ibid.*

NOTES.

holders in the absence of any resolution is bad. 49 C. 399=69 I.C. 241.

Sec. 79: AMENDMENT BY ACT XXII OF 1936.—This section has been substituted for the old S. 79; and this is based on S. 115 of the English Act, with several substantial modifications. The procedure to be adopted at meetings of the shareholders of a company is generally laid down in the Articles of Association of the company, and the provisions of old S. 79 were applicable only in cases where there were no provisions in the Articles regarding the same. This is also the English law, and S. 115 of the English Act allows of its provisions being overridden by the provisions made in the articles of the company. But in the present section, certain provisions such as those governing the notice to be given for special resolution, the manner of service of notices, the number of members entitled to demand a poll, and the form of proxy instruments have been made incapable of being varied by the articles of the company. Further, this section contains a specific provision that agenda must accompany the notice of a general meeting. There has been a practice not uncommon in the case of several companies to deny to shareholders duly brought on the register the full exercise of their rights as shareholders until after a specified period; and Cl. (e) of sub-S. (1) of this

section puts an end to that practice.

SUIT TO EXERCISE VOTE.—Any shareholder is entitled to institute a suit to enforce his right to exercise his vote. 61 M.L.J. 724=1932 M. 100. No matter where the meeting is held or how defectively the members are notified, the proceedings will bind all who appear at the meeting and participate in it without dissent. But if a single member having the right to be present and vote, is not notified in the prescribed manner, and is absent or refuses to consent to the proceedings held at the meeting, its proceedings will be illegal and void. But a shareholder actually knowing about the business to be transacted at a meeting cannot complain of insufficiency of notice. 52 B. 571=55 M.L.J. 697=1928 P.C. 180=55 I.A. 274 (P.C.). The omission to mention any secret arrangement is a serious defect in the notice. But if any omission was due to a *bona fide* mistake, Courts will take a liberal view of the matter and will not upset all the proceedings on that ground only. 26 Bom.L.R. 987=1925 B. 49.

PROXY.—The Court can under S. 153 settle a form of proxy, and any substantial failure to comply with the Courts' directions in that respect would invalidate the proxy. 30 Bom.L.R. 197=1928 B. 80. Unstamped proxies, proxies given by the company in favour of its director, and proxies given by persons who were debtors to the company are invalid. 1928 B. 80. But undated proxies, proxy signed by the shareholder within time, although he has signed another proxy out of time, and voting made by proxy in the presence of the member entitled to vote are valid. 1928 B. 80. Where

(a) a meeting of a company other than a meeting for the passing of a special resolution may be called by not less than fourteen days' notice in writing ; but with the consent of all the members entitled to receive notice of some particular meeting that meeting may be convened by such shorter notice and in such manner as those members may think fit ;

(b) notice of the meeting of a company with a statement of the business to be transacted at the meeting shall be served on every member in the manner in which notices are required to be served by Table A and for the purpose of this clause the expression ' Table A ' means that table as for the time being in force ; but the accidental omission to give notice to, or the non-receipt of notice by, any member shall not invalidate the proceedings at any meeting ;

(c) five members present in person or by proxy, or the chairman of the meeting, or any member or members holding not less than one-tenth of the issued capital which carries voting rights shall be entitled to demand a poll : provided that in the case of a private company if not more than seven members are personally present, one member, and if more than seven members are personally present, two members shall be entitled to demand a poll ;

(d) an instrument appointing a proxy, if in the form set out in regulation 67 of Table A, shall not be questioned on the ground that it fails to comply with any special requirements specified for such instruments by the articles ; and

(e) any shareholder whose name is entered in the register of shareholders of the company shall enjoy the same rights and be subject to the same liabilities as all other shareholders of the same class.

(2) The following provisions shall have effect in so far as the articles of the company do not make other provision in that behalf :—

(a) two or more members holding not less than one-tenth of the total share capital paid up, or, if the company has not a share capital, not less than five per cent. in number of the members of the company may call a meeting ;

(b) in the case of a private company two members and in the case of any other company five members personally present shall be a quorum ;

(c) any member elected by the members present at a meeting may be chairman thereof ;

(d) in the case of a company originally having a share capital, every member shall have one vote in respect of each share or each hundred rupees of stock held by him, and in any other case every member shall have one vote ;

(e) on a poll votes may be given either personally or by proxy ;

(f) the instrument appointing a proxy shall be in writing under the hand of the appointer or of his attorney duly authorised in writing, or if the appointer is a corporation, either under seal or under the hand of an officer or an attorney duly authorised ; and

(g) a proxy must be a member of the company.

(3) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called or to conduct the meeting of the company in manner prescribed by the articles or this Act, the Court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit, and where any such order is given may give such ancillary or consequential directions as it thinks expedient and any meeting called, held and conducted in accordance with any such order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted.]

NOTES.

votes on the amendments proposed were given in person, while the votes on the substantive proposition were given by

proxies in a meeting of the company held for changing its memorandum, it was held that such votes were valid. 1928 B. 80.

80. A company which is a member of another company may by resolution of the directors, authorise any of its officials or any other person to act as its representative at any meeting of that other company, and the person so authorised shall be entitled to exercise the same powers on behalf of the company which he represents as if he were an individual shareholder of that other company.

Representation of companies at meetings of other companies of which they are members.

81. (1) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

Extraordinary and special resolutions.

¹[(2) A resolution shall be a special resolution when it has been passed by such a majority as is required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one days' notice specifying the intention to propose the resolution as a special resolution has been duly given :

Provided that, if all the members entitled to attend and vote at any such meeting so agree, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one days' notice has been given.]

(3) At any meeting at which an extraordinary resolution ²[or a special resolution is submitted to be passed] a declaration of the chairman on a show of hands that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(4) At any meeting at which an extraordinary resolution ²[or a special resolution is submitted to be passed] a poll may be demanded ³[* * * * *]

(5) In a case where, if a poll is demanded, it may in accordance with the articles be taken in such manner as the chairman may direct ; it may, if the chairman so directs, be taken at the meeting at which it is demanded.

LEG. REF.

¹ This sub-section was substituted by S. 35 of Act XXII of 1936.

² These words were substituted for the words "is submitted to be passed or a special resolution is submitted to be passed or confirmed," *ibid*.

³ Certain words were omitted, *ibid*.

NOTES.

Sec. 81: AMENDMENT BY ACT XXII OF 1936.—Old sub-S. (2) has been replaced by the present sub-S. (2) ; and some consequential amendments in sub-Ss. (3) and (4) have been introduced. By virtue of this change, it is no longer necessary that any special resolution should be confirmed by a second general meeting, while it requires 21 days' notice to be given of the meeting at which the special resolution is passed. The provision as to demand of a poll in sub-S. (4) previously has been omitted in the present Act, as the same has been provided for by the amended S. 79 of the Act. The amendment of this section has been made on the lines of S. 117 of the English Act.

CHAIRMAN'S DECLARATION AS TO VOTES.—At any meeting either for extraordinary or

for special resolution, the declaration by the chairman on a show of hands that the resolution has been carried is conclusive evidence as to the passing of the resolution. The minutes of the meeting are inadmissible in evidence to show that the declaration of the chairman was not warranted. 30 Bom.L.R. 598=1929 B. 38. But see I.L.R. (1938) 1 Cal. 90=41 C.W.N. 1137=1937 Cal. 645. Amendment of articles of association—Failure to mention question of amendment in notice under S. 81—Is fatal to the proceedings. 1940 Lah. 243. Resolution relating to question of reduction of capital—Validity—Amendment of section after adjournment of meeting—Effect on procedure. 1938 Pesh. 41=177 I.C. 368.

"Poll."—The taking of a poll is not a meeting of the company in the strict sense but is a mere continuation in law, of a meeting at which a poll was directed to be taken. If a meeting has been adjourned to another date for the taking of poll, the original meeting continues until the poll is taken. 61 M.L.J. 724=1932 M. 100.

PROXY.—Proxy must be qualified not only when he is appointed but also when he acts. 29 B. 126 (P.C.). Vote by proxy even in

(6) When a poll is demanded in accordance with this section, in computing the majority on the poll, reference shall be had to the number of votes to which each member is entitled by the articles of the company, ¹[or under this Act.]

(7) For the purposes of this section notice of a meeting shall be deemed to be duly given at the meeting to be duly held when the notice is given and the meeting held in manner provided by the articles, ¹[or under this Act].

82. (1) A copy of every special and extraordinary resolution shall, within fifteen days from ²[the passing thereof] be printed or typewritten ³[and duly certified under the signature of an officer of the company] and filed with the registrar who shall record the same.

Registration and copies of special and extraordinary resolutions.

(2) Where articles have been registered, a copy of every special resolution for the time being in force shall be embodied in or annexed to every copy of the articles issued after the date of the resolution.

(3) Where articles have not been registered, a copy of every special resolution shall be forwarded in print to any member at his request, on payment of one rupee or such less sum as the company may direct.

(4) If a company makes default in so filing with the registrar a copy of a special or extraordinary resolution, it shall be liable to a fine not exceeding twenty rupees for every day during which the default continues.

(5) If a company makes default in embodying in or annexing to a copy of its articles or in forwarding in print to a member when required by this section a copy of a special resolution, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made.

(6) Every officer of a company who knowingly and wilfully authorises or permits any default by the company in complying with the requirements of this section shall be liable to the like penalty as is imposed by this section on the company for that default.

Minutes of proceedings of general meetings and of its directors.

83. (1) Every company shall cause minutes of all proceedings of general meetings and of its directors to be entered in books kept for that purpose.

(2) Any such minute, if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.

(3) Until the contrary is proved, every general meeting of the company or meeting of directors in respect of the proceedings whereof minutes have been so made shall be deemed to have been duly called and held, and all proceedings had thereat to have been duly had, and all appointments of directors or liquidators shall be deemed to be valid.

LEG. REF.

¹ These words were added by S. 35 of Act XXII of 1936.

² These words were substituted for the words "the confirmation of the special resolution or from the passing of the extraordinary resolution as the case may be," by S. 36, *ibid*.

³ These words were inserted, *ibid*.

NOTES.

the presence of the person entitled to vote is valid. 30 Bom.L.R. 197=1928 B. 80. Undated proxy is valid but not unstamped proxy, where law requires a stamp. 1928 B. 80. As to proxies given by directors of company, see 1928 B. 80. Second proxy, if revokes the previous one, see 1928 B. 80.

Sec. 82: AMENDMENT BY ACT XXII OF 1936.—For the words "the confirmation of

the special resolution or the passing of the extraordinary resolution as the case may be", the words "the passing thereof" have been substituted in sub-S. (1). This is a consequential change necessitated by the abolition of confirmation of extraordinary resolutions. After the words "type written" the words "and duly certified under the signature of an officer of the company" have been added with the object of securing the correctness of the records preserved in the Registrar's office. Discretion of Registrar in refusing to record special resolution of company altering articles of association, see 63 M.L.J. 917.

Sec. 83: AMENDMENT BY ACT XXII OF 1936.—Sub-Ss. (4) to (7) have been newly introduced by the amendment; and it has been done with a view to bring the law

¹[(4) The books containing the minutes of proceedings of any general meeting of a company held after the commencement of the Indian Companies (Amendment) Act, 1936, shall be kept at the registered office of the company and shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose so that no less than two hours in each day be allowed for inspection) be open to the inspection of any member without charge.]

¹[(5) Any member shall at any time after seven days from the meeting be entitled to be furnished within seven days after he has made a request in that behalf to the company with a copy of any minutes referred to in sub-section (4) at a charge not exceeding six annas for every hundred words.]

¹[(6) If any inspection required under sub-section (4) of this section is refused or if any copy required under sub-section (5) of this section is not furnished within the time specified in sub-section (5) the company and every officer of the company who is knowingly and wilfully in default shall be liable in respect of each offence to a fine not exceeding twenty-five rupees and to ²[a further fine not exceeding twenty-five rupees] for every day during which the default continues.]

¹[(7) In the case of any such refusal or default, the Court may by order compel an immediate inspection of the books in respect of all proceedings of general meetings or direct that the copies required shall be sent to the persons requiring them.]

³[Directors.

Directors obligatory.

83-A. ⁴[(1) Every company shall have at least three directors.]

(2) This section shall not apply to a private company ⁵[except a private company being a subsidiary company of a public company.]

Appointment of directors. ⁶[83-B.(1)] In default of and subject to any regulations in the articles of a company other than a private company—

LEG. REF.

¹ These sub-sections were added by S. 37 of Act XXII of 1936.

² These words were substituted for the words "a further fine to twenty-five rupees" by S. 2 and Sch. I of Act XXXIV of 1939.

³ This heading and Ss. 83-A and 83-B were inserted by S. 2 of Act XI of 1914.

⁴ This sub-section was substituted by S. 38 of Act XXII of 1936.

⁵ These words were added, *ibid.*

⁶ S. 83-B was re-numbered as sub-S. (1) of that section and sub-S. (2) was added by S. 39, *ibid.*

NOTES.

in accordance with S. 121 of the English Act. A period of 7 days from the meeting for the preparation of the minutes has been provided for in this section, since this task is sometimes entrusted to solicitors or others and is not always completed without some delay. The words "knowingly and wilfully" have been inserted to ensure that unintentional default is not to be penalised.

Sec. 83-A: AMENDMENT BY ACT XXII OF 1936.—(i) The amendment increases the minimum number of directors from two to three in the case of companies registered after the amendment comes into operation.

(ii) The amendment of sub-S. (2) deprives the benefit of the exception in the case of private companies which are subsidiary companies of a public company. The amending Act of 1936 introduces a distinction between 'private companies' and "private companies which are subsidiaries of public companies"; and the exemption accorded to the former by certain provisions of the Act, *e.g.*, Ss. 83-A, 86-D, 87-C, 87-D, 91-B (3), 91-D and sub-Ss. 141 (1) and 144 (5), is made not applicable to the case of the latter class of companies. A director or a managing director is in no way a servant of the company; he is the agent of the company for carrying on its business. 43 P.L.R. 619=1941 Comp.C. 301.

Sec. 83-B: AMENDMENT BY ACT XXII OF 1936.—Sub-S. (2) has been newly inserted by the amending Act, with a view to secure greater independence to the directors. It lays down that not less than two-thirds of the whole number of directors shall be persons whose period of office is liable to determination at any time by retirement of directors in rotation. There is a proviso with reference to companies incorporated before the commencement of this amending Act. This section is to be read

(i) the subscribers of the memorandum shall be deemed to be the directors of the company until the first directors shall have been appointed ;

(ii) the directors of the company shall be appointed by the members in general meeting ; and

(iii) any casual vacancy occurring among the directors may be filled up by the directors, but the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last appointed a director.]

¹[(2) Notwithstanding anything contained in the articles of a company other than a private company not less than two-thirds of the whole number of directors shall be persons whose period of office is liable to determination at any time by retirement of directors in rotation :

Provided that nothing herein contained shall apply to a company incorporated before the commencement of the Indian Companies (Amendment) Act, 1936, where by virtue of the articles of the company the number of directors whose period of office is liable to determination at any time by retirement of directors in rotation falls below the two-thirds proportion mentioned in this section.]

84. (1) A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in any prospectus issued by or on behalf of the company or in relation to any intended company or in any statement in lieu of prospectus filed by or on behalf of a company, unless, before the registration of the articles or the publication of the prospectus, or the filing of the statement in lieu of prospectus, as the case may be, he has by himself or by his agent authorised in writing—

(i) signed and filed with the registrar a consent in writing to act as such director ; and

(ii) save in the case of ²[companies] not having a share capital, either signed the memorandum for a number of shares not less than his qualification (if any) ³[or taken from the company and paid or agreed to pay for his qualification shares] or signed and filed with the registrar a contract in writing to take from the

LEG. REF.

¹ S. 83-B was re-numbered as sub-S. (1) of that section and sub-S. (2) was added by S. 39, Act XXII of 1936.

² This word was substituted for the words " a company limited by guarantee and " by S. 40 of Act XXII of 1936.

³ These words were inserted, *ibid*.

NOTES.

in conjunction with the amended S. 17 (2) which by making the provisions of Art. 78 of Table A applicable to all companies secures that all first directors of a company must retire at the first ordinary meeting of the company.

Sec. 83-B, Cl. (1).—Casual vacancy in this section means any vacancy occurring by death, resignation or bankruptcy, and not by efflux of time. 61 M.L.J. 724=34 L. W. 746=1932 M. 100. Articles of Association—Provision for automatic re-election of directors—Construction—Applicability to co-opted directors. See I.L.R. (1940) 1 Cal. 560. The articles of association of a company provided that a person elected by the directors as a director can hold office till the next general meeting, and that the person elected at the general meeting can hold office for three years. A candidate failed to get himself elected at the general meeting. It was held that it did not in any way detract

from the authority of the directors to co-opt that failed candidate for the limited time which would expire on the date of the next general meeting. 55 A. 399=1933 A. L.J. 290=1933 A. 344. One of the articles of association of a company provided as follows: "The directors shall have power, at any time, and from time to time, to appoint any other qualified person to be a director, either to fill a vacancy or as an addition to the Board, but so that the total number of directors shall not at any time exceed the maximum number fixed by Art. 98, and any person so appointed shall retain his office only until the next following ordinary meeting, and shall then be eligible for re-election". Held, that the ordinary power of the company in general meeting to appoint additional directors had not been excluded by the articles of association. 190 I.C. 551=1940 Sind 87.

Sec. 84: AMENDMENTS BY ACT XXII OF 1936.—(i) These changes made by Act XXII of 1936, slightly widen the application of the section. The exception contained therein has been made applicable not only to companies limited by guarantee and not having a share capital, but to all companies not having a share capital. The amendment brings the provisions of S. 84 (1) into accord with S. 140 (1) of the English Act. (ii)

company and pay for his qualification shares (if any) ¹[or made and filed with the registrar an affidavit to the effect that a number of shares, not less than his qualification (if any), are registered in his name.]

(2) On the application for registration of the memorandum and articles ²[if any,] of a company the applicant shall file with the registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person who has not so consented, the applicant shall be liable to a fine not exceeding five hundred rupees.

(3) This section shall not apply to a private company ²[or a company which was a private company before becoming a public company] not to a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business.

85. (1) Without prejudice to the restrictions imposed by section 84, it shall be the duty of every director who is by the articles required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the articles.

³[* * * * *]

³[(2)] If, after the expiration of the said period or shorter time, any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding fifty rupees for every day between the expiration of the said period or shorter time and the last day on which it is proved that he acted as a director.

86. The acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification: Provided that nothing in this section shall be deemed to give validity to acts done by a director after the appointment of such director has been shown to be invalid.

LEG. REF.

¹ These words were added, Act XXII of 1936.

² These words were inserted, *ibid.*

³ The original sub-S. (2) of S. 85 was omitted and sub-S. (3) was re-numbered (2) by S. 41 of Act XXII of 1936.

NOTES.

In sub-section (2), after the word 'articles' the words 'if any' have been inserted, with a view to make it applicable to companies which have no separate articles of association of their own but adopt Table A. (iii) The amendment introduced in sub-section (3), *viz.*, the insertion of the words 'or a company . . . public company' was for the purpose of making the section inapplicable to companies which began as private companies.

Sec. 85: AMENDMENT BY ACT XXII OF 1936.—The original sub-clause (2) in this section was omitted here, and the same has been inserted as cl. (a) of S. 86-I.

Sec. 86: ARTICLES OF ASSOCIATION.—A director invalidly appointed cannot bind the shareholders unless so provided in the articles of association. 1927 L. 70=109 I.C. 662. See also 36 A. 412=25 I.C. 210=12 A.L.J. 667.

KNOWLEDGE OF DIRECTORS, IF KNOWLEDGE OF COMPANY.—Though generally the knowledge of the directors is not necessarily the knowledge of the company, still if it is the duty of the director to disclose his know-

ledge to the company, then that knowledge may be attributed to the company. 33 Bom. L.R. 184.

BONA FIDE ACTS OF DIRECTORS.—As between a company and third persons, the directors *de facto* are directors *de jure*. 13 Bom.L.R. 162=10 I.C. 748. Acts done *bona fide* by a manager or director are valid in spite of a defect in their appointment not only between the company and outsiders but also between the company and its members. 46 P.R. 1911=10 I.C. 515. The Board of management of a Company granted a gratuity to an ex-secretary, although the Gratuity Rules of the Company did not permit such a grant. The Board of Management, on exception being taken to the grant by the Deputy Registrar of Co-operative Societies, amended the by-laws so as to permit the grant, and they placed the matter before the General Body. The latter passed a resolution at a meeting sanctioning the payment of gratuity. *Held*, that the matter only related to the administration and internal management of the affairs of the company and so long as the General Body acted within the ambit of the Articles of Association, any act done by them in regard to the management of the Company would be *intra vires* and not *ultra vires*; (2) that though the Board of management was delegated the power to frame by-laws, that did not take away the power of the General Body

¹[86A. (1) If any person being an undischarged insolvent acts as director

LEG. REF.

¹ This section was inserted by S. 42 of Act XXII of 1936.

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to sanction any payment of gratuity in exceptional cases not provided for by the by-laws as framed by the Board of management. This power always vested in the General Body and could not be taken away by the mere fact of delegation. 52 L.W. 417=1940 Mad. 928=(1940) 2 M.L.J. 488. The assets of the company are entrusted to the directors to be applied to certain defined objects and they are responsible as for a breach of trust if they apply them to other objects. 168 I.C. 786=1937 Pat. 293. The assets of a company cannot be disposed of by a resolution of the Directors only. They can only be disposed of after the resolution of the shareholders passed at a special meeting called for the purpose of winding up the company and disposing of its assets. A resolution passed by the Board of Directors of a company, authorizing one of their members to sell the assets of the company for satisfaction of its debts is *ultra vires* and a transfer of property effected in pursuance of such resolution is ineffectual to pass any title to the transferee, more so when the formalities in respect of the deed of transfer provided by the Articles of Association of the company have not been observed and the transfer has been effected not by the Director so authorized but by his agent whose authority to act for the company is not proved. 1938 Rang. 447; (1941) 1 M.L.J. 98 (P.C.).

ACT OF DIRECTORS *ultra vires*—RATIFICATION BY SHAREHOLDERS—VALIDITY.—To render valid an act of the directors of a company which is *ultra vires* the acquiescence of the shareholders must be of the same extent as the consent which would have given validity from the first, *viz.*, the acquiescence of each and every member of the company. Of course, this acquiescence cannot be presumed unless knowledge of the transaction can be brought home to every one of the remaining shareholders. By knowledge of the transaction is clearly meant knowledge of the invalidity of the transaction. There can be no ratification without an intention to ratify, and there can be no intention to ratify an illegal act without knowledge of the illegality. [(1869) 3 H.L. 171, Foll.; (1877) 2 A.C. 366 Rel. on.] 1938 P.C. 284 (P.C.).

ALLOTMENT OF SHARES.—Persons to whom no notice of allotment is served cannot be put on the list of contributories at the time of liquidation. 36 A. 412=25 I.C. 210=12 A.L.J. 667. But the first directors are bound to see if the allotment is made in their names, and they cannot avoid their liability to pay for the shares by pleading their own default or negligence in not making the allotment of shares to themselves. 149 I.C. 869=1934 S. 39.

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FORFEITURE OF SHARES.—Where the directors had acted *intra vires* and *bona fide*, the official liquidator cannot take advantage of any irregularity in the procedure of the directors in forfeiting the shares. 109 I.C. 662=1929 L. 70. But where the memorandum of association gave no power to the directors to forfeit shares, a compromise by directors of unpaid calls under the guise of forfeiture would be *ultra vires* and invalid, and the members of the company would not be bound by such acts, though beneficial to the company unless expressly ratified by all the shareholders. 54 B. 178=32 Bom.L.R. 87=1930 B. 267. As to forfeiture of shares, see also 45 C.W.N. 1075; 1940 M.W.N. 553=1940 Mad. 873; 1938 P.C. 284=43 C.W.N. 205=(1939) 1 M.L.J. 98 (P.C.).

SUIT FILED BY DE FACTO DIRECTOR.—Although the appointment of a person as director was irregular from the outset, if he has continued to act as such in good faith, he is to be deemed a *de facto* director, and the signing by him of any plaint will be validated under S. 86 of the Act. In a suit instituted by him, the mere raising of a doubt as to the validity of his appointment is not enough to "show" in the words of the proviso to the section that his appointment was invalid. Where the question as to the validity of appointment has been raised in proceedings before a Court, the appointment cannot be considered to be *shown* to be invalid until the Court has come to a definite decision on the subject. Where this question was remitted by the appellate Court for a finding, and the lower Court recorded a finding against the validity of the appointment, even then it cannot be said that it is "shown" to be invalid within the meaning of the proviso to S. 86; unless and until the appellate Court passes a definite decision on the point. Hence any act that may have been done by such a director since the raising of the question in any proceeding, as to the invalidity of his appointment, and till the definite decision of the same by the Court, cannot be deemed to be invalid. 9 R. 56=134 I.C. 737=1931 R. 139. When the question of the competency of the director to sign and verify a plaint is raised in defence, the Court cannot shut out evidence of facts or questions in cross-examination which may throw light on the point as to whether the signing of the plaint in the suit was or was not made after the director's appointment had been shown to be invalid. 130 I.C. 843=1931 R. 54.

Sec. 86-A: AMENDMENT BY ACT XXII OF 1936.—Ss. 86-A to 86-I have been newly inserted by Amending Act XXII of 1936, with a view to provide for the control of directors. S. 86-A has been enacted on the lines of the English Act, S. 142. The word 'bankrupt' used in the English Act has been replaced in this section by the more familiar term 'insolvent'; and while under the Eng-

Ineligibility of bankrupt to act as director. or managing agent or manager of any company, he shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand rupees or to both.

(2) In this section the expression 'company' includes a company incorporated outside British India which has an established place of business within British India.]

¹[86B. If in the case of any company provision is made by the articles or by any agreement entered into between any person and the company for empowering a director or manager of the company to assign his office as such to another person, any assignment of office made in pursuance of the said provision shall, notwithstanding anything to the contrary contained in the said provision, be of no effect unless and until it is approved by a special resolution of the company :

Assignment of office by directors. Provided that the exercise by a director of a power to appoint an alternate or substitute director to act for him during an absence of not less than three months from the district in which meetings of the directors are ordinarily held, if done with the approval of the board of directors, shall not be deemed to be an assignment of office within the meaning of this section :

Provided always that any such alternate or substitute director shall *ipso facto* vacate office if and when the appointer returns to the district in which meetings of the directors are ordinarily held.

Explanation.—For the purposes of the provisos to this section, the presidency-towns of Calcutta and Madras shall be deemed to be part of the 24 Parganas and Chingleput Districts, respectively, and the presidency-town of Bombay shall be deemed to be part of the Bombay Suburban and the Thana districts.]

¹[86C. Save as provided in this section, any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any director, manager or officer of the company or any person (whether an officer of the company or not) employed by the company as auditor from or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void :

Provided that—

LEG. REF.

¹ This section was inserted by S. 42 of Act XXII of 1936.

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lish Act 'any person who acts as director or either directly or indirectly takes part in or is concerned in the management of a company' is penalised this section applies only to 'directors or managing agent or manager'. Sub-sections (2) and (4) of the English Act have been omitted as being of no application to this country.

Sec. 86-B: AMENDMENTS BY ACT XXII OF 1936.—This section is new, and has been inserted by Act XXII of 1936 with a view to control the directors and to prevent them from sacrificing the interests of the company for their own benefit. It follows S. 151 of the English Act. The first proviso in this section is not contained in the

English Act, and it has been inserted here to make it clear that temporary appointments of alternate or substitute directors do not constitute an assignment of office, when made with the approval of the Board of Directors. The 2nd proviso provides for the absent director taking up his duties immediately on his return. The explanation has been added, in view of the close proximity of certain Districts to the Presidency Towns of Calcutta, Madras and Bombay.

Sec. 86-C: AMENDMENT BY ACT XXII OF 1936.—This section is newly added by Act XXII of 1936 and it follows S. 122 of the English Act. This makes it no longer possible for any director, manager or officer of the company to avoid liability for his acts by having suitable provisions inserted in the articles of association or in any contract with the company.

(a) in relation to any such provision which is in force at the date of the commencement of the Indian Companies (Amendment) Act, 1936, this section shall have effect only on the expiration of a period of six months from that date, and

(b) nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force, and

(c) notwithstanding anything in this section, a company may, in pursuance of any such provision as aforesaid, indemnify any such director, manager, officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted, or in connection with any application under section 281 of this Act in which relief is granted to him by the Court.]

¹[86D. (1) No company shall make any loan or guarantee any loan made to a director of the company or to a firm of which such director is a partner ²[or to a private company of which such director is a member or director.]

Loans of directors.

(2) In the event of any contravention of sub-section (1) any director of the company who is a party to such contravention shall be punishable with fine which may extend to five hundred rupees, and if default is made in repayment of the loan or in discharging the guarantee shall be liable jointly and severally for the amount unpaid.

(3) This section shall not apply to a private company (except a private company which is the subsidiary company of a public company) or to a banking company.]

¹[86 E. No director or firm of which such director is a partner or private company of which such director is a director shall without the consent of the company in general meeting hold any office of profit under the company except that of a managing director or manager or a legal or technical adviser or a banker :

Director not to hold office of profit.

Provided that nothing herein contained shall apply to a director elected or appointed before the commencement of the Indian Companies (Amendment) Act, 1936, in respect of any office of profit under the company held by him at the commencement of the said Act.

Explanation.—For the purposes of this section the office of managing agent shall not be deemed to be an office of profit under the company.]

¹[86F. Except with the consent of the directors, a director of the company, or the firm of which he is a partner or any partner of such firm, or the private company of which he is a member or director, shall not enter into any contracts for the sale, purchase or supply of goods and materials with the company, provided that

Sanction of directors necessary for certain contracts.

LEG. REF.

¹ This section was inserted by S. 42 of Act XXII of 1936.

² These words were substituted for the words "or to a private company of which such director is a director" by S. 5 of Act II of 1938.

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Sec. 86-D: AMENDMENT BY ACT XXII OF 1936.—This section is new, and it prohibits the making of loans of any kind to directors or guaranteeing any loans made by a director, and provides a punishment for breach of the same. It must however be noted that prohibition is not applicable to certain classes of private companies and to

banking companies.

Sec. 86-E: AMENDMENT, 1936.—This section has been newly inserted by Act XXII of 1936 with a view to prevent directors or firms or private companies in which these are directors, from holding offices of profit under the company, except those referred to in the section. Offices of profit held by directors elected or appointed before this amendment are expressly saved from the operation of this section. The explanation makes it clear that 'managing agents' shall not be deemed to hold any office of profit under the company.

Sec. 86-F.—This section has been added by Act XXII of 1936. By virtue of this

nothing herein contained shall affect any such contract or agreement for such sale, purchase or supply entered into before the commencement of the Indian Companies (Amendment) Act, 1936.]

¹[86G. (1) The company may by extraordinary resolution remove any director, whose period of office is liable to determination at any time by retirement of directors in rotation, before the expiration of his period of office and may by ordinary resolution appoint another person in his stead. The person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected director. A director so removed shall not be reappointed a director by the board of directors.

(2) This section shall not apply to directors elected or appointed before the commencement of the Indian Companies (Amendment) Act, 1936.]

¹[86H. The directors of a public company or of a subsidiary company of a public company shall not except with the consent of the company concerned in general meeting,—

- (a) sell or dispose of the undertaking of the company ;
- (b) remit any debt due by a director.]

¹[86I. (1) The office of a director shall be vacated if—

(a) he fails to obtain within the time specified in sub-section (1) of section ²[85] or at any time thereafter ceases to hold, the share qualification, if any, necessary for his appointment, or

(b) he is found to be of unsound mind by a Court of competent jurisdiction, or

(c) he is adjudged an insolvent, or

(d) he fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made, or

(e) he or any firm of which he is a partner or any private company of which he is a director without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of a managing director or manager or a legal or technical adviser or a banker, or

(f) he absents himself from three consecutive meetings of the directors or from all meetings of the directors for a continuous period of three months whichever is the longer without leave of absence from the board of directors, or

(g) he or any firm of which he is a partner or any private company of which he is a director accepts a loan, or guarantee from the company in contravention of section 86D, or

(h) he acts in contravention of section 86F.

LEG. REF.

¹ This section was inserted by S. 42 of Act XXII of 1936.

² This figure was substituted for the figure " 84 " by S. 4 of Act II of 1938.

NOTES.

section no director or firm in which also he is a director can enter into any contract with the company except with the sanction of the Board of Directors.

Sec. 86-G.—This section is newly added by Act XXII of 1936 and it makes provision for the removal of directors (excepting those who have been elected or appointed before the coming into force of this amendment), instead of leaving the matter to be

provided for in the articles of association.

Sec. 86-H.—This has been inserted by Act XXII of 1936. It restricts the powers of the directors, and requires the consent of the general meeting for the sale or other disposition of the undertaking of the company, and also for remitting any debt due by a director.

Sec. 86-I.—This section has been newly inserted with a view to make provision in the Act itself for the vacation of office of director instead of leaving the matter to be provided for in the articles of association. Cl. (1) (a) reproduces here the provision which was previously contained in sub-Cl. (2) of S. 85.

(2) Nothing contained in this section shall be deemed to preclude a company from providing by its articles that the office of director shall be vacated on grounds additional to those specified in this section.]

¹[87. (1) Every company shall keep at its registered office a register of its directors, managers and managing agents containing with respect to each of them the following particulars, that is to say:—

(a) in the case of an individual, his present name in full, any former name or surname in full, his usual residential address, his nationality, and, if that nationality is not the nationality of origin, his nationality of origin and his business occupation, if any, and if he holds any other directorship or directorships the particulars of such directorship or directorships;

(b) in the case of a corporation, its corporate name and registered or principal office, and the full name, address and nationality of each of its directors; and

(c) in the case of a firm, the full name, address and nationality of each partner, and the date on which each became a partner.

(2) The company shall within the periods respectively mentioned in this sub-section send to the registrar a return in the prescribed form containing the particulars specified in the said register and a notification in the prescribed form of any change among its directors, managers or managing agents or in any of the particulars contained in the register.

The period within which the said return is to be sent shall be a period of fourteen days from the appointment of the first directors of the company and the period within which the said notification of a change is to be sent shall be fourteen days from the happening thereof.

(3) The register to be kept under this section shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member of the company without charge and of any other person on payment of one rupee or such less sum as the company may impose for each inspection.

(4) If any inspection required under this section is refused or if default is made in complying with sub-section (1) or sub-section (2) of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of fifty rupees.

LEG. REF.

¹ This section was substituted by S. 43 of Act XXII of 1936.

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Sec. 87: AMENDMENT BY ACT XXII OF 1936.—This section has been substituted in the place of the old one by Act XXII of 1936, and it follows S. 144 of the English Act. This makes provision for the register of directors, managers and managing agents, containing the prescribed particulars, kept corrected and open to inspection. Under the old section there was no time-limit prescribed for filing with the Registrar a copy showing the changes, and such changes were rarely reported to the Registrar and if at all after inordinate delay. Nor was there any provision therein for the inspection of the register by the members. These defects have been rectified by the present amendment. 58 C. 882 and 35 L.W. 661, which were decided under the section as it stood

before the amendment are no longer good law, as now a 'time-limit' has been fixed by the amending section. Hence the penalty provided for default in compliance with the section can no longer be evaded.

CONSTRUCTIVE NOTICE.—It was held in 37 Bom.L.R. 978=161 I.C. 126=1936 B. 62, that it cannot be said that persons dealing with a company have notice of the contents of all the documents on the file of the particular company; and that merely because a list of directors has to be filed with the Registrar under S. 87 of the Act, it cannot be said that persons dealing with the company have notice of who the directors of the company are. But it is doubtful if this decision will be good law now in view of the provision introduced in the amended section, as to the inspection of the register of director, etc., by the members and the public at the company's office on every business day for a period of not less than 2 hours.

(5) In the case of any such refusal, the Court on application made by the person to whom inspection has been refused and upon notice to the company may by order direct an immediate inspection of the register.]

¹[*Managing Agents.*

87A. (1) No managing agent shall, after the commencement of the Indian Companies (Amendment) Act, 1936, be appointed to hold office for a term of more than twenty years at a time.

Duration of appointment of managing agent.

LEG. REF.

¹ This heading and S. 87A were inserted by S. 44 of Act XXII of 1936.

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Sec. 87-A: AMENDMENTS—MANAGING AGENTS.—Ss. 87-A to 87-I have been inserted by the Amending Act XXII of 1936, and they deal with the subject of managing agents. They deal with their appointments, the conditions applicable to them, their remuneration, and the restrictions imposed on them as to the obtaining of loans, the purchase of shares of other companies under their management, the issue of debentures, the engaging of themselves in any other competitive business, and the appointment of directors. These subjects will be dealt with in greater detail under each of the sections following. It will be useful to give here a general idea as to the system of managing agency, which has been for the first time brought now within the purview of the legislature. This institution of managing agency is one which is peculiar to this country, and it is not to be found in this form in any other part of the world. This system owes its origin to the fact that in this country there have been no facilities for obtaining financial assistance in the case of corporations. Banks and money lenders have been unwilling generally to advance monies to companies without having the guarantee of some third party of undoubted financial stability. The people also, having been unaccustomed to companies which have been only of recent growth in this country, have been unwilling to invest their monies in such concerns unless they were assured of their proper management and conduct by persons of approved commercial ability and experience. Owing to these circumstances, there came into existence two classes of persons, *viz.*, (i) those of well-known financial standing who were in a position to advance their own monies or to obtain on their credits from their friends or banks, monies needed for the carrying on of the business of the companies; and (ii) those men of commercial experience who undertook the responsibility of incorporating and managing the companies. Taking advantage of their importance in connection with the formation and conduct of the companies, they often stipulated to keep the practical management of the companies in their own hands for very long periods, and sometimes hereditarily also in their families. They

also managed to have their remunerations and commissions fixed at extraordinarily high rates, irrespective of the profits earned by the company. They generally had the liberty to engage in other competitive trades on their own account, using the funds of the companies under their management for the purpose, and thereby causing great loss to these companies. Thus, being in a position to dictate terms, these agents generally procured for themselves terms which when critically examined were sometimes in the nature of unconscionable bargains. The terms contained usually in their contract of management providing for their conduct being supervised by the directors of the company, and for their removal for dishonesty or fraud by the shareholders often proved illusory, since the managing agents almost in all instances contrived to have the directorate packed with men subservient to them and to have the shares issued and rules framed in such a way as to have effective control over the votes of the shareholders. Thus it was very often found impossible to have them under control in any manner or to have them removed. This is but the dark side of the picture, and the abuse of the powers by some of the managing agencies. On the other hand in several instances, it has been also found that the managing agents in this country have been mainly responsible for the prosperity of many of the industrial concerns in this country. But for the aid and assistance of the managing agents, and the driving force and skill in the organization and management brought to bear by them, many an industrial concern in this country would not have come into existence at all, or would have languished in their infancy. Under the circumstances narrated above, the system of managing agency came for criticism and consideration from time to time. One set of persons contended that the system had outlived its utility and was now exhibiting only its dark features that it should be abolished altogether by statute. Another set of persons emphasised on the advantages of the system, and contended that it should not be interfered with by legislation, and that parties should be left free in the matter of such contracts. There was still a third party which steered a middle course, and wanted that the system should not be abolished altogether, but that the Act should provide suitable provisions for regulating their tenure of office, appointment, powers, etc.

(2) Notwithstanding anything to the contrary contained in the articles of a company or in any agreement with the company a managing agent of a company appointed before the commencement of the Indian Companies (Amendment) Act, 1936, shall not continue to hold office after the expiry of twenty years from the commencement of the said Act unless then reappointed thereto or unless he has been reappointed thereto before the expiry of the said twenty years.

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The agitation regarding these matters became very wide and insistent especially as a consequence of the deplorable failure of several industrial concerns under the control of managing agents in recent years. The Government felt that it could no longer keep quite without interfering in the matter. The points, therefore, for the Government to consider were, whether there was any necessity for its interference at all, and if so, to what extent, *i.e.*, whether to abolish the system altogether or to have the same regulated by legislation. To decide as to this matter, the Government appointed committees to investigate into the matter and also invited the opinions of several responsible bodies. As a result of these inquiries and after considering the several opinions regarding this matter from responsible bodies, the Government was convinced that there were certainly very serious abuses in the system, but that no case was made out for the abolition of the system altogether, and that a good case had been made out for the remedying of those abuses by legislative enactment. In this state of things, the Government decided to allow the system of managing agency to function, and at the same time to prescribe by legislation the necessary and adequate limits as to its function, powers and privileges. The following matters were found to be some of the serious abuses, and the Government determined as follows:—(i) That the Act should contain some provisions regarding their appointment, tenure of office, remuneration, etc., beyond which the managing agents would not be able to go without the specific sanction and approval of the shareholders. (ii) That legislative provision should be made for the shareholders having a fair and real chance of having their say in matters connected with the conduct and management of the business. (iii) That the period of managing agents should be fixed and limited to a certain number of years. (iv) That provision should be made for the election of an independent directorate, who should have an effective supervision over the managing agents. (v) That the managing agents should be prohibited by legislation from obtaining loans from the companies under their management either for themselves or for some other companies under their management. (vi) That their powers regarding entering into any contract with the company under their management for the purchase, sale or supply of goods to the company, should be restricted in some respects. (vii) That restrictions should be imposed regarding the transfer of their

office, and the charging or assigning of their remuneration or any part thereof. (viii) That their power to appoint directors should be restricted to certain proportion. (ix) That the managing agents shall be removable even before the expiry of the period of their appointment, in certain contingencies, *e.g.*, insolvency or conviction for certain criminal offences. (x) That there should be legislative prohibition against their engaging themselves in any business which is competitive of the business under their management as managing agents. There was still further difficulty as to what should be done with reference to the existing managing agencies. The cry was raised that if the legislature touched the existing agencies it would mean a violation of the principle of sanctity of contracts and that any provision which would be made would be treated as exproprietary legislation. It was, on the other hand, pointed out by the Government that although it was the duty of every Government to see that the sanctity of contracts should be preserved, still it would be failing in its duty if, being convinced that reforms were needed, it held up its hands merely because legislation was likely to affect contracts. It was also pointed out that it was on this principle that several Acts were recently enacted for granting relief to debtors; and that these enactments affected not only contracts but even adjudications of Courts of competent jurisdiction in cases in which unhappy debtors were concerned. In view of all the abovesaid conclusions reached by the Government it brought forward a bill embodying certain provisions for the purpose of remedying the defects and abuses found in the working of the system of managing agency. The matter was thoroughly examined by the select committee of the legislature, and the bill as it emerged from the committee was with a few modifications passed into law. This section has been introduced by Act XXII of 1936. By this section, all new appointments of managing agents are to be for a period not exceeding 20 years at a time. In the case of existing agencies, notwithstanding the terms of their agreement or any provision in the articles of association, the period of office is to come to an end after 20 years. With a view to safeguard the rights of existing agents, the terms of office of many of whom will come to an end within 20 years, the section provides that no such termination will be effective unless the moneys due to the outgoing agents are paid off, and that in respect of all liabilities and obligations properly incurred by them, they would have by way of indemnity a charge

(3) A managing agent whose office is terminated by virtue of the provisions of sub-section (2) shall upon such termination be entitled to a charge upon the assets of the company by way of indemnity for all liabilities or obligations properly incurred by the managing agent on behalf of the company subject to existing charges and encumbrances, if any.

(4) The termination of the office of a managing agent by virtue of the provisions of sub-section (2) shall not take effect until all moneys payable to the managing agent for loans made to or remuneration due up to the date of such termination from the company are paid.

(5) Nothing in this section shall apply to a private company which is not the subsidiary company of a public company.]

Conditions applicable to managing agents. ¹[87B. Notwithstanding anything to the contrary contained in the articles of the company or in any agreement with the company—

(a) a company may, by resolution passed at a general meeting of which notice has been given to the managing agent in the same manner as to members of the company, remove a managing agent if he is convicted of an offence in relation to the affairs of the company punishable under the Indian Penal Code, and being under the provisions of the Code of Criminal Procedure, 1898, non-bailable; and for the purposes of this clause, where the managing agent is a firm or company an offence committed by a member of such firm or a director of or an officer holding a general power of attorney from such company shall be deemed to be an offence committed by such firm or company :

Provided that a managing agent shall not be liable to be removed under the provisions hereof if the offending member, director or officer as aforesaid is expelled or dismissed by the managing agent within thirty days from the date of his conviction or if his conviction is set aside on appeal ;

(b) the office of a managing agent shall be vacated if he is adjudged insolvent;

(c) a transfer of his office by a managing agent shall be void unless approved by the company in general meeting :

Provided that in the case of a managing agent's firm a change in the partners thereof shall not be deemed to operate as a transfer of the office of managing agent, so long as one of the original partners shall continue to be a partner of the managing

LEG. REF.

¹ This section was inserted by S. 44 of Act XXII of 1936.

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on the assets of the company, subject to the existing charges, if any. Note that no compensation has been provided for in the case of existing agents whose term of office would come to a premature end as a result of the enactment of this section, for the obvious reason that it will not be just to penalise the company for the termination of tenure of office of such agent by operation of law. The fair time-limit of 20 years has been fixed for the managing agents to show by the results of their management that they are indispensable, while from the point of view of the shareholders, it will give them an opportunity of considering every twenty years how the managing agents have carried on, and if they are dissatisfied or find they can do without the managing agents, they may have an opportunity of doing away

with them.

Sec. 87-B: AMENDMENT, 1936.—This section is new and has been inserted by Act XXII of 1936. It lays down the conditions applicable to managing agents. This section also provides for the removal of the managing agent by a resolution passed at a general meeting of the company in cases of certain specified offences committed by him; for avoiding payments of certain dues and compensation to the managing agent in the case of a winding up caused by the negligence or default of the managing agent; and for the necessity of approval of the company in general meeting for the validity of the appointment and removal of a managing agent and of any variation of a managing agent's contract of management, made after the commencement of this amending Act. Preliminary appointments announced in a prospectus, which would be impracticable to hold in abeyance until the first general meeting have been expressly excepted from the conditions laid down.

agent's firm. For the purpose of this proviso 'original partners' shall mean, in the case of managing agents appointed before the commencement of the Indian Companies (Amendment) Act, 1936, partners who were partners at the date of the commencement of the said Act, and in the case of managing agents appointed after the commencement of the said Act, partners who were partners at the date of the appointment ;

(d) a charge or assignment of his remuneration or any part thereof effected by a managing agent shall be void as against the company ;

(e) if a company is wound up either by the Court or voluntarily, any contract of management made with a managing agent shall be thereupon determined without prejudice however, to the right of the managing agent to recover any money recoverable by the managing agent from the company : Provided that where the Court finds that the winding up is due to the negligence or default of the managing agent himself the managing agent shall not be entitled to receive any compensation for the premature termination of his contract of management ; and

(f) the appointment of a managing agent, the removal of a managing agent and any variation of a managing agent's contract of management made after the commencement of the Indian Companies (Amendment) Act, 1936, shall not be valid unless approved by the company by a resolution at a general meeting of the company notwithstanding anything to the contrary in section 86-E :

Provided that nothing herein contained shall apply to the appointment of a company's first managing agent made prior to the issue of the prospectus or statement in lieu of prospectus where the terms of the appointment of such managing agent are there set forth.]

¹[87-C. (1) Where any company appoints a managing agent after the commencement of the Indian Companies (Amendment) Act, 1936, the remuneration of the managing agent shall be a sum based on a fixed percentage of the net annual profits of the company, with provision for a minimum payment in the case of absence of or inadequacy of profits, together with an office allowance to be defined in the agreement of management.

LEG. REF.

¹ This section was inserted by S. 44 of Act XXII of 1936.

NOTES.

Sec. 87-B (d).—The restriction by S. 87, Cl. (d) is against a managing agent making a voluntary charge or assignment of his remuneration and the object is undoubtedly to prevent him from doing so to the detriment of the company. It is an entirely different matter when a creditor of a firm of managing agents seeks to recover his debt by attaching the remuneration to which the managing agent is entitled. A restraint on voluntary alienation does not bar a compulsory sale at the instance of a creditor. 1941 Cal. 240.

Sec. 87-B, Cl. (f), Proviso.—This proviso does not mean that the restrictions in the Act relating to the period of office and the remuneration, etc., will not be applicable to such an appointment. The exception merely amounts to this, *viz.*, that provided the other limitations prescribed in the different sections of the Act are observed, an appointment made prior to the issue of a prospectus is not dependent for its validity

on a resolution of the shareholders. Clause (c) debars a managing agent from transferring his office without the concurrence of his shareholders, while the assignment of his remuneration by a managing agent is declared void as against the company. Changes in the constitution of a firm (where a firm is a managing agent) are, however, protected so long as one of the original partners continues in the firm.

Sec. 87-C.—This section is newly introduced by Act XXII of 1936. It provides that no managing agent can stipulate for his remuneration anything other than a percentage of the nett profits with provisions for a minimum remuneration in case of inadequacy or absence of profits; and any other form of remuneration has to be sanctioned by the shareholders. This was meant to put a stop to the very bad practice which was prevailing before, of providing in their agreements for remuneration whether any profits were made by the company or not. Further, sub-section (3) prescribes the mode for fixing the nett profits, and the formidable list of deductions therein included enforces a reasonable basis for the calculation of profits.

(2) Any stipulation for remuneration additional to or in any other form than the remuneration specified in sub-section (1) shall not be binding on the company unless sanctioned by a special resolution of the company.

(3) For the purposes of this section 'net profits' means the profits of the company calculated after allowing for all the usual working charges, interest on loans and advances, repairs and outgoings, depreciation, bounties or subsidies received from ¹[any Government] or from a public body, profits by way of premium on shares sold, profits on sale proceeds of forfeited shares, or profits from the sale of the whole or part of the undertaking of the company but without any deduction in respect of income-tax or super-tax, or any other tax or duty on income or revenue or for expenditure by way of interest on debentures or otherwise on capital account or on account of any sum which may be set aside in each year out of the profits for reserve or any other special fund.

(4) This section shall not apply to a private company except a private company which is the subsidiary company of a public company or to any company whose principal business is the business of insurance.]

²[87-D. (1) No company shall make to a managing agent of the company or to any partner of the firm, if the managing agent, is a firm, ³[or to any member or director of the private company,] if the managing agent is a private company, any loan out of moneys of the company or guarantee any loan made to a managing agent.

(2) Nothing contained in this section shall apply to any credit held by a managing agent in a current account maintained subject to limits previously approved by the board of directors by the company with the managing agent for the purposes of the company's business.

(3) In the event of any contravention of sub-section (1) any director of the company who is a party to the making of the loan or giving of the guarantee shall be punishable with fine which may extend to five hundred rupees, and if default is made in repayment of the loan or discharging the guarantee shall be liable jointly and severally for the amount unpaid.

(4) Nothing in this section shall apply to a private company except a private company which is the subsidiary company of a public company.

(5) Except with the consent of three-fourths of the directors present and entitled to vote on the resolution, a managing agent of the company, or the firm of which he is a partner, or any partner of such firm, or, if the managing agent is a private company, a member or director thereof, shall not enter into any contract for the sale, purchase or supply of goods and materials with the company, provided

LEG. REF.

¹ These words were substituted for the word "Government" by A.O., 1937.

² This section was inserted by S. 44 of Act XXII of 1936.

³ These words were substituted for the words "or to any director of the private company" by S. 6 of Act II of 1938.

NOTES.

Sec. 87-D.—This section has been inserted by Act XXII of 1936. Under this section, the giving of loans to or the guaranteeing of loans of managing agents is absolutely prohibited now. The privilege hitherto enjoyed by managing agents of entering into contracts with the company without any limitation is partly restricted by

sub-section (5), which provides that except with the consent of three-fourths of the directors present and entitled to vote, no such contract can be entered into. A penalty also has been provided in this section for a breach of the provisions of this section. Private companies, excepting those which are subsidiary companies of a public company, have been excluded from the operation of this section. Where the articles of association specifically excluded from the managing agent's powers, that of borrowing, but nevertheless such a managing agent borrows money and spends it, the company is not liable for the debts when the borrowings were neither *bona fide* nor necessary for the business of the company. 15 Luck. 515= 1940 Oudh 202.

that nothing herein contained shall affect any such contract for such sale, purchase or supply entered into before the commencement of the Indian Companies (Amendment) Act, 1936.]

¹[87-E. (1) No company incorporated under this Act after the commencement of the Indian Companies (Amendment) Act, 1936, which is under the management of a managing agent shall make any loan to or guarantee any loan made to any company under management by the same managing agent, and no company shall after the expiry of six months from the commencement of the said Act except by way of renewal of an existing loan or guarantee given make any loan to or guarantee any loan made to any such company :

Provided that nothing herein contained shall apply to loans made or guarantees given by a company to or on behalf of a company under its own management or loans made by or to a company to or by a subsidiary company thereof or to guarantees given by a company on behalf of a subsidiary company thereof.

(2) In the event of any contravention of the provisions of this section, any director or officer of the company making the loan or giving the guarantee who is knowingly and wilfully in default shall be liable to a fine not exceeding one thousand rupees and shall be jointly and severally liable for any loss incurred by the company in respect of such loan or guarantee.]

¹[87-F. A company other than an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not purchase shares or debentures of any company under management by the same managing agent, unless the purchase has been previously approved by a unanimous decision of the board of directors of the purchasing company.]

¹[87-G. A managing agent shall not exercise in respect of any company of which he is a managing agent a power to issue debentures or, except with the authority of the directors, and within the limits fixed by them, a power to invest the funds of the company, and any delegation of any such power by a company to a managing agent shall be void.]

¹[87-H. A managing agent shall not on his own account engage in any

LEG. REF.

¹ This section was inserted by S. 44 of Act XXII of 1936.

NOTES.

Sec. 87-E.—This section has been added by Act XXII of 1936. This prohibits the evil practice of inter-investment of funds, which was prevailing formerly. Now, no managing agent can make a company under his management lend any portion of its funds by way of loan to any other company under his management. The guaranteeing of any loans of any such other company is also prohibited. As to existing arrangements, only renewals are permissible. A very heavy penalty besides the liability to make good the loss occasioned by any loan given or guarantee offered in breach of the prohibition created under the Act is put upon directors and other officers (which includes a managing agent), who act in contravention of the provisions of the Act.

Sec. 87-F.—This section is new and was added by Act XXII of 1936. It lays down the rules regarding the purchase by a company of the shares or debentures of another company under the management of the same managing agent.

Sec. 87-G.—This section has been inserted by Act XXII of 1936, and it absolutely prohibits the creation of encumbrances over the assets of the company by the managing agent; and his rights to invest the funds of the company under his control is also limited to the limits fixed by the directors and is made dependent upon the authority to be given to him by the directors. The section also prohibits the delegation to the managing agent of any such power by the company.

Sec. 87-H.—This section has been inserted by Act XXII of 1936, and it prohibits the carrying on of any competitive business on his own account, by a managing agent.

Managing agent not to engage in business competing with the business of managed company.

business which is of the same nature as and directly competes with the business carried on by a company under his management or by a subsidiary company of such company.]

¹[87-I. Notwithstanding anything contained in the articles of a company other than a private company the directors, if any, appointed by the managing agent shall not exceed in number one-third of the whole number of directors.]

Limit on number of directors appointed by managing agent.

Contracts.

Form of contracts.

88. (1) Contracts on behalf of a company may be made as follows (that is to say) :—

(i) any contract which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged ;

LEG. REF.

¹ This section was inserted by S. 44 of Act XXII of 1936.

Sec. 87-I.—This section has been inserted by Act XXII of 1936. The packing of the Board of Directors by the nominees of the managing agent is now rendered impossible by this section; as he cannot have more than one-third of the total number of seats in the Board filled up by his nominees.

Sec. 88: "CONTRACT BEFORE FORMATION OF COMPANY".—A limited company is a distinct *persona* from the individuals composing it. 42 C. 1029=42 I.A. 97=25 M.L.J. 80 (P. C.). A company cannot be bound by a contract entered into on its behalf before the company was formed; nor is it competent to bring a company into existence bound to enter into a contract with a third party the terms of which have been arranged before the company was formed. It is for the company after its formation to determine whether it will enter into the contract or not. A clause in the memorandum of a company provided "that the firm of M.G. & Co. . . . shall be the agents of the company, so long as the said firm shall carry on business in Bombay" and it was held that this clause merely conferred a power upon the company but did not impose any obligation. 59 B. 218=36 Bom.L.R. 907=1934 B. 427. Further, a company cannot ratify or adopt a contract entered into by a person on its behalf before incorporation, though it may enter into a new contract embodying the terms of the old one. 36 B. 564=14 Bom.L.R. 45=14 I.C. 353; 68 I.C. 787=1923 L. 100.

CONTRACT BY AGENT.—Persons contracting with a company and dealing in good faith may assume that acts within the powers of the company have been properly and duly performed, and they are not bound to inquire whether the acts of internal management have been regular. Where an agent unauthorizedly borrowed on behalf of the company but the same was ratified by the

directors at a later meeting, it was held that the defect in the convening of the meeting did not render the contract and its ratification invalid. 53 A. 1009=1931 A.L.J. 1038=1932 A. 141. The *chairman of a Corporation* as principal officer while carrying on business of the corporation executed a declaration creating a lien on property of the corporation in respect of a loan sanctioned by the Board of Directors, but the Articles of Association were silent as to the authority of the person entering into agreement on behalf of the corporation. *Held*, that the chairman had implied authority to execute the declaration. 181 I.C. 681=1939 Sind 100. Where the matter of appointment of the staff of the company is in the hands of the chairman, and the directors have no reason to suspect the integrity of the chairman or advisory director, there being an entire absence of anything, which would point the finger of suspicion to either the chairman or the advisory director in the matter of the appointments, the directors cannot be made liable for the amounts misappropriated by the chairman or advisory director amounts paid by the staff as security for their employment; since the directors are justified in trusting the chairman and advisory director to deal properly with the employees it cannot be said that they are guilty of wilful negligence, and they cannot be called upon to pay the amount of the security utilised by the chairman or advisory director for their own purposes. 46 L.W. 869=(1937) 2 M.L.J. 848.

IRREGULARITY IN RESPECT OF SEAL.—One of the articles of association of a company provided that a document to which the common seal was affixed should also be signed by at least one director and counter-signed by an agent or other officer appointed by the Board for that purpose. The executant of a mortgage deed signed in his capacity as managing agent of the company and it bore the common seal of the company. It was held that the defect in respect of the seal did not render the document invalid

(ii) any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

(2) All contracts made according to this section shall be effectual in law and shall bind the company and its successors and all other parties thereto, their heirs, or legal representatives, as the case may be.

89. A bill of exchange, hundi or promissory note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a company if made, drawn, accepted or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority, express or implied.

Bills of exchange and promissory notes.

90. A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place ¹[either in or outside British India]; and every deed signed by such attorney, on behalf of the company, and under his seal, where sealing is required, shall bind the company, and have the same effect as if it were under its common seal.

Execution of deeds.

91. (1) A company whose objects require or comprise the transaction of business beyond the limits of British India may, if authorised by its articles, have for use in any territory, district or place not situate in British India, an official seal which shall be a facsimile of the common seal of the company, with the addition on its face of the name of every territory, district or place where it is to be used.

(2) A company having such an official seal may, by writing under its common seal, authorise any person appointed for the purpose in any territory, district or

LEG. REF.

¹ These words were substituted for the words "not situate in British India" by S. 45 of Act XXII of 1936.

NOTES.

as there was no provision of law requiring the deed to be under the common seal of the company. 53 A. 1009=1931 A.L.J. 1038=1932 A. 141.

Sec. 89: "AUTHORITY".—The ignorance of the manager of the Bank of the terms of the articles of association does not affect his power to make a transfer of negotiable instruments. He is the agent of the Bank for performing all ordinary banking transactions, and the transfer of such an instrument is a very ordinary transaction. 80 I. C. 741=1924 L. 462. Where the memorandum of association merely stated that one of the objects of the company was to make promissory notes, and it was not stated that the managing agent is to make them; and where under the articles of association power was given to the managing agent to make contracts and sign receipts on behalf of the company, and no specific power was given to the managing agent to make promissory notes on behalf of the company, it was held that these provisions were insufficient to constitute the managing agents "a duly authorized agent" of the company for the purpose of executing a promissory note under S. 27 of the Negotiable Instruments

Act. 52 A. 883=1930 A.L.J. 1052=128 I.C. 758=1930 A. 778.

LIABILITY OF DIRECTORS ON BILLS, ETC.—The question as to the liability of a company on any particular endorsement is in every case one of construction. Where the endorsement on a negotiable instrument was "M. & Sons, Managing Agents of L. A. company", it was held that it would not be clear to any one that the responsibility of L. A. company was involved and that therefore L. A. company was not liable. 52 C. 802=29 C.W.N. 828=1925 C. 1062. A company purchased certain machinery and in lieu thereof one of its Secretaries and Treasurers executed a promissory note signing it in his own name. The promissory note was on a sheet of paper printed with the name of the company and bearing a stamp impression of the company. It was held that the promissory note was signed on behalf of the company and that, therefore, the company was liable on it. 24 Bom.L.R. 355=67 I.C. 941=1923 B. 29.

Sec. 90: AMENDMENT BY ACT XXII OF 1936.—For the words "not situate in British India", the words "either in or outside British India" have been substituted by the amendment. The old section empowered a person to execute deeds on behalf of a company in any place outside British India. Now the section has been made to apply also to British India itself.

place not situate in British India to affix the same to any deed or other document to which the company is party in that territory, district or place.

(3) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period (if any) mentioned in the instrument conferring the authority, or if no period is there mentioned, then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

(4) The person affixing any such official seal shall, by writing under his hand, on the deed or other document to which the seal is affixed, certify the date and place of affixing the same.

(5) A deed or other document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company.

¹[91-A. (1) Every director who is directly or indirectly concerned or interested in any contract or arrangement entered into by or on behalf of the company shall disclose the nature of his interest at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exists or in any other case at the first meeting of the directors after the acquisition of his interest or the making of the contract or arrangement :

Provided that a general notice that a director is a ²[director or a member of any specified company or is a member of any specified firm], and is to be regarded as interested in any subsequent transaction with such firm or company, shall as regards any such transaction be sufficient disclosure within the meaning of this sub-section and after such general notice, it shall not be necessary to give any special notice relating to any particular transaction with such firm or company.

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to a fine not exceeding one thousand rupees.]

³[(3) A register shall be kept by the company in which shall be entered particulars of all contracts or arrangements to which sub-section (1) applies, and which shall be open to inspection by any member of the company at the registered office of the company during business hours.]

³[(4) Every officer of the company who knowingly and wilfully acts in contravention of the provisions of sub-section (3) shall be liable to a fine not exceeding five hundred rupees.]

LEG. REF.

¹ This section was inserted by S. 3 of Act XI of 1914.

² These words were substituted for the words "member of any specified firm or company" by S. 46 of Act XXII of 1936.

³ These sub-sections were added by *ibid*.

NOTES.

Sec. 91-A: AMENDMENTS BY ACT XXII OF 1936.—(i) In the proviso to sub-section (1), for the words "member of any specified firm or company" the words "director or a member of any specified company or is a member of any specified firm" have been substituted by the amendment. This is merely a verbal correction.

(ii) Sub-section (3) has been newly added. It was thought necessary that some provision should exist to ensure that shareholders may obtain information about contracts in which directors of the company are interested. Hence it is provided that a register should be maintained to supply this information.

(iii) Sub-section (4) also has been added by Act XXII of 1936, and it provides penalty for acting in contravention of provisions of sub-section (3).

SCOPE OF SECTION.—The breach of Ss. 91-A, 91-B and 91-C, though made punishable, does not *ipso facto* render the contract void or voidable. 1928 M.W.N. 481=115 I.C. 486=1929 M. 353. S. 91-A (1) is not limited to contracts entered into at a meeting of the directors but applies also to cases in which contracts were not made at such a meeting. 42 C.W.N. 533=1938 Cal. 440.

"INTEREST".—In India the interest of a director in a contract need not necessarily be a pecuniary interest. Even mere relationship, as that of husband and wife or father and son, is interest, if the circumstances are such that it may reasonably be regarded as affecting the director's mind. 1929 M. 353. Sub-partnership with the other party to the contract is an interest in the contract. 1929 M. 353.

¹[91-B. (1) No director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested ¹[nor shall his presence count for the purpose of forming a quorum at the time of any such vote]; and if he does so vote, his vote shall not be counted :

LEG. REF.

¹ This section was inserted by S. 3 of Act XI of 1914.

² These words were inserted by S. 47 of Act XXII of 1936.

NOTES.

DISCLOSURE OF INTEREST.—Where the interest of the director is such that it is likely to produce a conflict between his duty to the company and his duty or interest in the other party, he is bound to disclose it. But if the whole body of the directors was already aware of such interest, formal disclosure is not necessary. 1928 M.W.N. 481=115 I.C. 486=1929 M. 353. Where the company sues the director on the ground that he had interest in the contract entered into by him on behalf of the company, the fact of non-disclosure under this section must be set forth in the plaint; and the plaint will not be allowed to be amended after issues framed and evidence closed. 1929 M. 353. A letter written by the purchasing director to the chairman of the Board of Directors who merely signed it as noted, does not prove that the disclosure of the director's interest was made at any meeting of the directors as required by S. 91-A (1); when it is not referred to in the minutes of any of the meetings, 42 C.W.N. 533=1938 Cal. 440. Petty purchases by a director of a company from a firm in which he has and interest are covered by the proviso to S. 91-A (1); and the director's interest should be disclosed in the manner provided for therein. 42 C.W.N. 533=1938 Cal. 440.

Sec. 91-B: AMENDMENT BY ACT XXII OF 1936.—The amendment has introduced a salutary provision, the equity of which has been recognised by the Courts.

OBJECT OF SECTION—HOW FOR THIRD PARTIES ARE AFFECTED.—The object of S. 91-B of the Act is clearly to ensure that a company shall have the benefit of the judgment of an entirely independent Board. It is very well settled law in the case of English joint-stock companies that people dealing with such a company are fixed with notice of any limitations on the power of the company contained in the statute under which it is incorporated or in the memorandum or articles of association; but that if it is shown that a particular act was ostensibly authorised by the statute and the memorandum or articles of association persons dealing with the company are not concerned to see that the company has put itself into a position to exercise its power properly. That is to say, outside parties are not concerned with the internal management of the company; and if the disability of a director to vote upon

a contract in which he is personally interested were imposed by the articles of association, the question whether he is personally interested in, and entitled to vote upon, a particular contract would be regarded as a matter of internal management, with which outside persons dealing with the company would not be concerned. The principle of English Law ought to be applied to a case of disability of directors arising under S. 91-B of the Companies Act. But when a person has notice of the terms of the contract to which he is a party, he necessarily has notice of the circumstances under which the contract was passed or resolved upon by the directors. 37 Bom.L.R. 978=1936 B. 62. Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards and owes a duty to another company, which is proposing to enter into a transaction with the company of which he is the director, he comes within the rule laid down in S. 91-B and the transaction is voidable at the instance of the company with whom it is entered into. He has a personal interest in the matter and owes a duty which conflicts with his duty to the company of which he is the director. It is immaterial whether the conflicting interest belongs to him beneficially or as a trustee for others. S. 91-B would not however deprive of the benefit of his contract with the company a third party who had no notice of the defect in the director's authority. Such a person would be entitled to assume that the internal management of the company is properly conducted. But if the third party is shown to have knowledge of the real state of affairs, the transaction is voidable as against him. I.L.R. (1938) Bom. 421=42 C.W.N. 733=40 Bom.L.R. 1109=1938 P.C. 159 (P.C.).

Sec. 91-B (1) (before amendment): SHAREHOLDER CREDITOR—RIGHT TO VOTE FOR RESOLUTION AUTHORISING SET OFF OF FUTURE CALLS AGAINST DEBT DUE.—It is open to a company to agree with a shareholder to whom it owes money that the debt shall be set-off against future calls. But where such shareholder creditor is himself a director and the managing agent, he cannot validly vote for a resolution authorising such set-off. The resolution would be invalid when the necessary quorum is lacking without such director's vote. Such a shareholder can, therefore on liquidation, be placed in the list of contributories in respect of the unpaid share money. 54 L.W. 440=(1941) 2 M.L.J. 595.

VOTE.—Where the articles of association of a company required a quorum of three at the directors' meeting, and five directors at a meeting by their resolution allotted the un-

Provided that the directors or any of them may vote on any contract of indemnity against any loss which they or any one or more of them may suffer by reason of becoming or being sureties or surety for the company.

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to a fine not exceeding one thousand rupees.]

¹[(3) This section shall not apply to a private company.]

²[Provided that where a private company is a subsidiary company of a public company, this section shall apply to all contracts or arrangements made on behalf of the subsidiary company with any person other than the holding company.]

³[91-C. (1) Where a company enters into a contract for the appointment of a manager ⁴[or managing agent] of the company in which contract any director of the company is directly or indirectly concerned or interested, or varies any such existing contract, the company shall ⁴[, within twenty-one days from the date of entering into the contract or the varying of the contract,] send an abstract of the terms of such contract or variation, as the case may be, together with a memorandum clearly indicating the nature of the interest of the director in such contract, or in such variation, to every member; and the contract shall be open to the inspection of any member at the registered office of the company.

(2) If a company makes default in complying with the requirements of sub-section (1), it shall be liable to a fine not exceeding one thousand rupees; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.]

³[91-D. (1) Every manager or other agent of a company other than a private company ⁵[not being the subsidiary company of a public company] who enters into a contract for or on behalf of the company in which contract the company is an undisclosed principal shall, at the time of entering into the contract, make a memorandum in writing of the terms of the contract, and specify therein the person with whom it has been made.

LEG. REF.

¹ This sub-section was added by S. 2 of Act XLII of 1920.

² This proviso was added by S. 47 of Act XXII of 1936.

³ This section was inserted by S. 3 of Act XI of 1914.

⁴ These words were inserted by S. 48 of Act XXII of 1936.

⁵ These words were inserted by S. 49, *ibid.*

NOTES.

allotted shares of the company to three of them in certain proportions, it was held that the allotment of shares was a contract, that the three directors to whom the shares were allotted were not entitled to vote and that, therefore, there was no quorum and the resolution and allotment were invalid. 23 Bom.L.R. 1104=64 I.C. 933=1921 B. 372. That the interested director should not be counted in determining the quorum, is based on the principle that where a bare quorum is assembled, no contract can be made with a member of that quorum, because such a contract requires his concurrence, and he cannot be on both sides of the same contract. As to that contract he is not a director, but is a stranger; and when he steps out

of the bare quorum and assumes the attitude of a stranger the quorum is broken.

Sec. 91-C: AMENDMENT BY ACT XXII OF 1936.—After the word “manager” the words “or managing agent” and after the words “the company shall” the words within 21 days from the date of entering into the contract or the varying of the contract” have been inserted by the amendment. The first change has been made in view of the fact that the term “manager” does not include now after this amending Act a “managing agent”. The second provides a time limit within which the information is to be given to the members, so that there may be no long delay or evasion.

Sec. 91-D: AMENDMENTS BY ACT XXII OF 1936.—In sub-section (1) after the words “private company” the words “not being the subsidiary company of a public company”; and in sub-section (2) after the words “to the company” the words “and send copies to the directors” have been added by the amendment. The object of the amendment is to have copies of contracts by agents of the company in which the company is an undisclosed principal sent to the directors in advance.

(2) Every such manager or other agent shall forthwith deliver the memorandum aforesaid to the company ¹[and send copies to the directors], and such memorandum shall be filed in the office of the company and laid before the directors at the next directors' meeting.

(3) If any such manager or other agent makes default in complying with the requirements of this section—

(a) the contract shall, at the option of the company, be void as against the company; and

(b) such manager or other agent shall be liable to a fine not exceeding two hundred rupees.]

Prospectus.

92. (1) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus.

(2) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, shall be filed for registration with the registrar on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration.

(3) The registrar shall not register any prospectus unless it is dated, and the copy thereof signed, in manner required by this section.

(4) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section.

(5) If a prospectus is issued without a copy thereof being so filed, the company and every person who is knowingly a party to the issue of the prospectus, shall be liable to a fine not exceeding fifty rupees for every day from the date of the issue of the prospectus until a copy thereof is so filed.

93. (1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, shall state—

Specific requirements as to particulars of prospectus.

LEG. REF.

¹ These words were inserted by S. 49, Act XXII of 1936.

NOTES.

Sec. 92: APPLICATION OF SECTION.—It cannot be said that a prospectus is such only when it conforms to the terms of S. 93, and a person who incurs a penalty for failure to file a prospectus under this section cannot avoid the penalty by allowing the prospectus to lack some of the requisites laid down under S. 93, for that would be taking advantage of one's own wrong. 67 M.L.J. 437=40 L.W. 519=1934 M. 641.

OFFENCE UNDER SECTION NOT TECHNICAL.—*R* filed a prospectus fulfilling all requirements of law in the office of the Registrar, Joint-Stock Companies and subsequently issued a prospectus in Bengali. It was found that the prospectus in Bengali did not contain certain particulars required by S. 93, Companies Act, and was not a verbatim translation of the English prospectus. The Registrar filed a complaint under S. 92 (5) on the ground that the Bengali prospectus had been issued without having been filed before him. The Magistrate holding the offence to be

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purely technical and omission not culpable acquitted *R*. *Held*; that *R* was liable to be convicted under S. 92 (5); Companies Act. That the proceedings were initiated by the Registrar and not by a private person and as the question involved was one of great importance in view of the scope of the Act and of the necessity in the interest of the community of the strictest observance of its provision; the High Court could not refuse to interfere with the order of acquittal. 160 I.C. 829=40 C.W.N. 320=1936 C. 33.

Sec. 93: AMENDMENT BY ACT XXII OF 1936.—This section has been considerably amended by the amending Act (1936). The amendment provides for the disclosure in the prospectus of a company of certain details, which have not hitherto been required to be so disclosed. Chief among them are the following:

(i) In sub-section (1); clause (c); words have been added, to provide for the disclosure of the names of managing agents or proposed managing agents; and of the provision in the articles or in any contract as to the appointment of managers and managing agents, and the remuneration payable to them.

(a) the contents of the memorandum, with the names, descriptions and addresses of the signatories and the number of shares subscribed for by them respectively; and the number of founders or management or deferred shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company ¹[and the number of redeemable preference shares intended to be issued with the date or, where no date is fixed, the period of notice required and the proposed method of redemption]; and

(b) the number of shares (if any) fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and

(c) the names, descriptions and addresses of the directors or proposed directors and of the managers or proposed managers ¹[and managing agents or proposed managing agents] (if any) ¹[and any provision in the articles or in any contract as to the appointment of managers or managing agents and the remuneration payable to them]; and

(d) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount (if any) paid on the shares so allotted; and

(e) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or agreed to be issued; and

²[(ee) where any issue of shares or debentures is underwritten, the names

LEG. REF.

¹ These words were inserted by S. 50 of Act XXII of 1936.

² This clause was added, *ibid.*

NOTES.

(ii) After sub-section (1), clause (e) a new clause (ee) has been inserted requiring the prospectus to contain information about the underwriting of shares.

(iii) After sub-section (1), clause (f), a new clause (ff) has been inserted. By virtue of this amendment, where any property, purchased or acquired by the company, had been the subject of transfer by sale within the previous 2 years, the amounts of each of such transfers; and where the property is a business, then particulars relating to the profits of such business during the previous 3 years, and the balance-sheet of the business made up to at least 90 days prior to the issue of the prospectus, should be appended to the prospectus.

(iv) In sub-section (1), clause (h), words have been inserted, so as to make the provision as to disclosure amplified and applicable to discount also. Under the Amending Act power to issue shares at a discount under certain circumstances have been provided for in the new S. 105-A, and hence this amendment in this clause has become necessary.

(v) The amendment of clause (l) of sub-section (1) has been made with a view to secure fuller information in respect of pro-

perty purchased or to be purchased, *e.g.*, as to the existence of charges on such property.

(vi) After sub-section (1), clause (o), a new clause (p) has been inserted for the disclosure of the nature and extent of the restrictions contained in the articles upon the members' right to attend, speak or vote at meetings of the company; or upon their right to transfer shares, or upon the directors' powers of management.

(vii) Sub-section (1-A) has been newly inserted, with a view to render necessary further disclosure to be made in the prospectuses issued by a company which has been carrying on business prior to the issue thereof.

(viii) Sub-section (1-B) has been inserted newly for the purpose of avoiding by an explanation any difficulties in interpreting the word "profits".

(ix) A proviso has been added to clause (c) in sub-section (4), so as to be supplementary to the provision contained in S. 154 (1) of this Act. On this section see 160 I. C. 829=40 C.W.N. 320=1936 C. 33, cited under S. 92 *supra*.

Secs. 93 and 183 (5).—False and misleading prospectus—Right to avoid agreement to purchase shares is to be exercised within reasonable time—Application under S. 183 (5) for removal from list of contributories cannot be allowed after 11 years. See I.L.R. (1938) All. 301=1938 A.L.J. 94=1938 All. 193.

of the underwriters, and the opinion of the directors that the resources of the underwriters are sufficient to discharge the underwriting obligations ; and]

(f) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares or debentures to the vendor, and where there is more than one separate vendor or the company is a sub-purchaser, the amount so payable to each vendor : Provided that where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors ; and

¹(f) where any property referred to in clause (f) has within the two years preceding the issue of the prospectus been transferred by sale, the amount paid by the purchaser at each such transfer so far as the information is available and, where any such property is a business, the profits accruing from such business during each of the three years immediately preceding the issue of the prospectus or during each year of the existence of the business if less than three years so far as the information is available. A balance sheet of the business concerned made up to a date not more than ninety days before the date of the issue of the prospectus shall be appended to the prospectus ; and]

(g) the amount (if any) paid or payable as purchase-money in cash, shares or debentures, for any such property as aforesaid, specifying the amount (if any) payable for good will ; and

(h) the amount (if any) paid within the two preceding years or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in or debentures of, the company, ²[or as discount in respect of shares issued, showing separately the amount if any, so paid to the managing agents] : Provided that it shall not be necessary to state the commission payable to sub-underwriters ; and

(i) the amount or estimated amount of preliminary expenses ; and

(k) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment ; and

(l) the dates of, and parties to, every material contract ³[including contracts relating to the acquisition of property to which clause (f) applies] and a reasonable time and place at which any material contract or a copy thereof may be inspected : Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract ³[(except a contract appointing or fixing the remuneration of a managing director or managing agent)] entered into more than two years before the date of issue of the prospectus ; and

(m) the names and addresses of the auditors (if any) of the company ; and

(n) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company ; and

(o) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by, ³[and the rights in

LEG. REF.

¹ This clause was inserted by S. 50 of Act XXII of 1936.

² These words were substituted for the words

" or at the rate of any such commission," *ibid.*

³ These words were inserted by S. 50, Act XXII of 1936.

respect of capital and dividends attached to], the several classes of shares respectively ; ¹[and]

²[(p) where the articles of the company impose any restrictions upon the members of the company in respect of the right to attend, speak or vote at meetings of the company or of the right to transfer shares, or upon the directors of the company in respect of their powers of management, the nature and extent of those restrictions ;] ³[and]

⁴[(q) where any part of the sums required for the matters set out in sub-section (2) of section 101 is to be provided out of sources other than share capital particulars of the amount to be so provided and the sources thereof.]

⁵[(1-A) Where the prospectus is issued by a company which has been carrying on business prior to the issue thereof, the prospectus shall set out the following reports in addition to the matters referred to in sub-section (1), namely :—

(i) a report by the auditors of the company with respect to the profits of the company including its subsidiary companies, if any, so far as the information is available in each of the three financial years immediately preceding the issue of the prospectus, and with respect to the rates of the dividends, if any, paid by the company on each class of shares in the company for each of the said three years giving particulars of each such class of shares on which such dividends have been paid and the source from which the dividends have been paid and particulars of the cases in which no dividends have been paid on any class of shares for any of those years, and if no accounts have been made up for any part of a period of three years ending on a date three months before the issue of the prospectus, containing a statement of that fact ;

(ii) if the proceeds or any part of the proceeds of the issue of the shares or debentures are or is to be applied directly or indirectly in the purchase of any business, a report made by an accountant or accountants holding the certificate referred to in section 144 who shall be named in the prospectus upon the profits of the business in respect of each of the three financial years immediately preceding the issue of the prospectus :

Provided that, if, in the case of a company which has been carrying on business for less than three years, the accounts of the company have been made up only in respect of two years or any shorter period, this sub-section shall have effect as if references to two years or such shorter period were substituted for references to three years.]

⁶[(1-B) The statement referred to in clause (ff) of sub-section (1) and the report referred to in sub-section (1-A) with respect to the profits of a company or business shall show clearly the trading results and all charges and expenses incidental thereto excluding income or profits having no relation to the trading for the period covered and excluding also items of profit or income of a non-recurring nature but including amounts appropriated from profits to such purposes as payment of taxation or reserves.]

⁶[* * * * *]

(2) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum, or the signatories thereto, and the number of shares subscribed for by them.

(3) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons.

(4) The requirements of this section as to the memorandum and the qualification, remuneration and interest of directors, the names, descriptions and addresses

LEG. REF.

¹ This word was added by Act XXII of 1936.

² This clause was inserted *ibid*.

³ This word was inserted by S. 2 and Sch. I of Act XX of 1937.

⁴ This clause was inserted by S. 2 and Sch. I

of Act XX of 1937.

⁵ This sub-section was inserted by S. 50 of Act XXII of 1936.

⁶ Sub-s. (1-C) was omitted by S. 3 and Sch. II of Act XX of 1937.

of directors or proposed directors, and of managers or proposed managers, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business.

¹[Provided that the said requirements, except the requirement as to the amount or estimated amount of preliminary expenses shall apply to a prospectus filed in pursuance of section 154.]

(5) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section.

94. For the purposes of section 93 every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case, where—

(a) the purchase-money is not fully paid at the date of issue of the prospectus ; or

(b) the purchase-money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus ; or

(c) the contract depends for its validity or fulfilment on the result of that issue.

95. Where any of the property to be acquired by the company is to be taken on lease, section 93 shall apply as if the expression “vendor” included the lessor, and the expression “purchase-money” included the consideration for the lease, and the expression “sub-purchaser” included a sub-lessee.

96. ²[(1)]Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirements of section 93, or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus, shall be void.

²[(2) It shall not be lawful to issue any form of application for the shares in or debentures of a company unless the form is issued with a prospectus which complies with the requirements of section 93 :

Provided that this sub-section shall not apply if it is shown that the form of application was issued either—

(a) in connection with a *bona fide* invitation to a person to enter into an underwriting agreement with respect to the shares or debentures ; or

(b) in relation to shares or debentures which were not offered to the public.

If any person acts in contravention of the provisions of this sub-section, he shall be liable to a fine not exceeding five hundred rupees.]

LEG. REF.

¹ This proviso was added by S. 50 of Act XXII of 1936.

² S. 96 was re-numbered as sub-S. (1) of that section and sub-S. (2) was added by S. 51 of Act XXII of 1936.

NOTES.

Sec. 96.—This section has been amended by Act XXII of 1936. The amendment

makes it unlawful now to issue any form of application for shares in or debentures of a company unless the form is issued with a proper prospectus, and a penalty is provided for any contravention of this requirement. Exception, however, is made in the proviso in the case of *bona fide* invitation to an underwriting agreement and with reference to shares or debentures not offered to the public.

97. ¹[(1) If prospectus is issued which does not comply with the provisions of section 93, every person who is knowingly responsible for the issue of such prospectus shall be liable to a fine not exceeding fifty rupees for every day from the day of the issue of the prospectus until a copy complying with the requirements of section 93 is filed.]

¹[(2)] In the event of non-compliance with ²[or contravention of] any of the requirements of section 93, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance ²[or contravention] if he proves that—

(a) as regards any matter not disclosed, he was not cognisant thereof; or

(b) the non-compliance ²[or contravention] arose from an honest mistake of fact on his part; ³[or]

³[(3) the non-compliance or contravention was in respect of matters which in the opinion of the Court were immaterial, or was otherwise such as ought in the opinion of the Court having regard to all the circumstances of the case reasonably to be excused:]

Provided that, in the event, of non-compliance with ²[or contravention of] the requirements contained in clause (n) of sub-section (1) of section 93, no such director or other person shall incur any liability in respect of the non-compliance ²[or contravention] unless it be proved that he had knowledge of the matters not disclosed.

98. (1) A company which does not issue a prospectus on or with reference to its formation shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars ⁴[set out in the form marked I in the Second Schedule].

(2) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act or, in so far as it relates to the allotment of shares to a company limited by guarantee and not having a share capital.

⁵[98-A. (1) Where a company allots or agrees to allot any shares in or

LEG. REF.

¹ The original S. 97 was re-numbered as sub-S. (2) of that section and sub-S. (1) was inserted by S. 52 of Act XXII of 1936.

² These words were inserted, *ibid.*

³ The word "or" and Cl. (c) were inserted, *ibid.*

⁴ These words were substituted for the words "set out in the Second Schedule" by S. 53, *ibid.*

⁵ This section was inserted by S. 54 of Act XXII of 1936.

NOTES.

Sec. 97: AMENDMENTS BY ACT XXII OF 1936.—The original section has been altered as sub-section (2) of this section, with some amendment and addition of clause (c). Sub-section (1) of this section has been newly inserted. The words "or contravention" found in the present sub-section (2) have been newly added and so also clause (c). The present sub-section (1) has been inserted with a view to provide a penalty for the

issue of prospectus which fails to comply with the provisions of S. 93.

Sec. 98: AMENDMENT BY ACT XXII OF 1936.—In sub-section (1) for the former words "in the second schedule" the words "in the form marked I in the second schedule" have been substituted by the Amending Act. This amendment is consequential on the alteration now made in the second Schedule of this Act.

Sec. 98-A: AMENDMENT BY ACT XXII OF 1936.—This section has been newly introduced, with a view to escape the stringent rules regarding the issue and the contents of a prospectus. What certain companies were previously doing was to sell their shares or debentures to a purchaser, and to cause the purchaser to offer the same for sale to the public. Such a purchaser not being a person who was or had been engaged or interested in the formation of the company, the offer for sale to the public

Document offering shares or debentures for sale to be deemed a prospectus.

debentures of the company with a view to all or any of those shares or debentures being offered for sale to the public, any document by which the offer for sale to the public is made shall for all purposes be deemed to be a prospectus issued by the company and all enactments and rules of law as to the contents of prospectuses and to liability in respect of statements in and omissions from prospectuses or otherwise relating to prospectuses shall apply and have effect accordingly as if the shares or debentures have been offered to the public for subscription and as if persons accepting the offer in respect of any shares or debentures were subscribers for those shares or debentures but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of mis-statements contained in the document or otherwise in respect thereof.

(2) For the purposes of this Act it shall, unless the contrary is proved, be evidence that an allotment of or an agreement to allot shares or debentures was made with a view to the shares or debentures being offered for sale to the public, if it is shown—

(a) that an offer of the shares or debentures or of any of them for sale to the public was made within six months after the allotment or agreement to allot; or

(b) that at the date when the offer was made the whole of the consideration to be received by the company in respect of the shares or debentures had not been so received.

(3) Section 97 shall apply to the person or persons making the offer as though they were persons named in a prospectus as directors of a company, and the provisions of section 93 shall have effect as if it is required a prospectus to state, in addition to the matters required by that section to be stated in a prospectus,—

(a) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates, and

(b) the place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected.

(4) Where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the document aforesaid is signed on behalf of the company or firm by all directors of the company or not less than half of the partners, as the case may be, and any such director or partner may sign by his agent authorised in writing.]

Restriction on alteration of terms mentioned in prospectus or statement in lieu of prospectus.

99. A company shall not, at any time, vary the terms of contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of the company in general meeting.

100. (1) Where a prospectus invites persons to subscribe for shares in or debentures of a company, every person who is a director of the company at the time of the issue of the prospectus and every person who has authorised the naming of himself and is named in the prospectus as a director or as having agreed to become

Liability for statements in prospectus.

NOTES.

made by him did not strictly come under the term "prospectus". By this means, unscrupulous companies successfully managed to evade the provisions of the Act relating to the prospectus. With a view to avert this mischief and fraud, this section has been enacted. This section introduces S. 38 of the English Act, and renders every document containing an offer of shares subject to the provisions of the Act regarding "prospectus" and thereby renders the evasion of

the rules impossible.

Sec. 100: "REASONABLE PUBLIC NOTICE".—Under S. 101 (1), it is immaterial whether the director sees the prospectus or not; and he is liable if he authorizes the issue of a false prospectus. 67 M.L.J. 437=40 L.W. 519=1934 M. 641.

SOME DIRECTORS RETIRING BEFORE ALLOTMENT.—Where before allotment of shares in a limited company two of the directors mentioned in the prospectus retired, and the fact of retirement was not communicated

a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorised the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for all loss or damage they may have sustained by reason of any misleading or untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

(a) with respect to every misleading or untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that he had reasonable ground to believe and did up to the time of the allotment of the shares or debentures, as the case may be, believe that the statement fairly represented the facts or was true ;

(b) with respect to every misleading or untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation : Provided that the director, person named as director, promoter or person who authorised the issue of the prospectus shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report or valuation was competent to make it ; and

(c) with respect to every misleading or untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document : or unless it is proved—

(i) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent ; or

(ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent ; or

(iii) that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any misleading or untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.

(2) Where a company existing at the commencement of this Act has issued shares or debentures, and for the purpose of obtaining further capital by subscriptions for shares or debentures issues a prospectus, a director shall not be liable in respect of any statement therein unless he has authorised the issue of the prospectus, or has adopted or ratified it.

(3) Where the prospectus contains the name of a person as director of the company, or as having agreed to become a director thereof, and he has not consented to become a director or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorised the issue thereof, shall be liable to indemnify the person named as aforesaid against all damages, costs and expenses to which he may be made liable by reason of his name having been inserted in the prospectus or in defending himself against any suit or legal proceedings brought against him in respect thereof.

NOTES.

to the allottee; the latter would be entitled to rescind the contract of allotment and claim a refund of the monies paid by him. 32 L.W. 108=124 I.C. 193=1930 M. 325. The fact that subsequent to the formation of the company after allotment, there is every

likelihood of a change in the directorate has no bearing at all on the question, because until allotment of the shares, the allottee has a right to withdraw his offer; if there should be any breach in the terms of the contract published in the prospectus. 1930 M. 325.

(4) Every person who, by reason of his being a director or named as a director, or as having agreed to become a director, of his having authorised the issue of the prospectus, becomes liable to make any payment under this section, may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

(5) For the purposes of this section—

(a) the expression “promoter” means a promoter who was a party to the preparation of the prospectus, or the portion thereof containing the misleading or untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company ;

(b) the expression “expert” includes engineer, valuer, accountant, and any other person whose profession gives authority to a statement made by him.

Allotment.

101. ¹[(1) No allotment shall be made of any share capital of a company offered to the public for subscription unless the amount stated in the prospectus as the minimum amount which in the opinion of the directors must be raised by the issue of share capital in order to provide the sums or, if any part thereof is to be defrayed in any other manner, the balance of the sum required to be provided in respect of the matters specified in sub-section (2) has been subscribed, and the sum of at least five per cent. thereof has been paid to or received in cash by the company.]

¹[(2) The matters for which provision for the raising of a minimum amount of share capital must be made by the directors are the following, namely :—

(a) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue ;

(b) any preliminary expenses payable by the company and any commission so payable to any person in consideration of his agreeing to subscribe for or of his procuring or agreeing to procure subscriptions for any shares in the company ;

(c) the repayment of any moneys borrowed by the company in respect of any of the foregoing matters, and

LEG. REF.

¹ This sub-section was substituted by S. 55 of Act XXII of 1936.

NOTES.

Sec. 101: AMENDMENT BY ACT XXII OF 1936.—The present sub-Ss. (1), (2) and (2-A) have been substituted in the place of the old sub-Ss. (1) and (2). The amendment introduces the provisions of S. 39 of the English Act, and is aimed at discouraging floatation of companies with insufficient capital. Under sub-Ss. (1) and (2), as they stood previously, it was possible for mushroom companies to be formed with large authorized capital of which very little used to be subscribed. By providing for a nominal amount as “the minimum subscription” they were enabled to commence business almost immediately after incorporation and to exercise their borrowing powers. Their activities were frequently of a questionable character and they invariably came to grief within a very short time. When the crash came the creditors usually found themselves in a hopeless position. The existence of such companies was a source of considerable danger to the com-

mercial world, and caused immense damage to the growth of genuine companies. There has been an unanimous demand from all quarters for adequate legislation to prevent the formation of such companies. Several remedies were suggested, and the legislature has finally adopted the provisions contained in the amended sub-Ss. (1), (2) and (2-A) of this section.

(ii) Sub-Ss. (2-B) and (2-C) have also been inserted by the Amending Act XXII of 1936. (2-B) provides for the monies received in respect of shares to be kept deposited in Bank until the certificate to commence business has been granted, or until returned under the provisions of sub-S. (4).

APPLICATION MONEY NOT PAID—ALLOTMENT OF SHARES—POWER OF DIRECTOR.—S. 101 does not forbid the directors to allot shares to applicants who neglect to pay the application money in terms of the prospectus once the first allotment has been regularly made, although it may be that a provision in a prospectus empowering them to do this would be an infringement of the Act. I.L.R. (1939) 2 Cal. 512=1940 Cal. 164.

(d) working capital.]

¹[(2-A) The amount referred to in sub-section (1) as the amount stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is in this Act referred to as the minimum subscription.]

¹[(2-B) All moneys received from applicants for shares shall be deposited and kept in a scheduled bank as defined in the Reserve Bank of India Act, 1934, until returned in accordance with the provisions of sub-section (4) or until the certificate to commence business is obtained under section 103.]

¹[(2-C) In the event of any contravention of the provisions of sub-section (2-B) every promoter, director or other person knowingly responsible for such contravention shall be liable to a fine not exceeding five hundred rupees.]

(3) The amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share.

(4) If the conditions aforesaid have not been complied with on the expiration of one hundred and ²[eighty] days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and, if any such money is not so repaid within one hundred and ³[ninety] days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of seven per cent. per annum from the expiration of the one hundred and ⁴[ninetieth] day : Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.

(5) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

(6) This section, except sub-section (3) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.

(7) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription (that is to say)—

(a) the amount (if any) fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment ; or

LEG. REF.

¹ This sub-section was substituted by S. 55 of Act XXII of 1936.

² This word was substituted for the word "twenty", *ibid.*

³ This word was substituted for the word "thirty", *ibid.*

⁴ This word was substituted for the word "thirtieth," *ibid.*

NOTES.

Sec. 101, Sub-Sec. (3): APPLICATION OF.—Sub-S. (3) is applicable to all allotments of shares whether at the time of the floating of the company or any subsequent period. Any allotment which is made without payment of at least 5 per cent. of the nominal value of the shares by the applicant is, therefore, invalid. 161 I.C. 952; 154 I.C. 33=1934 A. 855. The directors who make such allotment would be guilty of misfeasance. (*Ibid.*) Sub-S. (3) to S. 101 lays down a mandatory requirement. The applicant for a share is under a statutory obligation to pay 5 per cent. of the nominal amount of the share along with his application, and the company is also under the

obligation to see that he does so, and it is against public policy that any allotment should be made without compliance with this requirement. That being so a company should not be allowed to take advantage of its own wrongdoing and neglect of the provisions of the Act by demanding the share money subsequently. 1939 Nag. 225 = I.L.R. (1941) Nag. 567. As to the liability of directors in respect of misfeasance, see S. 235, *infra*.

ALLOTMENT, WHEN VALID.—An allotment of shares must be made within a reasonable time, and a shareholder is not bound to accept an allotment made after inordinate delay. 36 Bom.L.R. 32=1934 B. 97. *R* applied for shares on 10th August, 1930, and a sum of Rs. 250 was paid along with the application. The allotment was said to have been made on 17th October, 1931. A letter was also issued to *R* on 2nd March, 1932, asking him to pay allotment money as well as the call money and the company resolved to go into liquidation on 3rd March, 1932, *held*, that *R* was not the purchaser of the shares of the company since shares were not allotted to him till, 17th October, 1931.

(b) if no amount is so fixed and named, the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash ;

has been subscribed and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company.

(8) Sub-section (7) shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act.

102. (1) An allotment made by a company to an applicant in contravention of the provisions of ¹[section 98 or section 101] shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later ²[or in any case where the company is not required to hold a statutory meeting or where the allotment is made after the holding of the statutory meeting within one month after the date of the allotment and not later), and shall be so voidable notwithstanding that the company is in course of being wound up.

Effect of irregular allotment.

(2) If any director of a company knowingly contravenes or permits or authorises the contravention of any of the provisions of ¹[section 98 or section 101] with respect to allotment, he shall be liable to compensate the company and the allottee respectively for any loss, damages or costs which the company or the allottee may have sustained or incurred thereby : Provided that proceedings to recover any such loss, damages or costs shall not be commenced after the expiration of two years from the date of the allotment.

Restrictions on commencement of business.

103. (1) A company shall not commence any business or exercise any borrowing powers unless—

(a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and

(b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription or, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash ; and

(c) there has been filed with the registrar a duly verified declaration by the secretary or one of the directors in the prescribed form, that the aforesaid conditions have been complied with ; and

(d) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the registrar a statement in lieu of prospectus.

LEG. REF.

¹ These words and figures were substituted for the word and figure "section 101" by S. 7 of Act II of 1938.

² These words were inserted by S. 56 of Act XXII of 1936.

NOTES.

and also because no notice of allotment was sent to, R. 161 I.C. 294=1936 L. 16.

Sec. 102: AMENDMENT BY ACT XXII OF 1936.—The words "or in any case . . . and not later" have been inserted by Act XXII of 1936. The reason for this amendment is that it supplies an obvious omission.

ALLOTMENT OF SHARES.—An allotment of shares by the Secretary and Treasurer would be valid if the articles, without specially providing for allotment by directors, pro-

vide that the general management should be by the Secretary and Treasurer, subject to the directors' supervision. 26 I.C. 349. Where one or more directors make an allotment of shares, without being duly empowered for the purpose, the allotment would be invalid, and the allottee could revoke his application for allotment of shares before any valid allotment or proper ratification is made. 51 I.C. 812; 1 L.L.J. 1.

Sec. 103: FAILURE TO PAY FOR SHARES BY DIRECTORS.—IF RENDERS SHARES LIABLE TO FORFEITURE.—Where the directors who have signed the articles of association and memorandum undertaking to take a certain number of shares and pay for them, fail to pay for them, it does not necessarily follow that they are liable to forfeiture of their shares. 1939 A.L.J. 950=1939 All. 739.

(2) The registrar shall, on the filing of a duly verified declaration, in accordance with the provisions of this section certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled :

Provided that, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, the registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him.

(3) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(4) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures.

(5) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding five hundred rupees for every day during which the contravention continues.

(6) Nothing in this section shall apply to a private company, or to a company registered before the commencement of this Act which does not issue a prospectus inviting the public to subscribe for its shares or, in so far as its provisions relate to shares, to a company limited by guarantee and not having a share capital.

104. (1) Whenever a company having a share capital makes any allotment of its shares, the company shall, within one month thereafter,—

Return as to allotments.

(a) file with the registrar a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and descriptions of the allottees, and the amount (if any) paid or due and payable on each share ; and

(b) in the case of shares allotted as fully or partly paid up otherwise than in cash, produce for the inspection and examination of the registrar a contract in

NOTES.

Sec. 104.—Contract relating to allotment of shares—Statement in Form VII filed before Registrar—Nature of—Not conveyance. It is liable to stamp duty only as an agreement. 167 I.C. 513=1937 M. 259=(1937) 1 M.L.J. 108 (F.B.). See also 39 P.L.R. 293, cited under S. 29.

AMENDMENT BY ACT XXII OF 1936.—Sub-section (4) has been newly added so as to exclude forfeited shares subsequently re-issued from the purview of the section.

SHARE ALLOTTED AS FULLY PAID UP, OTHERWISE THAN IN CASH.—As to a case where on a construction of a debenture deed, it was held that the share allotted was allotted as fully paid up otherwise than in cash. See 41 M. 307=33 M.L.J. 474=42 I. C. 674.

"CONSTITUTING THE TITLE OF THE ALLOTTEE".—Ratification of a previous contract with vendors of business by the Board of Directors cannot be described as a contract in writing constituting the title of the allottee within the meaning of S. 104 (1) (b). 23 L.W. 571=1926 M.W.N. 6=94 I.C. 892=1926 M. 380.

"ONE MONTH".—The Registrar should file the document even when it is presented beyond time; and should inform the officer of the company that unless, within a time to

be specified by the Registrar, he obtains an order from the Court extending the time up to the date of filing, he will take steps to prosecute him for the default. 56 C. 976=122 I.C. 214=1930 C. 146.

FAILURE TO FILE AGREEMENT, EFFECT OF.—The only consequence of a failure to file the agreement under this section, is the penalty provided in sub-section (3). 48 A. 503=24 A.L.J. 576=1926 A. 524. Ignorance of law will not excuse default. 52 I.C. 885.

STAMP DUTY.—An agreement for the allotment of shares by a company *in future*, need not be stamped as a "conveyance". 1932 A.L.J. 394=137 I.C. 337=1932 A. 291. Nor need the prescribed particulars furnished to the Registrar in respect of such an agreement require to be stamped as a 'conveyance'. 15 L. 501=1934 L. 530. Where 200 shares had been allotted in consideration of a written agreement as regards the transfer of a business and the company submitted a return as to allotment in Form No. 6, accompanied by the agreement which formed the consideration for the allotment of the 200 shares, it was held that the agreement did not constitute a conveyance, and that it was liable to a stamp duty of Re. 1 only, and that the fact that the agreement was in writing was immaterial. 15 L. 509=1934 L. 533.

writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and file with the registrar copies verified in the prescribed manner of all such contracts and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

(2) Where such a contract as above mentioned is not reduced to writing, the company shall, within one month after the allotment, file with the registrar the prescribed particulars of the contract stamped with the same stamp-duty as would have been payable if the contract had been reduced to writing, and these particulars shall be deemed to be an instrument within the meaning of the Indian Stamp Act, 1889, and the registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjudicated under section 31 of that Act.

¹[(2 A) If the registrar is satisfied that in the circumstances of any particular case the period of one month specified in sub-sections (1) and (2) for compliance with the requirements of this section is inadequate, he may extend that period as he thinks fit, and, if he does so, the provisions of sub-sections (1) and (2) shall have effect in that particular case as if for the said period of one month the extended period allowed by the registrar were substituted].

(3) If default is made in complying with the requirements of this section, every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding five hundred rupees for every day during which the default continues :

Provided that, in case of default in filing with the registrar ²[within the time specified in sub-section (1) & (2)] any document required to be filed by this section, the company, or any person liable for the default, may apply to the Court for relief, and the Court, if satisfied that the omission to file the document was accidental or due to inadvertence or that on other grounds it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such a period as the Court may think proper.

³[(4) Nothing in this section shall apply to the issue and allotment by a company of shares which under the provisions of its articles were forfeited for non-payment of calls.]

Commissions and Discounts.

105. (1) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, payment of the commission is authorised by the articles and the commission paid or agreed to be paid does not exceed the amount or rate so authorised and if the amount or rate per cent. of the commission paid or agreed to be paid is—

Power to pay certain commissions and prohibition of payment of all other commissions, discounts, etc.

(a) in the case of shares offered to the public for subscription, disclosed in the prospectus ; or

(b) in the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar and where a circular or notice, not being a prospectus inviting subscription for the shares is issued, also disclosed in that circular or notice.

(2) Save as aforesaid ⁴[and save as provided in section 105-A,] no company

LEG. REF.

¹ Sub-S. 2-A of S. 104 added by Act XXVI of 1941.

² Substituted by Act XXVI of 1941.

³ This sub-section was added by S. 57 of Act XXII of 1936.

⁴ These words were inserted by S. 58 of Act XXII of 1936.

NOTES.

Sec. 105: AMENDMENT BY ACT XXII OF 1936.—In sub-section (2), after the words "as aforesaid" the words "and save as provided in S. 105-A" have been added consequent on the introduction of the new section 105-A by this Amending Act.

shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase-money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase-money or contract price, or otherwise.

(3) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay, and a vendor to, promoter of, or other person who receives payment in money or shares from, a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section.

Power to issue shares at a discount. ¹[105-A. (1) Subject to the provisions of this section, it shall be lawful for a company to issue at a discount shares in the company of a class already issued :

Provided that—

(a) the issue of the shares at a discount must be authorised by resolution passed in general meeting of the company and must be sanctioned by the Court;

(b) the resolution must specify the maximum rate of discount (not exceeding ten per cent. in any case) at which shares are to be issued ;

(c) not less than one year must at the date of issue have elapsed since the date on which the company was entitled to commence business ;

(d) the shares to be issued at a discount must be issued within six months after the date on which the issue is sanctioned by the Court or within such extended time as the Court may allow.

(2) Every prospectus relating to the issue of the shares and every balance-sheet issued by the company subsequently to the issue of the shares must contain particulars of the discount allowed on the issue of the shares or of so much of that discount as has not been written off at the date of the issue of the document in question.

(3) If default is made in complying with sub-section (2), the company and every officer of the company who is in default shall be liable to a fine not exceeding fifty rupees.]

Issue of redeemable preference shares. ¹[105-B. (1) Subject to the provisions of this section, a company limited by shares may, if so authorised by its articles, issue preference shares which are, or at the option of the company are to be, liable to be redeemed.

LEG. REF.

¹ This section was inserted by S. 59 of Act XXII of 1936.

NOTES.

Sec. 105-A: AMENDMENT BY ACT XXII OF 1936.—This section is new. Before this amendment, the issue of shares at a discount was not allowed. It was thought desirable to legalise the issue of shares at a discount with a view to helping companies which have failed to attract subscribers. S. 47 of the English Act has been adopted in this respect, with necessary modifications suitable to the circumstances of this country.

Sec. 105-B: AMENDMENT BY ACT XXII OF 1936.—This section has been newly added by Act XXII of 1936. Under the Act as it previously stood, there was no provision for issuing any redeemable preference shares.

The needs of modern times, however, require that companies should have the power to issue such shares. It was found to be very useful in England and it was thought desirable to introduce the provisions of S. 46 of the English Act, in this respect, with proper modifications and necessary safeguards in this country also.

PREFERENCE SHARE-HOLDERS—RIGHTS OF—ARREARS OF PREFERENTIAL DIVIDENDS—PAYMENT OF.—It was provided by the Memorandum of Association of a company that the preference shares should rank both as regards dividend and capital in priority to the ordinary shares. The articles of association provided that preference shareholders should receive out of the profits of the company, if any, as a first charge thereon, a cumulative preferential dividend of 7 per

Provided that—

(a) no such shares shall be redeemed except out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption or out of sale proceeds of any property of the company ;

(b) no such shares shall be redeemed unless they are fully paid ;

(c) where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall out of profits which would otherwise have been available for dividend be transferred to a reserve fund, to be called " the capital redemption reserve fund," a sum equal to the amount applied in redeeming the shares, and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the capital redemption reserve fund were paid-up share capital of the company ;

(d) where any such shares are redeemed out of the proceeds of a fresh issue, the premium, if any, payable on redemption must have been provided for out of the profits of the company before the shares are redeemed.

(2) There shall be included in every balance-sheet of a company which has issued redeemable preference shares a statement specifying what part of the issued capital of the company consists of such shares and the date on or before which those shares are, or are to be, liable to be redeemed or, where no definite date is fixed for redemption, the period of notice to be given for redemption.

If a company fails to comply with the provisions of this sub-section, the company and every officer of the company who is in default shall be liable to a fine not exceeding one thousand rupees.

(3) Subject to the provisions of this section, the redemption of preference shares thereunder may be effected on such terms and in such manner as may be provided by the articles of the company.

(4) Where in pursuance of this section a company has redeemed or is about to redeem any preference shares, it shall have power to issue shares up to the nominal amount of the shares redeemed or to be redeemed as if those shares had never been issued, and accordingly the share capital of the company shall not for the purpose of calculating the fees payable under section 249 be deemed to be increased by the issues of shares in pursuance of this sub-section :

Provided that, where new shares are issued before the redemption of the old shares, the new shares shall not, so far as relates to stamp duty, be deemed to have been issued in pursuance of this sub-section unless the old shares are redeemed within one month after the issue of the new shares.

(5) Where new shares have been issued in pursuance of the last foregoing sub-section, the capital redemption reserve fund may, notwithstanding anything in this section, be applied by the company, up to an amount equal to the nominal

NOTES.

cent. per annum on the paid up amount of the preference shares held by them, and subject to the rights of the preference shareholders, the surplus profits should be divided among the holders of the ordinary shares. There was also a further provision that if the company should be wound up, the surplus assets should be applied in the first place, in repaying to the holders of preference shares the amount paid up thereon, and the residue should belong to the holders of ordinary shares. The company was wound up voluntarily, and no dividend on preference shares had been declared or paid for several years prior to the winding up. It was

held, (i) that the surplus assets must be applied in the first place in repaying to the holders of preference shares the amount paid up thereon and the residue belonged to the holders of the ordinary shares; (ii) that the arrears of preferential dividends could not be treated as "debts" and therefore to be paid out of the assets of the company before the "surplus assets" were ascertained. I.L.R. (1938) 2 Cal. 533=1939 Cal. 126. Preference shares not free from income-tax—Dividend at seven and half per cent. subject to tax—Right of company to deduct tax when no tax payable by company. See I.L.R. (1940) Bom. 165=42 Bom.L.R. 57=1940 Bom. 97 (F.B.).

amount of the shares so issued, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.]

¹[105-C. Where the directors decide to increase the capital of the company by the issue of further shares such shares shall be offered to the members in proportion to the existing shares held by each member (irrespective of class) and such offer shall be made by notice specifying the number of shares to which the member is entitled and limiting a time within which the offer if not accepted, will be deemed to be declined; and after the expiration of such time, or on receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company.]

106. Where a company has paid any sums by way of commission in respect of any shares or debentures or allowed any sums by way of discount in respect of any debentures, the total amount so paid or allowed or so much thereof as has not been written off, shall be stated in every balance-sheet of the company until the whole amount thereof has been written off.

Payment of Interest out of Capital.

107. Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for the time being paid up for the period and subject to the conditions and restrictions in this section mentioned and may charge the same to capital as part of the cost of construction of the work or building, or the provision of plant:

Provided that—

(1) no such payment shall be made unless the same is authorised by the articles or by special resolution;

(2) no such payment, whether authorised by the articles or by special resolution, shall be made without the previous sanction of the ²[Central Government] which sanction shall be conclusive evidence for the purposes of this section that the shares of the company in respect of which such sanction is given, have been issued for a purpose specified in this section;

(3) before sanctioning any such payment, the ²[Central Government] may at the expense of the company, appoint a person to inquire and report to ³[the Central Government] as to the circumstances of the case, and may, before making the appointment, require the company to give security for the payment of the costs of the inquiry;

(4) the payment shall be made only for such period as may be determined by the ²[Central Government]; and such period shall in no case extend beyond the close of the half-year next after the half-year during which the works or buildings have been actually completed or the plant provided;

(5) the rate of interest shall in no case exceed four per cent. per annum or such lower rate as the Central Government may, by notification in the Official Gazette, prescribe;

LEG. REF.

¹ This section was inserted by S. 59 of Act XXII of 1936.

² These words were substituted for the words "Local Government" by A.O., 1937.

³ These words were substituted for the words "such Central Government" by S. 2 and Sch. I of Act XXXIV of 1939.

NOTES.

Sec. 105-C: AMENDMENT BY ACT XXII OF 1936.—This section has been added by Act XXII of 1936. This provides that the first choice to take up any further issue of shares on an increase of the capital should be given to the existing members in the proportion of shares already held by them.

(6) the payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid ;

(7) the accounts of the company shall show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate ;

(8) nothing in this section shall affect any company to which the Indian Railway Companies Act, 1895, or the Indian Tramways Act, 1902, applies.

Certificates of Shares, etc.

108. (1) Every company shall, within three months after the allotment of any of its shares, debentures or debenture stock, and within three months after the registration of the transfer of any such shares, debentures or debenture stock, complete and have ready for delivery the certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures or debenture stock otherwise provide.

(2) If default is made in complying with the requirements of this section, the company, and every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

Information as to Mortgages, Charges, etc.

Certain mortgages and charges to be void if not registered.

109. ¹[(1)] Every mortgage or charge created after the commencement of this Act by a company and being either—

LEG. REF.

¹ S. 109 was re-numbered as sub-S. (1) of that section by S. 60 of Act XXII of 1936.

NOTES.

Sec. 109: AMENDMENTS BY ACT XXII OF 1936.—Under the Act before the amendment, a charge or mortgage created over movable property of the company other than book debts or the uncalled share capital need not be registered. The insertion of the present Cl. (e) to sub-S. (1) requires such charges or mortgages to be registered with certain qualifications. The insertion of sub-S. (2) is designed to affect transferees with notice as from the date of registration.

APPLICATION AND SCOPE.—This section applies to a mortgage or charge created by the company by contract and not to a charge arising by operation of law. 2 Luck. 299 = 99 I.C. 483 = 1927 O. 55. Proviso (iv) to sub-S. (1) means merely that a mortgage or a charge granted by a company is not to be deemed to be an interest in immovable property simply because it comprises or takes effect over debentures held by the company and such debentures constitute a charge on the immovable property of the company issuing the same. 57 C. 328 = 34 C.W.N. 605 = 1930 C. 536. As to whether and when such debentures require registration under the Indian Registration Act, S. 17, see 58 C. 136 = 1931 C. 223; 59 C. 377 = 58 I.A. 323 = 35 C.W.N. 1034 = 61 M.L.J. 589 (P.C.). The purpose effected by registration under this section is only the prevention of a party from setting up forged

and false instruments, and this registration does not affect the provisions of the Registration Act regarding the necessity for registration of any document under S. 17 of that Act, or regarding the priority given to registered documents under S. 48 of that Act. 58 C. 136 = 34 C.W.N. 405 = 1931 C. 223.

EFFECT OF DELAYED REGISTRATION.—A mortgage registered within 21 days under this section has priority over a prior mortgage registered subsequently under an order of extension by the High Court. (1915) 1 Ch. 643; 102 I.C. 592 = 1927 O. 300. The company itself while it is a going concern cannot repudiate its mortgage on the ground of want of registration under this section. 5 R. 585 = 104 I.C. 326 = 1927 R. 288.

MORTGAGE NOT REGISTERED NOT INVALID ALTOGETHER.—The section does not avoid absolutely the mortgage which is not registered under the section, but it does only so far as any security is given thereby on the company's property or undertaking. The effect therefore is that if a mortgage is not registered, it is valid as an admission of debt, but as against a creditor or a liquidator it could not be said that a valid charge on the company's property had been created. 57 I.A. 76 = 5 Luck. 128 = 1930 P.C. 66 = 59 M.L.J. 540 (P.C.). An instrument creating charge on the property of a corporation, if not registered with the Registrar as provided by S. 109, is void as against the Official Receiver. 181 I.C. 681 = 1939 Sind 100.

- (a) a mortgage or charge for the purpose of securing any issue of debentures ;
 or
 (b) a mortgage or charge on uncalled share capital of the company ; or
 (c) a mortgage or charge on any immovable property wherever situate,
 or any interest therein ; or
 (d) a mortgage or charge on any book debts of the company ; or
¹[(e) a mortgage or a charge, not being a pledge on any movable property
 of the company except stock-in-trade ; or]
¹[(f)] a floating charge on the undertaking or property of the company ;
 shall, so far as any security on the company's property or undertaking is thereby
 conferred, be void against the liquidator and any creditor of the company, unless
 the prescribed particulars of the mortgage or charge, together with the instrument
 (if any) by which the mortgage or charge is created or evidenced or a copy thereof
 verified in the prescribed manner are filed with the registrar for registration in
 manner required by this Act within twenty-one days after the date of its creation,

LEG. REF.

¹ This clause was inserted and the original Cl. (e) was re-lettered (f), by S. 60 of Act XXII of 1936.

NOTES.

EQUITABLE MORTGAGE.—It is necessary to file with the Registrar the particulars of a mortgage by deposit of title deeds, whether or no it is accompanied by a memorandum of deposit. 29 Bom.L.R. 253=101 I.C. 144=1927 B. 167. An assignment of a book-debt as security for an existing debt constitutes a mortgage thereof and requires registration under this section, although the transfer may be in the form of an absolute assignment. 62 C. 1=38 C.W.N. 1190=1935 C. 218.

FLOATING CHARGE, WHAT IS.—It is the essence of a floating charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes. 1936 A.L.J. 195=148 I.C. 498=1934 A. 161. A floating security is not a future security; it is a present security which presently affects all the assets of the company expressed to be included in it. On the other hand it is not a specific security. The holder cannot affirm that the assets are specially mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating charge is a present charge though it does not finally attach or crystallize upon any specific property until the happening of some event which puts an end to the right of the company to deal with the property in the course of its business. Where a debenture charged the company's properties and assets, present as well as future, and there was no stipulation to qualify the elasticity of the floating charge, it leaves the company at liberty to create specific mortgages or charges in priority to itself. In *re Florence Land Co.*, (1878) 10 Ch.D. 503; In *re Colonial Trust*, (1880) 15 Ch.D. 465. But it is not uncommon to insert in debentures words to the effect that the floating charge is not to authorize the company to create any mortgage or

charge ranking in priority to the debenture. 58 C. 136=34 C.W.N. 405=1931 C. 223. The principal tests as to whether a charge is a floating one are (1) Is it a charge upon all or a certain class of assets, present or future? (2) Would the assets charged in the ordinary course of business be changed from time to time? (3) Has the company power until such step is taken by the charges to carry on the business of the company in the ordinary way? Where a clause in an agreement was 'that the amount of security money will be the second charge on the machinery and other goods of the company', on a construction with reference to the tests laid down it was held that it amounted to a floating charge and that if not registered is void. I.L.R. (1938) All. 896=1938 A. L.J. 820=1938 All. 574. Where the assets of a corporation are of a fluctuating nature and must change from time to time in the ordinary course of business, and while taking loan creating charge on their assets, no restraint of any kind whatever is placed on the conduct of the business of the corporation, and the charge does not crystallize into a fixed security, the charge so created is a floating charge. 181 I.C. 681=1939 Sind 100. Where a deed created a charge on all assets of a company and provided that the property should be in possession and control of the lender, that the company should not alienate such property, and that in case of necessity the property may be alienated on an undertaking to replace the same by another property of equal value, it was held that the element of possession contemplated by the deed and which was actually given at the time, prevented the charge from being a purely equitable charge coming within the description of a floating charge. 54 C. 513=103 I.C. 748=1927 C. 682. Only a floating charge is created when the director of a company pledges the movable assets of the company, but remains himself in possession as agent of the pledgee, and the same would be void against the liquidator if it was not registered in accordance with S. 109. 27 Bom.L.R. 1218=91 I.C. 334=1926 B. 28.

but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section, the money secured thereby shall immediately become payable :

Provided that—

(i) in the case of a mortgage or charge created out of British India, comprising solely property situate outside British India, twenty-one days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in British India shall be substituted for twenty-one days after the date of the creation of the mortgage or charge, as the time within which the particulars and instrument or copy are to be filed with the registrar ; and

(ii) where the mortgage or charge is created in British India but comprises property outside British India, the instrument creating or purporting to create the mortgage or charge or a copy thereof verified in the prescribed manner may be filed for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate ; and

(iii) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a mortgage or charge on those book debts ; and

(iv) the holding of debentures entitling the holder to a charge on immovable property shall not be deemed to be an interest in immovable property.

¹[(2) Where any mortgage or charge on any property of a company required to be registered under this section has been so registered, any person acquiring such property or any part thereof, or any share or interest therein, shall be deemed to have notice of the said mortgage or charge as from the date of such registration.]

²[In this section ' British India ' does not include Burma or Aden, whatever the date of the mortgage or charge in question.]

³[109-A. (1) Where after the commencement of the Indian Companies (Amendment) Act, 1936, a company registered in British India acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part, the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the registrar for registration in manner required by this Act within twenty-one days after the date on which the acquisition is completed :

Provided that, if the property is situate and the charge was created outside British India, twenty-one days after the date on which the copy of the instrument could in due course of post, and if despatched with due diligence have been received in British India shall be substituted for twenty-one days after the completion of the acquisition as the time within which the particulars and the copy of the instrument are to be delivered to the registrar.

LEG. REF.

¹ This sub-section was added by S. 60 of Act XXII of 1936.

² These words were inserted by A.O., 1937.

³ This section was inserted by S. 61 of Act XXII of 1936.

NOTES.

Sec. 109-A: AMENDMENT BY ACT XXII OF 1936.—This section is new and follows

S. 81 of the English Act. It was thought anomalous that, while particulars of every charge or mortgage over its property *created by the company* should be registered, there should be no provision for the registration of the particulars of any previous charge or mortgage over the property which may be acquired by the company subject to such charge. This has been rectified by the enactment of this section.

(2) If default is made in complying with this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of five hundred rupees.]

110. Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture-holders of that series are entitled *pari passu* is created by a company, it shall be sufficient for the purposes of section 109 if there are filed with the registrar within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars :—

- (a) the total amount secured by the whole series ; and
 - (b) the dates of the resolutions authorising the issue of the series and the date of the covering deed (if any) by which the security is created or defined ; and
 - (c) a general description of the property charged ; and
 - (d) the names of the trustees (if any) for the debenture-holders :
- together with the deed or a copy thereof verified in the prescribed manner containing the charge, or if there is no such deed, one of the debentures of the series, and the registrar shall, on payment of the prescribed fee, enter those particulars in the register :

Provided that, where more than one issue is made of debentures in the series, there shall be filed with the registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

111. Where any commission, allowance or discount has been paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be filed for registration under sections 109 and 110 shall include particulars as to the amount or rate per cent. of the commission, discount or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued :

Provided that the deposit of any debentures as security for any debt of the company shall not for the purposes of this provision be treated as the issue of the debentures at a discount.

112. (1) The registrar shall keep, with respect to each company, a register in the prescribed form of all mortgages and charges created by the company after the commencement of this Act and requiring registration under section 109, and shall, on payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge.

(2) After making the entry required by sub-section (1), the registrar shall return the instrument (if any) or the verified copy thereof, as the case may be, filed in accordance with the provisions of section 109 or section 110 to the person filing the same.

(3) The register kept in pursuance of this section shall be open to inspection by any person on payment of the prescribed fee, not exceeding one rupee for each inspection.

113. The registrar shall keep a chronological index, in the prescribed form and with the prescribed particulars, of the mortgages or charges registered with him under this Act.

114. The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of section 109, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of sections 109 to 112 as to registration have been complied with.

Endorsement of certificate of registration on debenture or certificate of debenture stock.

charge so registered :

115. The company shall cause a copy of every certificate of registration given under section 114, to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or

Provided that nothing in this section shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge so given to be endorsed on any debenture or certificate of debenture stock which has been issued by the company before the mortgage or charge was created.

116. (1) It shall be the duty of the company to file with the registrar for registration the prescribed particulars of every mortgage or charge created by the company and of the issues of debentures of a series, requiring registration under section 109, but registration of any such mortgage or charge may be effected on the application of any person interested therein.

(2) Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration.

¹[(3) Whenever the terms or conditions or extent or operation of any mortgage or charge registered under this section are modified, it shall be the duty of the company to send to the registrar the particulars of such modification, and the provisions of this section as to registration of mortgage or a charge shall apply to such modification of the mortgage or charge as aforesaid.]

117. Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under section 109 to be kept at the registered office of the company: Provided that, in the case of a series of uniform debentures, a copy of one such debenture shall be sufficient.

118. (1) If any person obtains an order for the appointment of a receiver of the property of a company, or appoints such a receiver under any powers contained in any instrument, he shall, within fifteen days from the date of the order or of the appointment under the powers contained in the instrument, file notice of the fact with the registrar, and the registrar shall, on payment of the prescribed fee, enter the fact in the register of mortgages and charges.

(2) If any person makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

LEG. REF.

¹ This sub-section was added by S. 62 of Act XXII of 1936.

NOTES.

Sec. 114: POWER OF REGISTRAR TO ALTER OR CANCEL.—A debenture relating to immovable property, after registration and grant of certificate by the Registrar, cannot be altered or cancelled by the Registrar of his own accord, and even if he does so the

validity of the debenture as between the company and the debenture-holder will not be affected. 57 C. 328=127 I.C. 760=1930 C. 536.

Sec. 116: AMENDMENT BY ACT XXII OF 1936.—Sub-S. (3) which has been newly added provides for the registration of charges when modified, so that the correct state of affairs may be available at the Registrar's Office.

119. (1) Every receiver of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession, shall once in every half-year while he remains in possession, and also on ceasing to act as receiver, file with the registrar an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates, and shall, also, on ceasing to act as receiver, file with the registrar notice to that effect, and the registrar, shall enter the notice in the register of mortgages and charges.

¹[(2) Where a receiver of the property of a company has been appointed, every invoice, order for goods, or business letter issued by or on behalf of the company, or the receiver of the company, being a document on or in which the name of the company appears, shall contain a statement that a receiver has been appointed.]

¹[(3) If default is made in complying with the requirements of this section, the company and every director, manager, managing agent, secretary or other officer of the company and every receiver who knowingly and wilfully authorises or permits the default, shall be liable to a fine not exceeding two hundred rupees.]

120. ²[(1)] The Court, on being satisfied that the omission to register a mortgage or charge within the time required by section 109, or that the omission or mis-statement of any particular with respect to any such mortgage or charge ³[, or the omission to give intimation to the registrar of the payment or satisfaction of a debt for which a charge or mortgage was created] was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested and on such terms and conditions as seem to the Court just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or mis-statement be rectified, and may make such order as to the costs of the application as it thinks fit.

⁴[(2) Where the Court extends the time for the registration of a mortgage or charge, the order shall not prejudice any rights acquired in respect of the property concerned prior to the time when the mortgage or charge is actually registered.]

⁵[121. (1) It shall be the duty of the company to give intimation to the

LEG. REF.

¹ These sub-sections were substituted for the original sub-S. (2) by S. 63 of Act XXII of 1936.

² S. 120 was re-numbered as sub-S. (1) of that section by S. 64, *ibid*.

³ These words were inserted by *ibid*.

⁴ Sub-S. (2) was added by *ibid*.

⁵ This section was substituted by S. 65, *ibid*.

NOTES.

Sec. 120: AMENDMENT BY ACT XXII OF 1936.—The insertion of certain words makes sub-S. (1) now applicable also to the omissions to give intimation to Registrar of payment or satisfaction of a debt for which a charge or mortgage was created. S. 121 as it stood previously empowered Registrar on proof of satisfaction of a mortgage or charge to record satisfaction in the register. But it was not, however, obligatory on the company or the mortgagee to have such satisfaction recorded, and the records of the Registrar may accordingly remain incomplete. The insertion of sub-S. (2) and the amendments made in Ss. 121 and 122 remedy this defect.

REGISTRATION AFTER TIME, EFFECT OF.—

Sub-S. (2) protects the rights of any secured creditor whose security is registered between the expiration of the 21 days and the extended time allowed by the order, even though he has notice of the prior unregistered charge. *Re Monolithic Co.*, (1915) 1 Ch. 643. Subject to the above, the mortgage which is registered within the extended time constitutes a valid charge *ab initio* and not merely from the time of its registration. So, where a person obtains a mortgage in the intervening period specifically stating it to be a second charge, his charge will not rank in priority over the mortgage subsequently registered within the extended period. 5 Luck. 128=59 M.L.J. 540=57 I.A. 76 (P.C.).

Sec. 121: AMENDMENT BY ACT XXII OF 1936.—The old section empowered Registrar to register satisfaction of a debt secured by mortgage or charge, on proof of the same being given to his satisfaction. It laid down no obligation either on the company or on the mortgagee to record such satisfaction. The absence of any compulsory provision, and consequent failure to have satisfaction

Registration or satisfaction of mortgages and charges. registrar of the payment or satisfaction of any charge or mortgage created by the company and requiring registration under section 109 within twenty-one days from the date of the payment or satisfaction thereof.

(2) The registrar shall on receipt of such intimation cause a notice to be sent to the mortgagee calling upon him to show cause, within a time (not exceeding fourteen days) to be fixed by such notice, why the payment or satisfaction of the charge or mortgage should not be recorded.

(3) The registrar shall, if no cause is shown, order that a memorandum of satisfaction be entered on the register and shall if required furnish the company with a copy thereof.

(4) Where cause is shown, the registrar shall record a note to that effect in the register, and shall inform the company that he has done so.]

Penalties.

122. (1) If any company makes default in filing with the registrar for registration the particulars—

(a) of any mortgage or charge created by the company; or

¹[(b) of the payment or satisfaction of a debt in respect of which a mortgage or charge has been registered under section 109 or section 109-A; or]

¹[(c)] of the issues of debentures of a series, requiring registration with the registrar under the foregoing provisions of this Act, then, unless the registration has been effected on the application of some other person, the company, and every officer of the company or other person who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding five hundred rupees for every day during which the default continues.

(2) Subject as aforesaid, if any company makes default in complying with any of the requirements of this Act as to the registration with the registrar of any mortgage or charge created by the company, the company, and every officer of the company, who knowingly and wilfully authorises or permits the default shall, without prejudice to any other liability, be liable on conviction to a fine not exceeding one thousand rupees.

(3) If any person knowingly and wilfully authorises or permits the delivery of any debenture or certificate of debenture stock requiring registration with the registrar under the foregoing provisions of this Act without a copy of the certificate of registration being endorsed upon it, he shall, without prejudice to any other liability be liable on conviction to a fine not exceeding one thousand rupees.

123. (1) Every ²[*] company shall keep a register of mortgages and enter therein all mortgages and charges specifically affecting property of the company ³[and all floating charges on the undertaking or on any property of the company], giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge and (except in the case of securities to bearer) the names of the mortgagees or persons entitled thereto.

Companies' register of mortgages.

LEG. REF.

¹ Cl. (b) was inserted and the original Cl. (b) re-lettered (c) by S. 66 of Act XXII of 1936.

² The word "limited" was omitted by S. 67, *ibid.*

³ These words were inserted, *ibid.*

NOTES.

registered, rendered the records in the office of Registrar incomplete. No correct information could be obtained from the records at the Registrar's Office as to whether the debts registered therein have been satisfied and, if so, when. It was thought also inappropriate that Registrar should have

authority to determine whether the cause shown was satisfactory or not or to decide any matter in dispute under the section. Now this section makes it obligatory on the company to intimate all satisfactions to Registrar. Also the Registrar is obliged to register the satisfaction and has to make no inquiry as to correctness or otherwise of the satisfaction intimated to him by the company, but has only to send a notice to the mortgagee, and to note his protest, if any.

Sec. 123: AMENDMENT BY ACT XXII OF 1936.—The first change makes the section applicable not only to limited companies but to all classes of companies. Formerly it

(2) If any director, manager or other officer of the company knowingly and wilfully authorises or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding five hundred rupees.

124. (1) The copies kept at the registered office of the company in pursuance of section 117 of instruments creating any mortgage or charge requiring registration under this Act with the registrar, and the register of mortgages kept in pursuance of section 123, shall be open at all reasonable times to the inspection of any creditor or member of the company without fee, and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding one rupee for each inspection, as the company may prescribe.

Right to inspect copies of instruments creating mortgages and charges and company's register of mortgages.

(2) If inspection of the said copies or register is refused, the company shall be liable to a fine not exceeding fifty rupees and a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall incur the like penalty, and in addition to the above penalty, the Court may by order compel an immediate inspection of the copies or register.

125. (1) Every register of holders of debentures of a company shall, except when closed in accordance with the articles during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles, be open to the inspection of the registered holder of any such debentures, and of any holder of shares in the company, but subject to such reasonable restrictions as the company may in general meeting impose, so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of the register or any part thereof on payment of six annas for every one hundred words or fractional part thereof required to be copied.

Right to inspect the register of debenture-holders and to have copies of trust deed.

(2) A copy of any trust-deed for securing any issue of debentures shall be forwarded to every holder of any such debentures at his request on payment in the case of a printed trust deed of the sum of one rupee or such less sum as may be prescribed by the company, or where the trust-deed has not been printed, on payment of six annas for every one hundred words or fractional part thereof required to be copied.

(3) If inspection is refused, or a copy is refused or not forwarded, the company shall be liable to a fine not exceeding fifty rupees, and to a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall incur the like penalty, and the Court may by order compel an immediate inspection of the register.

Debentures and floating Charges.

126. A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the passing of this Act, shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable

Perpetual debentures.

NOTES.

was doubtful whether the provisions of the section were applicable to floating charges, in view of the fact that such charges did not affect the property until the charge became crystallized. The second change makes the intention of the section clear.

Sec. 126.—The debenture-holders can have no greater rights than the company from which their rights are derived. They have a charge on the assets of the company, but what those assets are depends on the rights of the company. 1940 A.L.J. 626 =1940 All. 490.

only on the happening of a contingency however remote, or on the expiration of a period however long.

127. (1) Where either before or after the commencement of this Act a company has redeemed any debentures previously issued, the company, unless the articles or the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns), shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and where a company has purported to exercise such a power the company shall have power, and shall be deemed always to have had power, to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place, and upon such re-issue the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

(2) Where with the object of keeping debentures alive for the purpose of re-issue they have, either before or after the commencement of this Act, been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

(3) Where a company has, either before or after the commencement of this Act, deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

(4) The re-issue of a debenture or the issue of another debenture in its place under the power by this section given to or deemed to have been possessed by, a company, whether the re-issue or issue was made before or after the commencement of this Act, shall be treated as the issue of a new debenture for the purposes of stamp-duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued :

Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp-duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered, that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp-duty and penalty.

(5) Nothing in this section shall prejudice—

(a) the operation of any decree or order of a Court of competent jurisdiction pronounced or made before the twenty-fifth day of February, 1910, as between the parties to the proceedings in which the decree or order was made, and any appeal from any such decree or order shall be decided as if this Act had not been passed ; or

(b) any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same.

Specific performance of contract to subscribe for debentures.

128. A contract with a company to take up and pay for any debentures of the company may be enforced by a decree for specific performance.

129. (1) Where either a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge, or possession is taken by or on behalf of those debenture-holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up

Payments of certain debts out of assets subject to floating charge in priority to claims under the charge.

are under the provisions of Part V relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

(2) The periods of time mentioned in the said provisions of Part V shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be.

(3) Any payments made under this section shall be recouped, as far as may be, out of the assets of the company available for payment of general creditors.

Statements, Books and Accounts.

Books to be kept by company and penalty for not keeping proper books.

¹[130. (1) Every company shall cause to be kept proper books of account with respect to—

(a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place ;

(b) all sales and purchases of goods by the company ;

(c) the assets and liabilities of the company.

(2) The books of account shall be kept at the registered office of the company or at such other place as the directors think fit, and shall be open to inspection by the directors during business hours.

²[(3) Where a company has a branch office, the company shall be deemed to have complied with the provisions of sub-section (1) and sub-section (2) if proper books of account relating to the transactions effected at the branch office are kept at the branch office and proper summarised returns, made up to dates at intervals of not more than two months, are sent by the branch office to the registered office of the company or other place referred to in sub-section (2).]

²[(4)] In the case of a company managed by a managing agent the managing agent, or where the managing agent is a firm or company, the partner or director of such firm or company and in any other case the director or directors who have knowingly by their act or omission been the cause of any default by the company in complying with the requirements of this section, shall in respect of such offence be liable to a fine not exceeding one thousand rupees.]

131. ³[(1) The directors of every company shall at some date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year lay before the company in general meeting a balance-sheet and profit and loss

Annual balance sheet.

LEG. REF.

¹ This section was substituted by S. 68 of Act XXII of 1936.

² This sub-section was inserted and original sub-S. (3) was re-numbered (4) by S. 8 of Act II of 1938.

³ This sub-section was substituted by S. 69 of Act XXII of 1936.

NOTES.

Sec. 130: AMENDMENT BY ACT XXII OF 1936.—This section adopts S. 122 of the English Act. The words 'during business hours' have been deliberately used in the section, as it is thought that it would be sufficient. Further, having regard to Indian practice, where there is a managing agent, he and not the directors are made responsible for securing compliance with this section.

Sec. 130, Cl. (2).—*Shareholders* have not as a rule the right to inspect the books and accounts of the company, except in cases and in the circumstances specifically provided for in this Act or the Articles of Association. This section makes provision for inspection only of the *directors*.

Sec. 131: AMENDMENT BY ACT XXII OF 1936.—The new sub-S. (1) adopts the substance of S. 123 (1) of the English Act. The provisions of sub-S. (4) in the old section omitted here, are now contained in S. 133 as now amended. The existence of some disputes regarding the amount due to the company, cannot constitute any excuse for not discharging the duty imposed by this section as to the issue of a proper balance-sheet. 143 I.C. 135=1933 L. 301. Penalty for non-compliance with the provisions of this section is laid down in S. 133 (3), *infra*. A person cannot be held liable under S. 131 in respect of default in preparing a balance-sheet or placing it before a general meeting of the company made long before he ever became a director or officer of the company and indeed before he was even a shareholder, and the conviction of such a person is unsustainable. 45 L. W. 242=1937 M. 341. As to condonation of default or delay by Registrar, see 53 L. W. 660=1941 Mad. 504=(1941) 1 M.L.J. 419.

account or in the case of a company not trading for profit an income and expenditure account for the period, in the case of the first account since the incorporation of the company and in any other case since the preceding account, made up to a date not earlier than the date of the meeting by more than nine months or in the case of a company carrying on business or having interests outside British India by more than twelve months :

Provided that the registrar may for any special reason extend the period by a period not exceeding three months.]

(2) The balance-sheet ¹[and the profit and loss account or income and expenditure account] shall be audited by the auditor of the company as hereinafter provided, and the auditor's report shall be attached thereto, or there shall be inserted at the foot thereof a reference to the report, and the report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

(3) Every company other than a private company shall send a copy of ²[such balance-sheet and profit and loss account or income and expenditure account so audited together with a copy of the auditor's report] to the registered address of every member of the company at least ³[fourteen days] before the meeting at which it is to be laid before the members of the company, and shall deposit a copy at the registered office of the company for the inspection of the members of the company during a period of at least ³[fourteen days] before that meeting.

⁴[* * * * *]

⁵[131-A. (1) The directors shall make out and attach to every balance-sheet a report with respect to the state of the company's affairs, the amount, if any, which they recommend should be paid by way of dividend and the amount, if any, which they propose to carry to the Reserve Fund, General Reserve or Reserve Account shown specifically on the balance-sheet or to a Reserve Fund, General Reserve or Reserve Account to be shown specifically in a subsequent balance-sheet.

(2) The report referred to in sub-section (1) may be signed by the chairman of the directors on behalf of the directors if authorised in that behalf by the directors.

(3) The provisions of sub-section (3) of section 130 shall apply to any person being a director who is knowingly and wilfully guilty of a default in complying with this section.]

132. (1) The balance-sheet shall contain a summary of the property and

LEG. REF.

¹ These words were inserted by S. 69 of Act XXII of 1936.

² These words were substituted for the words "such balance-sheet so audited," *ibid.*

³ These words were substituted for the words "seven days," *ibid.*

⁴ Sub-S. (4) of S. 131 was omitted, *ibid.*

⁵ This section was inserted by S. 70, *ibid.*

NOTES.

Secs. 131 and 134.—Section 131 relates to the auditing of the balance-sheet of the accounts of a company and placing the same before the general meeting of the company, while S. 134 relates to the non-sending of a copy of the balance-sheet after it had been laid before a general meeting of the company. In respect of the same years the same persons cannot be charged with offences punishable under both Ss. 131 and 134,

because S. 134 clearly contemplates the sending of a copy of the balance-sheet only after it has been placed or laid before the company at a general meeting; and where there has been a prosecution and conviction under S. 131, the offence under S. 134 cannot possibly have been committed, as the prosecution under S. 131 makes it clear that there was no placing of the balance-sheet before the company at a general meeting. 45 L.W. 242=1937 M. 341.

Sec. 131-A: AMENDMENT BY ACT XXII OF 1936.—This section reproduces sub-section (2) of S. 123 of the English Act.

Sec. 132: AMENDMENT BY ACT XXII OF 1936.—Sub-section (3) introduces a provision requiring disclosure, in the profit and loss account now made compulsory by the amended sub-section (1) of S. 131, of certain information of importance to shareholders. The provisions as to the disclo-

Contents of balance-sheet. assets and of the capital and liabilities of the company giving such particulars as will disclose the general nature of those liabilities and assets and how the value of the fixed assets has been arrived at.

(2) The balance-sheet shall be in the form marked F in the Third Schedule or as near thereto as circumstances admit.

¹[(3) The profit and loss account shall include particulars showing the total of the amount paid whether as fees, percentages or otherwise to the managing agent, if any, and the directors respectively as remuneration for their services and, where a special resolution passed by the members of the company so requires, to the manager, and the total of the amount written off for depreciation. If any director of the company is by virtue of the nomination, whether direct or indirect, of the company, a director of any other company, any remuneration or other emoluments received by him for his own use, whether as a director of, or otherwise in connection with the management of, that other company, shall be shown in a note at the foot of the account or in a statement attached thereto.]

²[132-A. (1) Where a company, in this Act referred to as the holding company, holds shares, either directly or through a nominee, in a subsidiary company or in two or more subsidiary companies there shall be annexed to the balance-sheet of the holding company the last audited balance-sheet, profit and loss account and auditors' report of the subsidiary company or companies, and a statement signed by the persons by whom, in pursuance of section 133, the balance-sheet of the holding company is signed stating how the profits and losses of the subsidiary company, or, where there are two or more subsidiary companies, the aggregate profits and losses of those companies, have been dealt with in or for the purposes of the accounts of the holding company, and in particular how and to what extent .

(a) provision has been made for the losses of a subsidiary company either in the accounts of that company or of the holding company or of both, and

LEG. REF.

¹ This sub-section was added by S. 71 of Act XXII of 1936.

² This section was inserted by S. 72, *ibid*.

NOTES.

sure of the remuneration of the directors nominated as directors of any other company, has been adopted from S. 148 of the English Act.

BALANCE-SHEET, NATURE AND CONTENTS OF.—A balance-sheet is supposed to be a pictorial representation of the company easily appreciated not by ignorant people but by persons who are responsibly able to understand commercial expressions and commercial conditions. 40 C.W.N. 1341=1936 C. 680. If a balance-sheet shows as profits a sum of money representing the interest on bad or doubtful debts due to the bank which was never paid and was never likely to be paid, it contains a materially false statement and the directors signing it are liable to be prosecuted under S. 282. 25 S.L.R. 297=134 I.C. 993. It was held in 29 Bom.L.R. 722=102 I.C. 504=1927 B. 414 that all genuine book debts must be covered by the entry against this item in the balance-sheet, whether they are considered good, doubtful or bad debts; and that if any part of a secret reserve (if permissible

at all) is availed of to meet bad and doubtful book-debts, it must be revealed in the balance-sheet and not concealed. The present amended form of the balance-sheet makes suitable provision for the above matters. (As to balance-sheet of banks, see Sch. III, Form F, *infra*.)

Sec. 132-A: AMENDMENT BY ACT XXII OF 1936.—This section is enacted on the lines of S. 126 of the English Act with some additions. It requires that the balance-sheet and the profits and loss account of subsidiary companies and the Auditor's report should be circulated along with the accounts of the holding company. It further requires that members of the holding company should be empowered to inspect the accounts of the subsidiary companies, and should have rights in respect of them to demand investigation. Where the holding company is a public company, it has been thought necessary to deprive its subsidiary companies also, even if the subsidiary companies should be private companies, of certain exemptions contained in the Act regarding purely private companies. With this view other provisions also have been introduced by the amending Act in Ss. 83-A, 86-D, 87-C, 87-D, 91-B, 91-D, 144 (1), and 144 (5) (iii) of the Act.

(b) losses of a subsidiary company have been taken into account by the directors of the holding company in arriving at the profits and losses of the company as disclosed in its accounts :

Provided that it shall not be necessary to specify in any such statement the actual amount of the profits or losses of any subsidiary company or the actual amount of any part of any such profits or losses which has been dealt with in any particular manner :

Provided further that for the purposes of this section an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not be deemed to be a holding company by reason only that part of its assets consists in 51 per cent. or more of the shares of another company.

(2) If, in the case of a subsidiary company, the auditors' report on the balance-sheet of the company does not state without qualification that the auditors have obtained all the information and explanations they have required and that the balance-sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them and as shown by the books of the company, the statement, which is to be annexed as aforesaid to the balance-sheet of the holding company, shall contain particulars of the manner in which the report is qualified.

(3) For the purposes of this section the profits or losses of a subsidiary company mean the profits or losses shown in any accounts of the subsidiary company made up to a date within the period to which the accounts of the holding company relate, or, if there are no such accounts of the subsidiary company available at the time when the accounts of the holding company are made up, the profits or losses shown in the last previous accounts of the subsidiary company which became available within that period.

(4) If for any reason the directors of the holding company are unable to obtain such information as is necessary for the preparation of the statement aforesaid, the directors who sign the balance-sheet shall so report in writing and their report shall be annexed to the balance-sheet in lieu of the statement.

(5) The holding company may by a resolution authorise representatives named in the resolution to inspect the books of account kept in accordance with section 130 by any subsidiary company, and on such resolution being passed those books of account shall be open to inspection by those representatives at any time during business hours.

(6) The rights conferred by section 138 upon members of a company may be exercised in respect of any subsidiary company by members of the holding company as if they were members of that subsidiary company.]

133. (1) Save as provided by sub-section (2) the balance-sheet ¹[and profit and loss account or income and expenditure account] shall—

(i) in the case of a banking company, be signed by the manager ¹[or managing agent] (if any) and, where there are more than three directors of the company, by at least three of those directors and, where there are not more than three directors, by all the directors ;

LEG. REF.

¹ These words were inserted by S. 73 of Act XXII of 1936.

NOTES.

Sec. 133: AMENDMENT BY ACT XXII OF 1936.—The substitution of a new sub-section (3) is with a view to apply the penalty which was provided in S. 131 (4) previously (now omitted by this amending Act)

to defaults under that section, as well as under Ss. 131, 132 and 132-A. The provisions of Ss. 131, 132 and 132-A are mandatory, and any company which makes default in compliance with them *ipso facto* renders itself liable to the penalty contained in this section. The position is different as regards the officers of the company. 37 C. W.N. 1159=1934 C. 63.

(ii) in the case of any other company, be signed by two directors or, when there are less than two directors, by the sole director and by the manager ¹[or managing agent] (if any) of the company.

(2) When the total number of directors of the company for the time being in British India is less than the number of directors whose signatures are required by sub-section (1), then the balance-sheet ¹[and profit and loss account or income and expenditure account] shall be signed by all the directors for the time being in British India, or, if there is only one director for the time being in British India, by such director, but in such a case there shall be subjoined to the balance-sheet ¹[and profit and loss account or income and expenditure account] a statement signed by such directors or director explaining the reason for non-compliance with the provisions of sub-section (1).

²[(3) If any default is made in laying before the company or in issuing a balance-sheet and profit and loss account or income and expenditure account as required by section 131 or if any balance-sheet and profit and loss account or income and expenditure account is issued, circulated or published which does not comply with the requirements laid down by and under section 131, section 132, section 132-A and this section, the company and every officer of the company who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to five hundred rupees.]

134. (1) ³[After the balance-sheet and profit and loss account ⁴[or the income and expenditure account as the case may be] have] been laid before the company at the general meeting ⁵[three copies thereof] signed by the manager or secretary of the company shall be filed with the registrar at the same time as the copy of the annual list of members and summary prepared in accordance with the requirements of section 32.

(2) If the general meeting before which a balance-sheet is laid does not adopt the balance-sheet, a statement of that fact and of the reasons therefor shall be annexed to the balance-sheet and to the ⁶[copies] thereof required to be filed with the registrar.

LEG. REF.

¹ These words were inserted by S. 73 of Act XXII of 1936.

² This sub-section was substituted, *ibid.*

³ These words were substituted for the words "After the balance-sheet has" by S. 74, *ibid.*

⁴ These words were inserted by S. 9 of Act II of 1938.

⁵ These words were substituted for the words "a copy of the balance-sheet", *ibid.*

⁶ This word was substituted for the word "copy," *ibid.*

NOTES.

Sec. 134: GENERAL.—The provisions of this section are mandatory and any company which makes default in compliance with them *ipso facto* renders itself liable to the penalties mentioned therein. The position is different as regards officers of the company. 37 C. W. N. 1159=1934 C. 63. Though the section speaks also of authorization of defaults, to sustain a conviction under this section, it is not necessary to prove such authorization. The offence is also complete if the officer of the company concerned knew of the defaults and permitted them. 39 C.W.N. 1152=162 I.C. 282=1936 C. 237. Nor would the fact that the officer was away from the office and that the company was in charge of others at the

time the defaults occurred absolve him from liability. If he knowingly and wilfully authorises or permits the default, he is guilty and liable to be convicted. If he being aware of non-compliance with the requirements of the section takes no steps to have them complied with, he can be safely held to have "permitted the defaults". (*Ibid.*) Person convicted under S. 131—Conviction of in same year under S. 134 also—Legality. 45 L.W. 242=1937 M. 341.

DEFENCE.—A charge under this section of non-filing the balance-sheet before the Registrar, receives a complete reply if the accused can show that the balance-sheet was not due to be filed before the Registrar. It is altogether immaterial whether they had or had not prepared the balance-sheet. 35 L.W. 661=138 I.C. 317=1932 M. 497. A plea that no meeting was held and that no balance-sheet was laid before the meeting and that it was impossible to comply with the section cannot be taken by a director. 45 C. 486=22 C.W.N. 96=41 I.C. 307.

FINE.—An order directing the directors to pay the fine imposed on the company is illegal. 86 I.C. 431=1924 L. 489.

JURISDICTION AND PROCEDURE.—As the office of the Registrar is in Calcutta, the Presidency Magistrate in Calcutta has jurisdiction to try a charge under this section even

(3) This section shall not apply to a private company.

(4) If a company makes default in complying with the requirements of this section, the company and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty as is provided by section 32 for a default in complying with the provisions of that section.

135. Save as otherwise provided in this Act, any member of a company shall be entitled to be furnished with copies of the balance-sheet ¹[and the profit and loss account or the income and expenditure account] and the auditor's report at a charge not exceeding six annas for every hundred words or fractional part thereof.

Right of member of company to copies of the balance-sheet and the auditor's report.

Statement to be published by Banking and certain other Companies.

136. (1) Every company being a limited banking company or an insurance company or a deposit, provident or benefit society shall, before it commences business, and also on the first Monday in February and the first Monday in August in every year during which it carries on business, make a statement in the form marked G in the Third Schedule, or as near thereto as circumstances will admit.

(2) A copy of the statement ²[together with a copy of the last audited balance-sheet laid before the members of the company] shall be displayed and, until the display of the next following statement, kept displayed in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on.

(3) Every member and every creditor of the company shall be entitled to a copy of the statement on payment of a sum not exceeding eight annas.

(4) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

(5) This section shall not apply to a life assurance company or provident insurance society to which the provisions of the Indian Life Assurance Companies Act, 1912, or of the Provident Insurance Societies Act, 1912, as the case may be, as to the annual statements to be made by such company or society, apply with or without modifications, if the company or society complies with those provisions.

Investigation by the Registrar.

137. (1) Where the registrar, on perusal of any document which a company is required to submit to him under the provisions of this Act, is of opinion that any information or explanation is necessary in order that such document may afford full particulars of the matter to which it purports to relate, he may, by a written order, call on the company submitting the docu-

Power of registrar to call for information or explanation.

LEG. REF.

¹ These words were inserted by S. 75 of Act XXII of 1936.

² These words were inserted by S. 76, *ibid.*

NOTES.

though the company is not in Calcutta. 45 C. 486=22 C.W.N. 96=41 I.C. 307. A complaint under this section which was not brought by the Registrar but was filed by a clerk of his office and counter-signed by the Public Prosecutor is not valid and will be rejected. 34 P.W.R. 1910 Cr. A case under this section may be tried summarily. 35 A. 173=11 A.L.J. 196=18 I.C. 665.

Sec. 136.—It is no defence to a charge under this section that the statements could not be published in time on account of the change in the closing date of the financial year of the company. 48 B. 305=26 Bom. L.R. 68.

Sec. 137: AMENDMENTS BY ACT XXII OF 1936.—The amendment in sub-S. (3) provides for intervention by the Court to secure production of documents for the information of the Registrar. The insertion of sub-S. (6) extends the powers of the Registrar, providing at the same time that action shall be taken by the Registrar only after the company has been given an oppor-

ment to furnish in writing such information or explanation within such time as he may specify in his order.

(2) On the receipt of an order under sub-section (1), it shall be the duty of all persons who are or have been officers of the company to furnish such information or explanation to the best of their power.

(3) If any such person refuses or neglects to furnish any such information or explanation, he shall be liable to a fine not exceeding fifty rupees in respect of each offence ¹[, and the Court may on the application of the registrar and upon notice to the company make an order on the company for production of such documents as in its opinion may reasonably be required by the registrar for his investigation and allow the registrar inspection thereof on such terms and conditions as it thinks fit].

(4) On receipt of such information or explanation the registrar may annex the same to the original document submitted to him ; and any additional document so annexed by the registrar shall be subject to the like provisions as to inspection and the taking of copies as the original document is subject.

(5) If such information or explanation is not furnished within the specified time, or if after perusal of such information or explanation the registrar is of opinion that the document in question discloses an unsatisfactory state of affairs, or that it does not disclose a full and fair statement of the matters to which it purports to relate, the registrar shall report in writing the circumstances of the case to the ²[Central Government].

³[(6) If it is represented to the registrar in materials placed before him by any contributory or creditor that the business of a company is carried on in fraud of its creditors or in fraud of persons dealing with the company or for a fraudulent purpose, he may after giving the company an opportunity of being heard by written order call on the company for information or explanation on matters specified in the order within such time as he may specify in the order and the provisions of sub-sections (2), (3) and (5) of this section shall apply to such order. If upon investigation the registrar is satisfied that any representation on which he has taken action under this sub-section is frivolous or vexatious, he shall disclose the identity of the informant to the company.

(7) The provisions of this section shall apply *mutatis mutandis* to documents which a liquidator is required to file under this Act.]

Inspection and Audit.

138. The ²[Central Government] may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the ²[Central Government] may direct—

Investigation of affairs of company by inspectors.

LEG. REF.

¹ These words were added by S. 77 of Act XXII of 1936.

² These words were substituted for the words "Local Government" by A.O., 1937.

³ These sub-sections were added by S. 77 of Act XXII of 1936.

NOTES.

tunity of explanation. It also provides as a check on frivolous charges, that the Registrar shall disclose the identity of his informant if he should find the allegations made to him to be frivolous or vexatious. The insertion of sub-S. (7) makes the provisions of this section applicable to documents required to be filed by a liquidator. This would now enable the Registrar to

investigate any matters in connection with the documents filed by the liquidators. See 44 C.W.N. 454=1940 Cal. 232.

Secs. 137, 138 and 141-A.—S. 137 has no relation to a prosecution for an offence under S. 282 nor does S. 138 or S. 141-A bar a prosecution upon a private complaint of an offence under S. 282. 1942 Sind 9. See also 44 C.W.N. 454=1940 Cal. 232.

Sec. 138.—The inquiry ordered under this section is not of the nature of a judicial proceeding and therefore the Court will not issue any order of injunction prohibiting its being held. *Grosvenor and West-end Railway Terminus Hotel Co.*, (1897) 76 L.T. 337 C.A. On this section, see also 12 L. 678=1931 L. 351.

(i) in the case of a banking company having a share capital, on the application of members holding not less than one-fifth of the shares issued ;

(ii) in the case of any other company having a share capital, on the application of members holding not less than one-tenth of the shares issued ;

(iii) in the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members ;

(iv) in the case of any company, on a report by the registrar under section 137, sub-section (5).

139. An application by members of a company under section 138 shall be supported by such evidence as the ¹[Central Government] may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in, requiring the investigation ; and the ¹[Central Government] may, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry.

Application for inspection to be supported by evidence.

140. (1) It shall be the duty of all persons who are or have been officers of the company to produce to the Inspectors all books and documents in their custody or power relating to the company.

(2) An inspector may examine on oath any such person in relation to its business, and may administer an oath accordingly.

(3) If any person refuses to produce any book or document which under this section it is his duty to produce, or to answer any question relating to the affairs of the company, he shall be liable to a fine not exceeding fifty rupees in respect of each offence.

141. (1) On the conclusion of the investigation, the inspectors shall report their opinion to the ¹[Central Government], and a copy of the report shall be forwarded by the ¹[Central Government] ²[to the registrar and another copy] to the registered office of the company, and a further copy shall, at the request of the applicants for the investigation, be delivered to them.

Results of examination how dealt with.

LEG. REF.

¹ These words were substituted for the words " Local Government " by A.O.

² These words were inserted by S. 78 of Act XXII of 1936.

NOTES.

Sec. 139.—As to the legal position of auditors with reference to this section, see 10 N.L.R. 98; 18 I.C. 97=12 M.L.T. 282. As to granting an injunction against the holding of an examination under sub-S. (2), see *Grosvenor & West-End Terminus Hotel Co.*, (1897) 76 L.T. 337 (C.A.).

Sec. 140 (3).—The refusal on the part of the managing agent and director of a company to produce the book and accounts of the company before the Inspector appointed under S. 138 will not render him liable to conviction under S. 140 (3), if it is found that the Inspector has not been validly appointed. An Inspector appointed by a Provincial Government subsequent to the transfer of the functions of that Government under S. 138 to the Central Government and before the entrustment of these functions to the Provincial Govern-

ment by Governor-General cannot be held to be validly appointed. 49 L.W. 651=1939 Mad. 589=(1939) 2 M.L.J. 97.

Sec. 141: AMENDMENTS BY ACT XXII OF 1936.—Certain words in sub-S. (1) and sub-S. (4) have been newly introduced with a view to have the report filed in the Registrar's Office also, so that the same may be available to the members of the public as part of the records of the company itself in the office of the Registrar. The proviso to sub-S. (3) had to be introduced under the following circumstances. There was no provision formerly for the realization of costs in cases where inspectors were appointed by Local Government. The only remedy of Government was to take such proceedings as were available to the ordinary creditors of the company. The difficulty became greater if the company happened to go into liquidation. In respect of this claim, in the view of the Punjab High Court, Government was not entitled under the law as it stood previous to the present amendment, even to preferential payment although the investigation was directed by Government for the good of the company. (See

(2) The report shall be written or printed, as the ¹[Central Government] directs.

(3) All expenses of, and incidental to, the investigation shall be defrayed by the applicants unless the ¹[Central Government] directs the same to be paid by the company, which the ¹[Central Government] is hereby authorised to do:

²[Provided that the expenses of and incidental to an investigation held in pursuance of clause (iv) of section 138 shall be paid out of the assets of the company and shall be recoverable as an arrear of land-revenue.]

³[(4) The registrar shall keep the copy of the report sent to him with the records of the company in his custody.]

⁴[141-A. (1) If from any report made under section 138 it appears to the ¹[Central Government] that any person has been guilty of any offence in relation to the company for which he is criminally liable, the ¹[Central Government] shall refer the matter to the Advocate-General or the Public Prosecutor.

(2) If the officer to whom the matter is referred considers that the case is one in which a prosecution ought to be instituted, he shall cause proceedings to be instituted, and it shall be the duty of all officers and agents of the company, past and present (other than the accused in the proceedings), to give to him all assistance in connection with the prosecution which they are reasonably able to give.

(3) For the purposes of sub-section (2), the expression "agents" in relation to a company shall be deemed to include the bankers and legal advisers of the company and any persons employed by the company as auditors, whether those persons are or are not officers of the company.

(4) Any director, manager or other officer of the company convicted as the result of a prosecution initiated under this section shall not without the leave of the Court be a director of or in any way whether directly or indirectly be concerned in or take part in the management of a company for a period of five years from the date of such conviction.]

Power of company to appoint inspectors.

142. (1) A company may by a special resolution appoint inspectors to investigate its affairs.

(2) Inspectors so appointed shall have the same powers and duties as inspectors appointed by the ¹[Central Government], except that, instead of reporting to the ¹[Central Government], they shall report in such manner and to such persons as the company in general meeting may direct.

(3) All persons who are or have been officers of the company shall incur the like penalties in case of refusal to produce any book or document required to be produced to inspectors so appointed, or to answer any question, as they would have incurred if the inspectors had been appointed by the ¹[Central Government].

LEG. REF.

¹ These words were substituted for the words "Local Government" by A.O.

² This proviso was added by S. 78 of Act XXII of 1936.

³ This sub-section was added, *ibid.*

⁴ This section was inserted by S. 79, *ibid.*

NOTES.

12 L. 678=134 I.C. 200.) In view of proviso now inserted, there will not be any difficulty for the Government to recover the costs.

Sec. 141-A: AMENDMENT BY ACT XXII OF 1936.—This section is based on S. 136 of the English Act. The section names the

Advocate-General or the Public Prosecutor as the legal advisers to be consulted on the question of instituting prosecutions. The words "*of any offence in relation to the company for which he is criminally liable*" in S. 141-A mean not only criminally liable under the Act but criminally liable under the Penal Code as well. 1942 Sind 9.

Secs. 141-A and 137: PRIVATE PROSECUTIONS—**IF BARRED.**—There is nothing in the actual terms of S. 141-A or of S. 137 to justify the inference that the intention of the Legislature was that prosecutions by private individuals under the Act should not be allowed. I.L.R. (1940) 1 Cal. 575=44 C.W.N. 454 =1940 Cal. 232. See also 1942 Sind 9.

143. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company whose affairs they have investigated, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report.

144. (1) No person shall be appointed or act as an auditor of any company other than a private company ¹[not being the subsidiary company of a public company] unless he holds a certificate from the ²[Central Government] entitling him to act as an auditor of companies :

³[Provided that a firm ⁴[whereof all the partners practising in India] hold such certificates may be appointed by its firm name to be auditor of a company, and may act in its firm-name.]

⁵[(2) The ²[Central Government] may, by notification in the Official Gazette and after previous publication, make rules providing for the grant, renewal or cancellation of such certificates and prescribing conditions and restrictions for such grant, renewal or cancellation :

Provided that nothing contained in such rules shall preclude any person from being granted a certificate merely by reason that he does not practice as a public accountant.

(2-A) In particular, and without prejudice to the generality of the foregoing power, such rules may—

(a) provide for the maintenance of a Register of Accountants entitled to apply for such certificates ;

(b) prescribe the qualifications for enrolment on the Register and the fees therefor ;

(c) provide for the examination of candidates for enrolment, and prescribe the fees to be paid by examinees ;

(d) prescribe the circumstances in which the name of any person may be removed from or restored to the Register ;

(e) provide for the establishment, constitution and procedure of an Indian Accountancy Board, consisting of persons representing the interests principally affected or having special knowledge of accountancy in India, to advise ⁶[it] on all matters of administration relating to accountancy, and to assist ⁶[it] in maintaining the standards of qualification and conduct of persons enrolled on the Register ; and

(f) provide for the establishment, constitution and procedure of local accountancy boards at such centres as the Central Government may select, to advise ⁶[it] and the Indian Accountancy Board on any matter that may be referred to them.

(2-B) The holder of a certificate granted under this section shall be entitled to be appointed and act as an auditor of companies throughout British India.]

(3) Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

LEG. REF.

¹ These words were inserted by S. 80 of Act XXII of 1936.

² These words were substituted for the words "Local Government," by A.O.

³ This proviso was substituted by S. 2 of Act XIX of 1930.

⁴ These words were substituted for the words "whereof the partners all" by S. 2 of Act I of 1932.

⁵ These sub-sections were substituted for the

original sub-S. (2) by S. 2 of Act XIX of 1930.

⁶ This word was substituted for the word "him" by A.O.

NOTES.

Sec. 144: AMENDMENT BY ACT XXII OF 1936.—The amendments have been made with a view not to exempt private companies which are subsidiary to a public company from the provisions of this section.

(4) If an appointment of an auditor is not made at an annual general meeting, the ¹[Central Government] may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services.

(5) The following persons, that is to say :

(i) a director or officer of the company ; and

(ii) a partner of such director or officer ; and

(iii) in the case of a company other than a private company, ²[not being the subsidiary company of a public company] any person in the employment of such director or officer ; ³[and

(iv) any person indebted to the company]

shall not be appointed auditors of the company ⁴[and if any person after being appointed auditor becomes indebted to the company his appointment shall thereupon be terminated].

(6) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a member of the company to the company not less than fourteen days before such annual general meeting, and the company shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to its members either by advertisement or in any other mode allowed by the articles not less than seven days before the annual general meeting :

Provided that, if after notice of the intention to nominate an auditor has been given to the company, an annual general meeting is called for a date fourteen days or less after the notice has been given, the requirements of this section as to time in respect of such a notice shall be deemed to have been satisfied, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this section, be sent or given at the same time as the notice of the annual general meeting.

(7) The first auditors of the company may be appointed by the directors before the statutory meeting, and if so appointed shall hold office until the first annual general meeting, unless previously removed by a resolution of the members of the company in general meeting, in which case such members at that meeting may appoint auditors.

(8) The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues, the surviving or continuing auditor or auditors (if any) may act.

(9) The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the statutory meeting, or to fill any casual vacancy, may be fixed by the directors.

145. (1) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors.

LEG. REF.

¹ These words were substituted for the words "Local Government" by A.O.

² These words were inserted by S. 80 of Act XXII of 1936.

³ This word and Cl. (iv) were inserted, *ibid.*

⁴ These words were added, *ibid.*

NOTES.

Sec. 145: AMENDMENTS BY ACT XXII OF 1936.—The amendments introduced in this

section have been made chiefly with a view to supplement the duties of auditors, and to clarify the wording of the section as it stood previously. It also gives auditors power to attend the meetings of the Company and to explain the accounts. It was not obligatory on the part of the auditors previously to report as to whether proper accounts within the meaning of the Act have been kept. This is an information which the shareholders are entitled to have. So

(2) The auditors shall make a report to the members of the company on the accounts examined by them, and on every balance-sheet ¹[and profit and loss account] laid before the company in general meeting during their tenure of office, and the report shall state—

(a) whether or not they have obtained all the information and explanations they have required ; and

²[(b) whether or not in their opinion the balance-sheet and the profit and loss account referred to in the report are drawn up in conformity with the law ; and]

(c) whether ³[or not] such balance-sheet exhibits a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company ; ⁴[and

(d) whether in their opinion books of account have been kept by the company as required by section 130.]

⁵[(2-A) Where any of the matters referred to in clauses (a), (b), (c) and (d) of sub-section (2) is answered in the negative or with a qualification, the report shall state the reason for such answer.]

(3) In the case of a banking company, if the company has branch banks beyond the limits of India, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in British India.

⁶[(4) The auditors of a company shall be entitled to receive notice of and to attend any general meeting of the company at which any accounts which have been examined or reported on by them are to be laid before the company and may make any statement or explanation they desire with respect to the accounts.]

⁷[(5) If any auditors' report is made which does not comply with the requirements of this section, every auditor who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to one hundred rupees.]

LEG. REF.

¹ These words were inserted by S. 81 of Act XXII of 1936.

² This clause was substituted, *ibid.*

³ These words were inserted, *ibid.*

⁴ This word and Cl. (d) were added, *ibid.*

⁵ This sub-section was inserted, *ibid.*

⁶ This sub-section was added, *ibid.*

⁷ This sub-section was added, *ibid.*

NOTES.

Cl. (d) and sub-S. (2-A) have been inserted to remedy this defect. Further, in meetings of the Company where the audited accounts of the Company are discussed, shareholders frequently required informations and explanations which the auditors alone could render; and in the absence of any provision for the auditors to attend as of right, the shareholders were often denied the rights of asking for such informations as may be necessary for them to protect their interests. Hence sub-S. (4) has been inserted. Auditors as officers of the Company used to be often protected by provisions in the articles of association, and in order to obviate the same and render them liable to penalty for knowing and wilful default, sub-S. (5) has been inserted. Unless auditors are to be held strictly to

their legal liability, however honest these may be, the object of the legislature in requiring a certificate from them would be absolutely defeated. It is nothing to an auditor whether the business of a company is being conducted prudently or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that. He is to ascertain that position by examining the books of the company. But his first duty is to examine the books not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company. If he fails in his duty, he will be jointly and severally liable with those who are responsible for the management of the company, although he is not guilty of any dishonesty. 47 A. 669=23 A.L.J. 473=88 I.C. 785. The auditors appointed under the statutory powers contained in S. 144 are officers of the company and as such are liable for any misfeasance under S. 235. *Re London and General Bank (No. 2)*, (1895) 2 Ch. 673 (C.A.). See also 6 Bur.L.T. 201.

146. (1) Holders of preference shares and debentures of a company shall have the same right to receive and inspect the balance-sheets ¹[and profit and loss accounts] of the company and the reports of the auditors and other reports as is possessed by the holders of ordinary shares in the company.

Rights of preference shareholders, etc., as to receipts and inspection of reports, etc.

(2) This section shall not apply to a private company, nor to a company registered before the commencement of this Act:

²[Provided that in the case of any public company whether registered before or after the commencement of this Act the trustees for holders of debentures shall have the right conferred by sub-section (1) on holders of preference shares and debentures of a company.]

Carrying on business with less than the legal minimum of members.

147. If at any time the number of members of a company is reduced, in the case of a private company, below two, or in the case of any other company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognizant of the fact that it is carrying on business with fewer than two members or seven members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be sued for the same without joinder in the suit of any other member.

Liability for carrying on business with fewer than seven or, in the case of a private company, two members.

Service and authentication of Documents.

148. A document may be served on a company by leaving it at, or sending it by post to, the registered office of the company.

Service of documents on company.

149. A document may be served on the registrar by sending it to him by post, or delivering it to him, or by leaving it for him at his office.

Service of documents on registrar.

150. A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorised officer of the company, and need not be under its common seal.

Authentication of documents.

Tables, Forms and Rules as to prescribed matters.

151. (1) The forms in the Third Schedule or forms as near thereto as circumstances admit shall be used in all matters to which those forms refer.

Application and alteration of tables and forms, and power to make rules as to prescribed matters.

(2) The Central Government may alter any of the tables and forms in the First Schedule, so that ³[it] does not increase the amount of fees payable to the registrar in the said Schedule mentioned, and may alter or add to the forms in the Third Schedule.

LEG. REF.

¹ These words were inserted by S. 82 of Act XXII of 1936.

² This proviso was added, *ibid.*

³ This word was substituted for the word "he" by A.O.

NOTES.

Sec. 146: AMENDMENTS BY ACT XXII OF 1936.—The proviso added to sub-S. (2) gives the trustees for debenture-holders the right to receive and inspect the balance-sheets and the auditor's reports. The other

amendment in sub-S. (1) is a consequential one.

Sec. 148.—The word "document" is not defined in this Act. Under the English Act, S. 380, the word is defined as including summons, notice, order, and other legal process and registers. As to service of summons in proceedings under this Act, see 12 Bom.L.R. 730=7 I.C. 982. Service at a branch establishment of the company is not proper service under this section. *Pearks v. Richardson*, (1902) 1 K.B. 91.

(3) Any such table or form, when altered, shall be published in the Official Gazette and on such publication shall have effect as if enacted in this Act, but no alteration made by the Central Government in Table A in the First Schedule shall affect any company registered before the alteration, or repeal, as respects that company, any portion of that table.

(4) In addition to the powers hereinbefore conferred by this section, the Central Government may make rules providing for all or any matters which by this Act are to be prescribed by ¹[its] authority.

(5) Every such rule shall be published in the Official Gazette, and on such publication shall have effect as if enacted in this Act.

Arbitration and Compromise.

152. (1) A company may by written agreement refer to arbitration, in accordance with the ²[*] ^{*}] Arbitration Act, ³[1940], an existing or future difference between itself and any other company or person.

Power for companies to refer matters to arbitration.

LEG. REF.

¹ This word was substituted for the word "his" by A.O.

² The word "Indian" omitted by Act XXXII of 1940.

³ This figure was substituted for the figure "1899" by S. 49 and Sch. IV of Act X of 1940.

NOTES.

Sec. 152: SCOPE AND APPLICATION.—S. 152 is an enabling one and it merely confers power on companies to refer disputes to arbitration under the Arbitration Act by an agreement in writing, when this course is preferred. It is not obligatory on a company governed by the Arbitration Act, to make a reference to arbitration out of Court in the Province of Punjab, only in pursuance of the provisions of the Arbitration Act and to file an award made on such reference in the Court of the District Judge as required by the Arbitration Act. It is permissible for the company, although governed by the Arbitration Act, to make a reference outside the Arbitration Act, and although the award on such reference is filed in the Court of the Senior Subordinate Judge, the decree passed on the basis of it is perfectly legal. 17 L. 722=1936 L. 721 (F.B.). [1929 L. 246=118 I.C. 533, not approved.] It is not obligatory that any references to arbitration to which a limited company is a party should be made under the Arbitration Act. 190 I.C. 146=1940 Lah. 97. S. 152 only empowers a company to refer to arbitration an existing difference between itself and any other company or persons. But a shareholder of a company has no such right against the company. Apart from the Articles of Association of the company, a shareholder has no power to compel a submission to arbitration of a dispute arising out of the affairs of the company. 45 L.W. 405=1937 M. 405. The section applies to those cases only in which

a Joint Stock Company by written agreement refers to arbitration in accordance with the provisions of the Arbitration Act, any dispute between itself and any other company or person. In a case where the reference to arbitration is not by written agreement of the parties, but is made by the Court in a pending suit, the arbitrator has to submit his report to the Court which has to pass judgment in the suit in accordance with the terms of the award or pass such other order in accordance with law as it thought fit. A decree on such award is open to appeal in the ordinary course. Such a case does not come under S. 152. 1936 L. 257=163 I.C. 339. The scope of S. 152 is that the provisions of Ss. 3 to 22 of the Old Arbitration Act would apply, where one or both the parties to arbitration are companies registered under the Companies Act, by force and effect of the Companies Act itself, irrespective of the provisions of S. 2 of the Arbitration Act; that is to say, the said Act would apply in a case falling within the scope of the Act even when the *locus* of the subject-matter was outside a Presidency town, provided one of the parties or both of them were companies registered under the Companies Act. As the old Arbitration Act has no application to arbitration with the intervention of Court, S. 152 does not require the procedure laid down in the said Act to be followed in the case of such arbitration even if a company is a party to it. 1941 Cal. 127=I.L.R. (1940) 2 Cal. 237=44 C.W.N. 828. (See now the present Arbitration Act X of 1940.) See also the following cases under the old Act. 14 L. 249=1933 L. 44 [overruling 32 P.L.R. 444=132 I.C. 379=1931 L. 555]; 13 Pat.L.T. 169=136 I.C. 445=1933 P. 49; 14 L.W. 249. A company under the Companies Act stands in the Punjab on no different footing than a private individual governed by Punjab Act I of 1911. Therefore if an

(2) Companies, parties to the arbitration, may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body.

(3) The provisions of the ¹[* * *] Arbitration Act, ²[1940] ³[* * *] shall apply to all arbitrations between companies and persons in pursuance of this Act.

153. (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a

LEG. REF.

¹ The word "Indian" omitted Act XXXII of 1940.

² This figure was substituted for the figure "1899" by S. 49 and Sch. IV of Act X of 1940.

³ The words "other than those restricting the application of the Act in respect of the subject-matter of the arbitration" were omitted, *ibid.*

NOTES.

agreement between the parties of which one is a company makes no specific reference to the Arbitration Act, the Arbitration Act will not apply to the arbitration agreement between the parties. 1938 Lah. 827. (Case under the old Act.) The word 'may' after the words 'a company' in the beginning of S. 152 does not go with the sentence 'in accordance with the Indian Arbitration Act, 1899', but with the words 'refer to arbitration'. Again the existence of the words 'in accordance with the Indian Arbitration Act, 1899' in Cl. (1) of S. 152 is an indication that the Legislature considered it to be *de rigueur* that every reference by a limited liability company to arbitration should be in accordance with the Arbitration Act, Cl. (3) is conclusive on the point that the provisions of the Arbitration Act only apply to arbitrations to which a limited liability company is a party. Limited liability companies cannot refer to arbitration independently of this provision of the law and Sch. II, C.P. Code, has no application. The Arbitration Act alone applies to all references to arbitration made by limited liability companies and hence the award is executable by the District Judge only and not by the Sub-Judge. (1934 Pesh. 107, Foll.) 177 I.C. 659=1938 Pesh. 54. The concluding words of S. 152 (3) "in pursuance of this Act" mean that the provisions of the Arbitration Act, except S. 2 thereof, would apply to all arbitrations in which one or both the parties are companies irrespective of the *locus* of the subject-matter by the force and effect of the Companies Act, and the procedure provided for in the Arbitration Act for extending its field of operation would not have to be followed in such cases. On this interpretation of S. 152 (3), Ss. 3 and 4 (a) of the Arbitration Act would apply to all arbitration in which a company is a party. The Court in which the award will have to be filed must be either the High Court or the Court of the District Judge, as the case may be. I.L.R. (1940) 1 Cal. 358=44 C.W.N. 285=1940 Cal. 220. The power to refer cannot be exercised by the liquidator. Thus although a living company is allowed to refer matters in difference to arbitration, in a particular way, an official liquidator may not be allowed to do so. 50 A. 867=26 A.L.J. 810. An agreement as to submission to arbitration, though not under seal, is valid. 37 A. 273=13 A.L.J. 312.

Sec. 153: AMENDMENTS BY ACT XXII OF 1936.—The amendment in sub-S. (6) simplifies the determination of the meaning of 'creditors of the same class' in view of the judicial uncertainty that has manifested itself on this point. The present sub-Ss. (3), (4), (5) and (7) introduce sub-Ss. (3) and (4) of S. 153 of the English Act and also specifically provide for appeals from orders made under this section. In cases where schemes of arrangements were proposed because of financial difficulties, it was very often found that on the initiation of the proceedings under this section obstructive creditors and contributories immediately began to file suits or apply for attachment before judgment or apply for the compulsory winding up of the company, and thereby render the application for the arrangement practically infructuous. Under the law as it stood previously, the Court was powerless to grant any interim protection against such proceedings, and the natural consequence was that the company was frequently obliged to submit to most extortionate terms in order to obtain the withdrawal of such proceedings. It was to obviate this difficulty that sub-S. (5) has been inserted.

SCOPE OF THE SECTION.—This section makes provision not merely for a scheme for the resuscitation or re-organising of companies, but it also provides for a scheme of arrangement, which provides an alternative mode of liquidation which the law allows the statutory majority of creditors to substitute for winding-up, whether voluntary or under the

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Court. So, the failure of a scheme for resuscitation of a company is not by itself sufficient to justify a winding-up order being made, as it cannot be said that because the scheme has failed in this important particular it has failed in its entirety, leaving open to the Court only the simple course of ordering a compulsory liquidation. 16 Lah. 1029=158 I.C. 816=1935 L. 779. A scheme of merger of several companies under which a company should transfer its business and undertaking to the new combined or merger company, which involves a re-organization of capital altering rights conferred by the memorandum of association and re-organising the rights of different classes of shareholders and which provides for a distribution of the assets of the company among the different classes of shareholders should the company be wound up after the merger, is one which may be sanctioned by the Court under S. 153 of the Act. An application for sanction of such a scheme is maintainable and the Court has jurisdiction to consider it, and see if it is fair and reasonable, even though the scheme may involve winding-up. But the Court may, in the exercise of its discretion, impose certain conditions upon the company before sanctioning it, i.e., it may ask the company to make some provision for the dissentients. Such a provision is not, however, a *sine qua non* to sanctioning a scheme if it is reasonable and fair. 39 Bom.L.R. 675=1937 Bom. 423. Even after an order for winding-up a company has been made, a creditor or a member of the company can move the Court under S. 153. The liquidator has also the right to make an application under S. 153 but he has not got the exclusive right to do so. It was not the intention of the Legislature to deprive the creditors or members of the right once an order for winding-up is made and place them at the mercy of the liquidator who may or may not choose to move in the matter. 1938 M.W.N. 1313=1939 Mad. 318. S. 153 does not make it obligatory either upon the Court or the company to serve a notice of the creditors' meeting on each and every creditor of the company, and a decision arrived at by the creditors and the company in the absence of any individual creditor is not, therefore, invalid. 39 P.L.R. 230=1937 L. 442. The unsecured creditors of a company who have obtained decrees and the unsecured creditors who have not obtained decrees do not constitute different classes of creditors, and a scheme of composition passed and sanctioned under the provisions of the Companies Act binds all the creditors of the company including judgment-creditors. 39 P.L.R. 230=1937 L. 442. A scheme of arrangement sanctioned by the Court binds not only the creditors favouring the scheme but also the dissentient minority. 41 A. 566; 153 I.C. 119=1934 L. 515; 40 C.W.N. 551. Where after a scheme of composition has been passed by the creditors at a meeting the holder of a decree against the company applies to the High Court contending that the scheme is not binding on him, but the High Court decides that he is bound by the scheme, the decree-holder cannot be permitted to nullify that decision by getting his decree transferred to a mofussil Court and attempting to execute it against the assets of the company. If the decree-holder attempts to start execution the High Court has power to stop the execution proceedings and will issue an injunction to restrain him from further proceeding with the execution of the decree, so long as the scheme is in operation. 40 C.W.N. 551. Powers of the Court under S. 153 are strictly limited. The Court may either sanction or refuse to sanction a scheme approved by the company and its creditors or members. The Court has no power upon an application to alter the scheme which has been sanctioned by the Court and agreed to at a meeting under S. 153 without giving parties to the agreement an opportunity of considering the scheme in the way the Court proposes. I.L.R. (1937) 1 C. 368=1937 C. 124.

CONSTRUCTION OF SECTION.—The plain language of S. 153 is applicable both to a going company and to the case of company in liquidation; a compromise or arrangement can therefore be availed of both in the case of a company which is a going concern and also in the case of a company which is in the course of being wound up. It cannot therefore be contended that an application under the section cannot be made before an order for winding up is made. 1939 M. 58; 1939 Mad. 318. See also 1937 Bom. 423. This section enables the majority of a class of creditors to bind the minority and it exercises a most formidable compulsion upon dissentient or would-be dissentient creditors; and it, therefore, requires to be construed with great care, so as not to place in the hands of some of the creditors the means and opportunity of forcing dissentients to do that which it is unreasonable to require them to do or of making a mere jest of the interests of the minority. 28 S.L.R. 213=149 I.C. 51=1934 S. 54. A petition was presented by the Directors of a Bank under S. 153 asking the Court to refer a scheme, which they had prepared, to the shareholders and creditors for their consideration, but a winding up petition was filed subsequently by some of the creditors. *Held*, there was no bar to the hearing of the winding up petition, though the scheme was not placed before the shareholders and the creditors by the Court as prayed for. 48 L.W. 648=(1938) 2 M.L.J. 812.

SANCTION OF COURT.—The fact that the shareholders and creditors of a company have approved of a scheme of compromise or arrangement as contemplated by S. 153 of the Indian Companies Act does not mean that the Court is bound to accept the scheme. It is the duty of the Court to examine the

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proposals and decide whether they are fair and reasonable. That the shareholders and creditors have approved of a scheme will of course carry weight, but there may be more important considerations. Where the resolution approving of a scheme is shown to have been passed as a result of misleading statements contained in a letter written by one of the creditors of the company who was also a director thereof, and circulated to all the shareholders and creditors before the meeting, where the company is hopelessly insolvent and the scheme confers no apparent benefit on any one and in fact ignores creditors who are not depositors, and the scheme is itself not a feasible one, and where besides there are also allegations of unlawful and unauthorised acts on the part of the company's officials, justice demands that the resolutions approving of the scheme passed at the meeting of the shareholders and creditors should be disregarded. 51 L. W. 639=1940 Mad. 621. See also 1937 Bom. 423. A mere agreement on the part of the members or shareholders is not enough for the acceptance of the scheme. It is ultimately for the Court either to sanction it or not to sanction it. 1930 A. L.J. 305=1930 A. 330. It will be without effect if the sanction of the Court is refused; although when given, the agreement takes effect not from the date of the sanction but from the date when it is made. 46 I.A. 135=36 M.L.J. 562=50 I.C. 429 (P.C.); 106 P.W.R. 1916=40 I.C. 904; 41 A. 566; 32 I.C. 451=18 O.C. 272. See also 41 C. W.N. 1272=65 C.L.J. 503. What the Court has to do on an application for sanctioning a scheme is to see first of all that the provisions of the Act have been complied with; and, secondly that the majority have been acting *bona fide*. It must also see whether the scheme is a reasonable one or whether there is any reasonable objection to it. 39 Bom.L.R. 675=1937 Bom. 423. See also 1940 Mad. 621. The function of the Court is not to simply register the resolution come to by the creditors or the shareholders as the case may be. It is the duty of the Court to satisfy itself that the meeting was duly held and conducted, that the compromise was a real compromise, that it was accepted by a competent majority, that the majority was acting in good faith and for the common advantage of the whole class, and that what they did was reasonably prudent and proper. 28 S.L.R. 213=149 I.C. 51=1934 S. 54; 30 Bom.L.R. 197=108 I.C. 465=1928 B. 80; 1933 L. 51=140 I.C. 128. If the Court finds it otherwise, it will refuse its sanction. It is not the function of the Court to substitute its own scheme *suo motu* for the scheme presented to it for sanction. If the Court finds that some radical amendment ought to be effected in the scheme as presented, it is the duty of the Court to reject the scheme. 61 C. 913=38 C.W.N. 920=1934 C. 816; 10 R. 438=140 I.C. 133=1932 R. 154; 57 M.L.J.

633=1929 P.C. 256 (P.C.). A Court will not give sanction to a scheme which will have the effect of enabling a bank or other company, which is, to all intents and purposes, insolvent, to continue carrying on business and attract deposits which in all probability will go the way of the former deposits. These principles are to be adhered to in dealing with applications to sanction schemes of composition and arrangement intended to keep sinking banking companies afloat, whose assets consist principally of monies lent out on mortgages, simple bonds, promissory notes, decrees of Court and immovable property, but no cash. 63 C. 99.

SCHEME SANCTIONED BY COURT—SUBSEQUENT MODIFICATION—POWER OF COURT.—Under S. 153 of the Companies Act, the Court may order a meeting to be held to consider a scheme of arrangement and may grant or withhold sanction of such scheme. If a scheme has been sanctioned by the Court, it has no power to subsequently modify or alter or expunge any part of it without the consent of those who have agreed to it. 41 C.W.N. 599=1937 Cal. 667. Where one Judge has sanctioned a scheme it is not within the power of another Judge exercising equal jurisdiction to declare in effect that the order sanctioning the scheme is to the extent that it affects a particular person, a nullity. 1937 Cal. 401. Where a scheme is passed by a meeting properly called and competent to approve it, the Court cannot either at the time of sanction or at any time thereafter, alter the terms of the scheme without consulting those who agreed to it and without their sanction. Therefore the Court has no power, either at the time of sanction or at any time thereafter, to expunge any part of the scheme or to modify it in any way without consulting those who passed it originally and without obtaining their consent. All that the Court can do is to refuse to sanction the scheme or possibly to withdraw the sanction which has already been given. 1937 Cal. 401. Upon confirmation by the Court of a scheme of arrangement, that scheme becomes by virtue of S. 153 binding upon the creditors, the shareholders and the company. Its terms can thereafter only be varied by order of the Court after the variation had been approved at meetings of the creditors and shareholders and it is not possible for the company or its directors or shareholder whether by resolution or ratification or otherwise to alter the scheme. Nor is it possible for the company or its directors to vary the scheme under the guise of a compromise with a shareholder, as no variation or departure from that scheme can be validated by mere acquiescence of the shareholders or the creditors. 1938 P.C. 284=I.L.R. (1939) Lah. 1=(1939) 1 M.L.J. 98 (P.C.).

MEANING OF TERMS.—(i) '*Compromise or arrangement*'.—The mere fact that year after year the company, by appropriate means, as laid down in the memorandum,

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varies the rights of different classes of shares cannot tantamount to a compromise or arrangement between the company and its members. 57 A. 810=1935 A.L.J. 527=156 I.C. 1088=1935 A. 310. The word 'arrangement' used in this section is in the sense of something analogous to a compromise; and in any arrangement which can fairly be called a compromise or be considered as analogous to a compromise, there must be both 'give' and 'take' on both sides. 28 S.L.R. 213=149 I.C. 51=1934 S. 54.

(ii) *Creditors*.—This word includes all persons having any pecuniary claim against the company whether actual or contingent, present or future. *Re Midland Coal Co.*, (1895) 1 Ch. 267. It includes also debenture-holders and other secured creditors. *Re Empire Mining Co.*, (1890) 44 Ch.D. 402. As between a decree-holder and an unsecured creditor, their interests are not so dissimilar as to make it necessary to place them in different classes. Where a notice of a meeting to approve a scheme of arrangement between the company and its unsecured creditors is issued to its unsecured creditors the decree-holder who is also an unsecured creditor of the company is *prima facie* bound by such notice. 172 I.C. 717=1937 Cal. 401.

(iii) *Company*.—Where the directors of a company are authorised to manage the business and exercise all powers, a proposal by the Board of Directors made under this section in the name of the company, is valid and proper. 28 S.L.R. 213=149 I.C. 51=1934 S. 54.

(iv) *'Class'*.—This word must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. Matured and unmatured policy holders of an insurance company belong to different classes, and a member holding a matured policy is entitled to dissent and cannot be bound by a resolution passed at a meeting of all the policy holders including both the matured and unmatured class. 28 S.L.R. 213=149 I.C. 51=1934 S. 54. So also, holders of shares partly paid and holders of shares with the uncalled balance paid in advance of calls and carrying interest, constitute different classes from holders of fully paid-up shares. *Re United Provident Assurance Co. v. Dadd*, (1910) 2 Ch. 477. But an unsecured creditor of a company who is also a decree-holder is not entitled to be regarded as belonging to a defined and distinct class of persons as opposed to an unsecured creditor who has not got a decree. Consequently they are not entitled to execute their decrees after the scheme has been sanctioned and passed. 39 C.W.N. 1198=160 I.C. 407=1936 C. 12; 39 C.W.N. 1199=62 C.L.J. 310=1935 C. 977; 39 C.W.N. 875. But it was held in 38 C.W.N. 1171=155 I.C. 811=1935 C. 117; and in 156 I.C. 590=1935 C. 398=40

C.W.N. 1104; 40 C.W.N. 580=1930 C. 162, that a depositor in a company who had obtained a decree against the company before the scheme was embarked upon, belonged to a different class from the depositors who had not obtained decrees. But note that the Act has since been amended and there will no longer be any distinction between unsecured creditors who have obtained decrees and those who have not obtained decrees for the purposes of this section. See also I.L.R. (1937) 1 C. 368=1937 C. 124.

Sec. 153 before 1936 Amendment.—Under the law as it was prior to the Companies Amendment Act, 1936, a depositor who has obtained a decree and one who has not obtained a decree cannot be regarded as belonging to the same class of creditors for the purpose of S. 153 and accordingly a notice sent to such a decree-holder directing him to attend a meeting of the depositors for the purpose of considering a scheme is not binding on him, as equally as he is not bound by anything which is decided at such meeting. But a depositor who has merely filed a suit and has not obtained a decree on the date of the meeting of the creditors at which a scheme is agreed to by them, is in the same class of creditors as all the rest of the depositors who have not filed suits, although he obtains a decree before the date on which the Court sanctions the scheme. Such a depositor is entitled to receive notice of the meeting of the creditors and to attend it, and if he does not choose to attend, he is bound by the scheme passed by the majority of his fellow depositors. The sanction of the scheme by Court has a retrospective effect, and the scheme, therefore, operates not from the date on which the sanction is given but from the date on which it is agreed to by the creditors, namely, the date of the meeting. The fact that in the suit filed by the depositor, the company filed a written statement subsequent to the passing of the scheme by the creditors admitting their liability and asking for time within which to pay does not preclude them from resisting execution of the decree. 41 C.W.N. 1272=65 C.L.J. 503. See also 42 C.W.N. 610; 40 C.W.N. 1104; 1937 Cal. 169; 1938 Cal. 337=I.L.R. (1938) 2 Cal. 30. In view of the fact that it is impracticable to try and ascertain the true or real value of the policies of an Insurance Company, the nominal value of the policies must be accepted for the purpose of ascertaining majorities at meetings held to approve or disapprove of a scheme of compromise under S. 153. 45 C.W.N. 979.

MEETINGS ORDERED BY COURT.—The meetings ordered by the Court are subject to the direction of the Court. But when the Court has given no express direction, the meetings have to be conducted in accordance with the directions contained in the Articles of Association, as far as may be possible. 30 Bom.L.R. 197=108 I.C. 465=1928 B. 80.

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Before ordering a meeting of the class of creditors with whom it is proposed to make an arrangement it is not necessary that the Court should first have issued notices. A certificate from the Chairman of the meeting that notice of application and of meeting ordered, had been issued and acknowledged by the depositors, may be relied on for the fact that the provisions of the law have been duly complied with. 28 S.L.R. 213=149 I.C. 51=1934 S. 54. The Court has to exercise its discretion in making an order under S. 153 of the Companies Act. There is a *distinction between making an order under S. 153 (1) and an order under S. 153 (2)* when the scheme comes before the Court for sanction after the approval of the majority of the Court. It is very essential that any scheme put forward before the general body of creditors must as far as possible be based upon correct information; and any scheme which is approved must *prima facie* appear to be based on correct information and date. But that does not mean that an application under S. 153 to call a meeting of the creditors to consider a proposed scheme should be rejected merely because the same is not based on correct information as to the affairs of the company. The Court can call for a report giving a fair idea of the affairs of the company and on that information the scheme as adumbrated or with the necessary amendments can be circulated along with the report. A Court ought not to decline to order a meeting of the creditors unless the proposals are illegal as being in contravention of the Companies Act or incapable of modification in view of ascertained facts. 1939 Comp.C. 14=1938 M.W.N. 1313=1939 Mad. 318. It is not enough to hold a single meeting of all different classes of creditors in general, and any scheme of arrangement approved at such a meeting ought not to be sanctioned by the Court. 39 C.W.N. 690. The expression "meeting of creditors or class of creditors" in S. 153 (1) of the Companies Act should be interpreted as comprising all creditors of the company whether in British India or outside. There is nothing to preclude the Courts from directing a meeting of all such creditors. The question of principal liquidation or ancillary liquidation does not matter. 1938 M.W.N. 1313=1939 Mad. 318. Where after the issue of a notice of a meeting to frame a scheme under S. 153 on the general body of creditors of a company, one of them assigns his interest to a debtor of the company after the receipt of the notice and before the date of the meeting, the assignee is bound by the scheme adopted at the meeting and sanctioned by the Court. He cannot contend that he belongs to a class of "debtor creditor" and is therefore different from the class of creditors who formed the meeting and agreed to the scheme. 43 C.W.N. 1181=1939 Comp. C. 247.

SCHEME SANCTIONED BY COURT—IF CAN BE CHALLENGED IN EXECUTION PROCEEDING.—The executing Court cannot modify, alter or amend the scheme which definitely includes the depositors who had obtained decrees, and which has been sanctioned under S. 153. If there are circumstances to justify any modification or alteration or amendment of the scheme by excluding the depositors who had obtained decrees, the remedy is to go to the Court which sanctioned the scheme. An order sanctioning the scheme cannot be challenged collaterally in the executing Court as without jurisdiction either on the ground that no notice of the meeting was served upon the depositor who had obtained a decree in the proceeding under S. 153 of the Act, or on the ground that in the said proceeding the Court did not order that the meetings of the different classes of depositors should be held separately. Such objections to the order do not touch the question of the existence of the jurisdiction but relate only to the illegal or irregular exercise of the jurisdiction. So long as the order stands, it continues to be binding upon the party whom it purports to bind. 41 C. W.N. 406=1937 C. 211. A scheme of arrangement which is sanctioned by the Court under S. 153 has the force of a judicial pronouncement. Where in execution of a decree obtained against a loan company by one of its depositors, the sanctioned scheme is set up as a bar by the company, the executing Court cannot go behind the sanction unless it is shown that the order giving the sanction was without jurisdiction. When the matter comes before the executing Court, it is not open to the decree-holder to urge against the sanctioned scheme that there was any defect in the procedure or that there was no meeting of the particular class of creditors to which he belongs. Such defects, if any, do not take away the foundation of the authority of the Court in granting sanction under S. 153 and they are at the most irregularities and do not render the sanctioned scheme a nullity in the eye of the law. The order of the High Court unless set aside or modified is binding on the decree-holder and on person who seeks to execute his decree and is one which the executing Court has to obey. I.L.R. (1938) 2 Cal. 30=1938 Cal. 337. *See also* I.L.R. (1937) 1 C. 781=41 C.W.N. 952=1937 C. 517.

VOTE BY PROXY.—The Court has jurisdiction under this section to settle the terms and form of the instrument of proxy to be used at the meeting. Any rule framed by the High Court under S. 246 of the Act, purported to fetter or restrict the jurisdiction of the Court in respect of this matter is *ultra vires* and not operative. 10 R. 438=140 I.C. 133=1932 R. 154. Where the Court has specifically directed that the decision of the chairman as to the admissibility of any proxy shall be final for the purpose of the meeting, the scrutineers appointed by the Court to assist the chairman, have no right to decide whether any proxy was good

company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

¹[(3) An order made under sub-section (2) shall have no effect until a certified copy of the order has been filed with the registrar, and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.]

¹[(4) If a company makes default in complying with sub-section (3) the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made.]

¹[(5) The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against a company on such terms as it thinks fit and proper until the application is finally disposed of.]

²[(6)] In this section the expression "company" means any company liable to be wound up under this Act ³[and for the purposes of this section unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors.]

⁴[(7) An appeal shall lie from any order made by the Court exercising original jurisdiction under this section to the authority authorised to hear appeals from the decisions of the Court.]

LEG. REF.

¹ This sub-section was inserted by S. 83 of Act XXII of 1936.

² The original sub-S. (3) was re-numbered (6), *ibid.*

³ These words were added, *ibid.*

⁴ This sub-section was added, *ibid.*

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or bad, or to file any petition into Court for directions as to the validity of certain proxies used. 10 R. 189=137 I.C. 444=1932 R. 96. A vote given by an executor of a deceased member must be disallowed and it is not possible to distinguish the case of liquidator or receiver. 30 Bom.L.R. 197=108 I.C. 465=1928 B. 80.

JURISDICTION—Ss. 153, 270 AND 271.—S. 153 confers jurisdiction on the High Court to deal with a scheme, but how the scheme when sanctioned can be rendered effective and operative on the company in question as a whole does not affect the jurisdiction of the Court to deal with it. 1938 M.W.N. 1313=1939 Mad. 318. The High Court has jurisdiction to entertain an application under S. 153, at the instance of a creditor or a member of a foreign company. A Bank

incorporated outside British India and having its registered office outside British India is a foreign company, but it would be an unregistered company within the meaning of Ss. 270 and 271 of the Act and therefore liable to be wound up under the Act. The expression "Court" in the case of an unregistered company including a foreign company would mean "the Court in which the said company is liable to be wound up," and under S. 271, the High Court is the Court in which a foreign company is liable to be wound up. A Bank which has its central office in British India, which is the centre of administrative control, is subject to the jurisdiction of the High Court in that part of British India, though its registered office and place of incorporation may be outside British India. 183 I.C. 353=1938 M.W.N. 1313=1939 Mad. 318. There is no warrant for holding that because an order for winding up a foreign company has been made by the Court of the place which is the registered office of the company a British Indian Court has no jurisdiction to entertain an application under S. 153. S. 271 of the Act, on the other hand, negatives such a theory. Under S. 271, it is left to the dis-

¹[153-A. (1) Where an application is made to the Court under section 153 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as a 'transferor company') is to be transferred to another company (in this section referred to as 'the transferee company'), the Court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters :—

(a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company ;

(b) the allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person ;

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company ;

(d) the dissolution, without winding up, of any transferor company ;

(e) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement ;

(f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest

LEG. REF.

¹ This section was inserted by S. 84 of Act XXII of 1936.

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cretion of the Court whether it would wind up the company in spite of a similar order having been passed in some other Courts. There is nothing to oblige the Court to pass an order of winding up. The desire to assist in the main liquidation—the desire to act as ancillary to the Court where the main liquidation is going on—will not ever make the Court give up the forensic rules which govern the conduct of its own liquidation. The underlying principle is one of co-operation based on the essential principles of justice and equity. 183 I.C. 353=1938 M. M.N. 1313=1939 Mad. 318.

APPEAL.—An order rejecting a scheme is appealable. 10 R. 189; 27 Bom.L.R. 655; 10 R. 438=140 I.C. 133=1932 R. 154. It is only the creditors or contributories that have a right of appeal from an order under this section. Other persons having no present interest in the company, but only a prospective interest to be appointed secretaries and agents if the company was to be brought to life as a result of the scheme, are not entitled to file an appeal against the order refusing to sanction the scheme, even though they may have originally propounded the scheme and were parties in the lower Court. 56 B. 16=33 Bom.L.R. 1495=1932 B. 78.

Secs. 153 and 213.—The plain language of S. 153 clearly shows that the machinery provided by the section is available where there is and where there is not a winding in progress, and the section would apply to a going concern as well as in a winding up. S. 213, on the other hand, is applicable only in view of a winding up or in the course of a winding up. 39 Bom.L.R. 675=1937 Bom. 423. See also 1939 M. 318.

Sec. 153-A: AMENDMENT BY ACT XXII OF 1936.—This section and S. 153-B have been newly added and thereby Ss. 154 and 155 of the English Act dealing with arrangements and reconstructions have been incorporated in this Act also. Schemes under this Act very often involved a transfer of shares or a class of shares in the company to another company; and in such cases the consent of the shareholders for the transfer had to be obtained. There will always be found a dissenting minority in every company, and although a scheme may have been approved by a substantial majority of their co-shareholders, the carrying out of the scheme used to be often rendered infructuous. To meet this contingency and to put through the scheme approved by a substantial majority, it was thought necessary to make some provisions for acquiring the shares of the dissenting minority on reasonable terms, and the present amendment contains suitable provisions in this respect.

in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and in the case of any property, if the order so directs, freed from any charge which is by virtue of the compromise or arrangement to cease to have effect.

(3) Where an order is made under this section, every company in relation to which the order is made shall cause a certified copy thereof to be delivered to the registrar for registration within fourteen days after the completion of the order, and if default is made in complying with this sub-section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.

(4) In this section the expression 'property' includes property, rights and powers of every description, and the expression 'liabilities' includes duties.

(5) Notwithstanding the provisions of ¹[sub-section (6)] of section 153, the expression 'company' in this section does not include any company other than a company within the meaning of this Act.]

²[153-B. (1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as 'the transferor company') to another company, whether a company within the meaning of this Act or not (in this section referred to as the 'transferee company'), has within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than three-fourths in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and where such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company :

Provided that, where any such scheme or contract has been so approved at any time before the commencement of the Indian Companies (Amendment) Act, 1936, the Court may by order, on an application made to it by the transferee company within two months after the commencement of that Act, authorise notice to be given under this section at any time within fourteen days after the making of the order, and this section shall apply accordingly, except that the terms on which the shares of the dissenting shareholder are to be acquired shall be such terms as the Court may by the order direct instead of the terms provided by the scheme or contract.

(2) Where a notice has been given by the transferee company under this section and the Court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice has been given, or, if an application to the Court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares.

LEG. REF.

¹ This word, brackets and figure were substituted for the word, brackets and figure "sub-S. (4)." by S. 10 of Act II of 1938.

² This section was inserted by S. 84 of Act XXII of 1936.

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Sec. 153-B: AMENDMENTS BY ACT XXII OF 1936.—This section adopts S. 155 of the English Act. As to the necessity for this amendment, see notes under S. 153-A (Amendment), *supra*. The stringency of

(3) Any sums received by the transferor company under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

(4) In this section the expression "dissenting shareholder" includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.]

Conversion of private company into public company.

¹[154. (1) If a company, being a private company, alters its articles in such manner that they no longer include the provisions which, under the provisions of clause (13) of sub-section (1) of section 2, are required to be included in the articles of a company in order to constitute it a private company, the company, shall, as on the date of the alteration, cease to be a private company and shall, within a period of fourteen days after the said date, file with the registrar a prospectus or a statement in lieu of prospectus in the form and containing the particulars set out in the form marked II in the Second Schedule.

(2) If default is made in complying with sub-section (1) of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding five hundred rupees.

(3) Where the articles of a company include the provisions aforesaid but default is made in complying with any of those provisions, the company shall cease to be entitled to the privileges and exemptions conferred on private companies under the provisions contained in this Act, and thereupon the provisions of this Act shall apply to the company as if it were not a private company :

Provided that the Court, on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any other person interested and on such terms and conditions as seem to the Court just and expedient, order that the company be relieved from such consequences as aforesaid.]

PART V.

WINDING UP.

Preliminary.

Mode of winding up.

155. (1) The winding up of a company may be either—

LEG. REF.

¹ This section was substituted by S. 85 of Act XXII of 1936.

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the requirements contained in the English Act has been slightly relaxed in this section.

Sec. 154: AMENDMENT BY ACT XXII OF 1936.—The present section adopts the provisions of S. 27 of the English Act. Also a separate form has been introduced in the second schedule for use, when a private company is converted into a public company. In the section, even as it formerly stood, a private company could by making adequate alteration in its articles convert itself into a public company. But, there was no limitation provided as to the time within which the requirements of the section had to be complied with, and very often there used to be unreasonable delay in complying with all the

requirements of the section. In such cases, it was difficult to state the exact position of the company before the provisions of the section had been fully complied with, *vis.*, whether it was to be treated as a private or public company. To put an end to this delay and doubt, this present amendment provides a time limit for complying with the provisions of the section, and prescribes a penalty for default; and it also enacts that such companies would cease to be private companies and forfeit all the privileges of a private company as from the date of the alteration of the articles.

Sec. 155: GENERAL.—Companies incorporated under this Act could be put an end to only in one of two ways, *vis.*, either through the machinery of a winding-up or by the Registrar striking off the register defunct companies in certain cases.

(i) by the Court; or

(ii) voluntary; or

(iii) subject to the supervision of the Court.

(2) The provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of these modes.

Contributories.

156. (1) In the event of a company being wound up, every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up, and for

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APPLICABILITY OF THIS PART V.—The provisions relating to the winding-up are made applicable also to the following companies (Ss. 250 and 251) of the Act:

(i) Existing companies, *i.e.*, companies formed and registered under the Companies Act 1866, or under any Act or Acts repealed thereby, or under the Companies Act, 1882.

(ii) Companies registered but not formed under Act XIX of 1857 and Act VII of 1860 or either of them, or under the Companies Act of 1866 or 1882.

(iii) Unregistered companies, *i.e.*, any partnership, association or company consisting of more than seven persons and other than a railway company incorporated by Act of Parliament or by Act of the Governor-General in Council, and a company registered under this Act or any of the previous Companies Acts. In the case of the winding-up of these unregistered companies, certain exceptions and additions to the general provisions contained in this Part V are enacted in Part IX, Ss. 270-276 of this Act.

Sec. 156: SCOPE AND APPLICATION OF SECTION.—This section proceeds on the assumption that the contributories are all innocent parties and that they must contribute equally towards the loss sustained by the company for no fault of theirs, subject however to certain equities which are contained in the exceptions contained in the section. Hence, whatever may be the effect of plea of fraud or misrepresentation as against managing agents, it does not affect the liability of the contributories, as such, in the winding-up of the company. 149 I.C. 869=1934 Sind 39. S. 156 creates a new liability as regards shareholders to contribute to the assets of the company, and this new liability arises for the first time upon the winding-up and is unaffected by the fact that previous calls have been made by the company and have become barred by limitation. 45 C.W.N. 879=1941 Cal. 143=I.L.R. (1940) 2 Cal. 175.

"MEMBER".—Where at the commencement of the winding-up a person had been in fact for over three years entered on the register of shareholders, with his full knowledge and consent, his liability flows from the fact of his being on the register in respect of those shares. Even if he took the shares under a

contract with the company which is found to be illegal and void as offending against the provisions of S. 105 of the Act, that does not affect his liability to contribute on the winding-up. The original contract may supply the reason for his name having been placed on the register in respect of the shares, but after the winding-up his liability in respect of the shares arises *ex lege* and not *ex contractu*. 60 I.A. 1=54 A. 827=37 C.W.N. 373=63 M.L.J. 859 (P.C.). By mere death, a member of a company does not become a 'past member' within the meaning of this section. Having died, though he cannot continue to be a member, his estate continues to be liable. 55 A. 417=1933 A.L.J. 233=1933 A. 334. A director of a company who ceases to be a director does not thereby cease to be a member of the company. He cannot be held to be a "past member" of the company within the meaning of S. 156 (1) (i). 32 S.L.R. 167=1938 Sind 187.

LIABILITY OF CONTRIBUTORY.—This liability of the contributory, on the winding-up, to pay the money remaining unpaid in respect of his shares, is a new statutory liability and is enforceable at the instance of the liquidators. That there had been some transactions with the company before the winding-up or that there had been an arrangement with the directors by which the contributory's liability was excluded, cannot be pleaded in defence to the liquidator's claim. 59 C. 1099=36 C.W.N. 409=1932 C. 691. A person who is a signatory to the memorandum of association is responsible for the shares which in the memorandum of association is shown opposite his own name, and such a person is bound as far as the creditors of the company are concerned to pay up the amount due on such shares. 20 L.W. 74=83 I.C. 94=1924 M. 703. Where a person applied for obtaining certain shares in a company in the expectation of obtaining some commission or special gain, and an arrangement was made in accordance thereto by the promoters of the company and the application was granted, it was held that the allottee became a shareholder *in praesenti* absolutely; and the breach or the unenforceability of the collateral agreement could not in any way interfere with the liability of the person as contributory on the

the adjustment of the rights of the contributories among themselves, with the qualifications following (that is to say) :

(i) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up ;

(ii) a past member shall not be liable to contribute in respect of any debt, or liability of the company contracted after he ceased to be a member ;

(iii) a past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act ;

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liquidation of the company. 52 A. 406=1930 A.L.J. 139=1930 A. 357. There is a material distinction between an application with a *condition precedent* and an application with a collateral agreement or condition subsequent. 52 A. 406. So where a person signed a memorandum of association of a company purely on the understanding that he would be given certain number of shares *as fully paid up in consideration of assets transferred* to the company, and the memorandum itself showed the same, it was held that he was not liable as contributory even though the contract to transfer such paid-up shares was subsequently cancelled. 48 A. 503=24 A.L.J. 576=1926 A. 524.

WHEN LIABILITY ARISES.—When a company goes into liquidation and an official liquidator is appointed, the liability of the contributories to pay up the balance of their share amounts, arises only when the Court is satisfied that the financial circumstances of the company are such that a call is necessary for discharging the liabilities of the company. Until the Court makes such an order, the shareholder need not pay the uncalled share-money. 1930 A.L.J. 1203=124 I.C. 726=1930 A. 617. The call in respect of the unpaid shares has to be made only after the list of contributories has been settled. But where, however, a liquidator who was appointed and given all the powers conferred by S. 179 of the Act made a call on the contributory in respect of his unpaid share before the settlement of the list of the contributories and the same was paid, it was held that the contributory need not pay once over when the list was subsequently settled and a formal order of call was made. 59 I.C. 1099; 36 C.W.N. 409=139 I.C. 882=1932 C. 691.

TRANSFER, FORFEITURE OR SURRENDER.—Under this Act which is almost a reproduction of the English Act, the liability of the shareholder is not taken away so far as the company is concerned by any transfer, surrender or forfeiture of the shares. Even after a transfer, forfeiture or surrender of the shares if the liquidation takes place within one year of such transfer, etc., and if he is placed on the list of contributories the shareholder is liable. 20 L.W. 74=83 I.C. 94=1924 M. 703. It is not necessary that the list should have been placed before a meeting of creditors, to make the shareholder liable in such a case. 1924 M. 703.

An intention to forfeit, not carried into effect, is no forfeiture at all. Where there was only a notice that the shares will be forfeited if the payment of call was not made within a certain fixed time, and there was no resolution of the directors, in fact, forfeiting the shares, it was held that there was no forfeiture at all and that the shareholder was liable as contributory even though the company went into liquidation more than one year from the date mentioned in the notice. 10 P. 249=12 Pat. L.T. 215=1931 P. 44; 36 P.L.R. 282.

CALLS IN RESPECT OF FORFEITED SHARES—INTEREST.—Where calls made by a company are not paid and their recovery by the company is time-barred, the liquidator can have no higher rights than the company and as such he also cannot recover them. But if the claim of the liquidator is not on foot of the debt, but is for contribution under S. 156 of the Companies Act, which creates a new liability, the shareholder is liable for unpaid calls and his liability is limited to the amount unpaid on the shares but not to interest. The fact that he has ceased to be a member by reason of the forfeiture of his shares by non-payment of call, would not help him. 1936 L. 226; 1936 L. 739.

CLAIM OF SET-OFF AGAINST CALLS.—Members with limited liability of a joint stock company under liquidation cannot set-off paid-up calls or calls to be paid up against a debt due to the company and thus give a preference over the creditors. The principle is applicable to a set-off claimed in Court as well as to one claimed out of Court. 40 M. 1004=32 M.L.J. 528.

JURISDICTION OF COURT.—After a winding up order the question as to the liability of a contributory should be decided only by the Court conducting the liquidation, and no suit is maintainable by a contributory in respect of it. 13 P.R. 1917=29 P.L.R. 1917=37 I.C. 791.

LIMITATION.—As soon as a company goes into liquidation, the shareholders are saddled with a new statutory liability in respect of unpaid calls, and such calls are recoverable at the instance of the liquidators, though barred by time and irrecoverable by the company. The right of the liquidator is distinct from, and independent of, the right of the company, before the winding up, to make calls. The period of limitation for a suit by the liquidator for recovery of unpaid calls from the shareholders is six years

(iv) in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect to which he is liable as a present or past member ;

(v) in the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up ;

(vi) nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract ;

(vii) a sum due to any member of a company in his character of a member, by way of dividends, profits, or otherwise, shall not be deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company ; but any such sum may be taken into account for the purpose of the final adjustments of the rights of the contributories among themselves.

(2) In the winding up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up to contribute to the extent of any sums unpaid on any shares held by him.

157. In the winding up of a limited company any director whether past or present, whose liability is in pursuance of this Act, Liability of directors whose liability is unlimited. unlimited, shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of the winding up a member of an unlimited company :

Provided that—

(i) a past director shall not be liable to make such further contribution if he has ceased to hold office for a year or upwards before the commencement of the winding up ;

(ii) a past director shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office ;

(iii) subject to the articles a director shall not be liable to make such further contribution unless the Court deems it necessary to require that contribution in order to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of the winding up.

158. The term “contributory” means every person liable to contribute to

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under Art. 120, Limitation Act, and time begins to run from the date of default. 16 L. 1055=1935 L. 335; 155 I.C. 16=1934 L. 1015.

Secs. 156, 212 and 216.—Where a shareholder has failed to pay for shares allotted to him as a signatory to the memorandum of association or on application, he can, in the event of the company going into liquidation, be placed upon the list of contributories and the liquidator can make a call upon him for what is due, in which case a Court can enforce the call without requiring the liquidator to institute a suit, and the amount of the call becomes payable irrespective of any question of limitation. There is no real difference between a company

which is being compulsorily wound up and a company which is in voluntary liquidation. Where the contesting respondent raises several defences, the Court may direct the liquidator to file a suit. I.L.R. (1941) Mad. 538=1941 Mad. 565=(1941) 1 M. L.J. 369.

Sec. 158: CONTRIBUTORY.—The term ‘contributory’ as defined in S. 158 includes a shareholder who holds fully paid up shares only. 1938 A.L.J. 925=1938 All. 613. The holder of fully paid up shares is a contributory. *Re Driffield Gas Light Co.*, (1898) 1 Ch. 451, although his name will not be entered in the list of contributories except at his own desire, since he has no further liability to contribute to the assets. *Re Marlborough Club Co.*, (1868) L.R. 5

Meaning of "contributory." the assets of a company in the event of its being wound up, and, in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory.

Nature of liability of contributory. 159. ¹[(1) The liability of a contributory shall create a debt payable at the time specified in the calls made on him by the liquidator.]

(2) No claim founded on the liability of a contributory shall be cognizable by any Court of Small Causes sitting outside the Presidency-towns.

160. (1) If a contributory dies either before or after he has been placed on the list of contributories, his legal representatives and his heirs shall be liable in a due course of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly.

LEG. REF.

¹ This sub-section was substituted by S. 86 of Act XXII of 1936.

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Eq. 365. See also 57 M. 955=67 M.L.J. 599=1934 M. 476. But a mere debtor to the company is not a contributory. *Re European Society Arbitration Act*, (1878) 8 Ch. D. 679; 25 A.L.J. 934=89 I.C. 994=1926 A. 101. Where a person who agreed to become a member on some condition precedent and the condition was not fulfilled, he does not become a member, and hence is not a contributory. 108 I.C. 192=1928 L. 234; 107 I.C. 492=1928 L. 236.

Sec. 159: AMENDMENT BY ACT XXII OF 1936.—Under the law as it stood previously there was some difficulty felt with reference to calls which may have been made more than three years before the winding up commenced. The language of the section was not clear as to the time when the cause of action with reference to such calls commenced. Hence it was thought necessary to render the matter clear and to provide by this amendment; that in the case of such calls made before the date of winding up, the cause of action against the defaulter should be regarded as arising from the commencement of the winding up. Of course, on calls made after the commencement of the winding up the cause of action may properly be considered to rise from the date of the call.

DEBT.—Where a mutual benefit society carried on banking business by accepting deposits and granting loans to strangers, it was held that the transactions were *ultra vires* of the memorandum and articles of association of the company. Where the carrying on of a business by a company is *ultra vires*, the *ultra vires* transactions cannot create any debt either legal or equitable. The relationships between the depositor and the company in such cases, is not that of debtor and creditor, and the only possible remedy for the depositor is on *in rem* and not *in personam*. Hence, the contributories of the company during the liquidation proceed-

ings are not liable to pay such debts. 1931 M. 792=60 M.L.J. 270.

FRAUD.—A person whose agreement to become a member of the company, has been obtained by fraud, may have the same rescinded before the commencement of the winding up. But when once an application for the compulsory winding up of the company has been made; it is no longer open to the shareholder to get himself relieved of his liability as contributory; on the ground of fraud. 75 I.C. 745=1924 L. 649.

Sec. 159, Sub-Sec. (2).—A suit by a company for recovery of arrears of allotment money and call money due on the shares allotted, is cognizable by a Court of Small Causes. 34 P.L.R. 592=1933 L. 657. But see 59 C. 1186=36 C.W.N. 589=1932 C. 716, where it was held that a suit to enforce the liability of a shareholder for the balance due on his share was not cognizable by a Court of Small Causes, and that a second appeal was competent, even though the amount demanded was less than Rs. 500.

Sec. 160: AMENDMENT BY ACT XXII OF 1913.—Sub-section (3) has been added by the amending Act, and the provision contained therein has been aimed at securing that a surviving coparcener of a Hindu joint family under the Mitakshara law cannot escape liability under this section by asserting that he is neither an heir nor a legal representative.

LIABILITY OF REPRESENTATIVES.—Where a deceased person has been placed on the list of contributories and a payment order has been made against him, the remedy of the liquidator lies against the estate of the deceased in due course of administration as enacted in S. 160. 43 P.L.R. 650=1941 Lah. 480. Until the company is duly informed of the death of a contributory, the deceased person continues to be liable as a member, and the company is not bound to take notice of the death otherwise. So, all proceedings including the settlement of the list of contributories, adopted by the company in the name of the deceased, are good and are not

(2) If the legal representatives or heirs make default in paying any money ordered to be paid by them, proceedings may be taken for administering the property of the deceased contributory, whether movable or immovable, or both, and of compelling payment thereof of the money due.

¹[(3) For the purposes of this section the surviving coparceners of a contributory who is a member of a Hindu joint family governed by the Mitakshara School of Hindu Law shall be deemed to be his legal representatives and heirs.]

Contributories in case of insolvency of member. 161. If a contributory is adjudged insolvent either before or after he has been placed on the list of contributories, then—

(1) his assignees shall represent him for all the purposes of the winding up, and shall be contributories accordingly, and may be called on to admit to proof against the estate of the insolvent, or otherwise to allow to be paid out of his assets in due course of law, any money due from the insolvent in respect of his liability to contribute to the assets of the company; and

(2) there may be proved against the estate of the insolvent the estimated value of his liability to future calls as well as calls already made.

Winding up by Court.

Circumstances in which company may be wound up by Court.

162. A company may be wound up by the Court—

LEG. REF.

¹ This sub-section was added by S. 87, Act XXII of 1936.

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a nullity as would otherwise be the case under the ordinary law. 59 B. 558=36 Bom.L.R. 1002=154 I.C. 178; 1934 B. 469. But see 52 A. 430=1930 A.L.J. 373=1930 A. 503, where it was held that an order against a deceased contributory was a nullity, and that therefore, in order to fix the liability those persons who represent the estate of the contributory should be brought on record before an effective order may be made. But where the death of a contributory has taken place *after an order of payment has been passed against him*, the personal representatives of the contributory automatically become liable instead of the deceased contributory and no application is necessary to bring such representatives on record, and consequently, no question of limitation will arise in respect of such an application. The application is to be deemed to amount only to an intimation to the Court that the contributory was dead and that his representatives have to be treated by the Court as contributories. 141 I.C. 168=1932 L. 648. No question of limitation can arise in such a case. (*Ibid.*) See also 19 Pat.L.T. 214=1938 Pat. 287.

EXTENT OF LIABILITY.—The liability of the legal representatives of a deceased shareholder to contribute, is limited to the extent of the assets, if any, which have come into their hands from the deceased shareholder. 10 P. 249=12 P.L.T. 215=1931 P. 44.

JOINT HINDU FAMILY.—Under this section a son in a joint Hindu family is liable as the legal representative of his father, as a contributory in due course of administration,

only to the extent of the separate property of his father in which no other person had any interest in the lifetime of the father, when the joint family is constituted by members other than father and sons. The son's share in the joint family property is not liable under the doctrine of '*pious obligation*', as the doctrine applies only in cases where the family consists of father and sons alone. 55 A. 417=1933 A. 334. But this decision was disapproved in 57 A. 176, and the new sub-section (3) has been added to the section by the amending Act.

PROCEDURE.—This section lays down the procedure to be adopted in the matter of enforcing the liability of a deceased contributory. The proper course, in such a case, is to take proceedings to recover the amount in due course of administration of the estate of the deceased contributory and not by application for an order for payment against the heir personally. 59 B. 558.

Sec. 162: APPLICATION OF SECTION.—The power to wind up a company should not be used unless there is very strong ground for it because the Indian companies are governed by a majority of its own members, and where there is a domestic tribunal with powers to decide upon a question, it should, if possible, be left to the domestic tribunal. Unless a clear case is made out to the contrary it is for the shareholders of the company to decide whether the company's business shall be or shall not be carried on. 39 A. 334=15 A.L.J. 193=39 I.C. 570; 47 C. 654=59 I.C. 542. But this rule should not be as strictly applied in India as in England. In this country limited liability companies are in their infancy and shareholders and creditors are easily misled by fraudulent directors. Hence, while the opinion of

- (i) if the company has by special resolution resolved that the company be wound up by the Court ;
- (ii) if default is made in filing the statutory report or in holding the statutory meeting ;
- (iii) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year ;
- (iv) if the number of members is reduced, in the case of a private company, below two or, in the case of any other company, below seven ;
- (v) if the company is unable to pay its debts ;

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shareholders and creditors undoubtedly ought to be taken into consideration, these classes of persons in India require to be protected against themselves. 16 L. 1029=38 P.L. R. 166=1935 L. 779.

POWERS OF COURT.—Rules of companies curtailing the power of Court to wind up in circumstances under which the Court has power to do so under the Act are *ultra vires*. 29 C. 688. A very wide discretion is given to the Court under this section, and the same has to be exercised with reference to the facts and circumstances of each case. Even where some of the requisites mentioned in the section exists, the Court is not bound to order the winding up. In a case where the business of the company was suspended for more than a whole year, the Court refused to order a winding up on an application by a shareholder, as it appeared to the Court that the suspension was due to temporary causes and was satisfactorily accounted for, and that there was every prospect of the business being resumed. 47 C. 654=59 I.C. 542. So also in a case, where there was a failure to meet the statutory demand for payment of a creditor's debt, the Court refused to order the winding up at the instance of the creditor, as it found that there was a *bona fide* dispute as to the company's liability to that debt. 106 I.C. 423=1929 M. 265. Similarly in the case of a company which had lost 5 lacs out of 7 lacs of its capital, in a misadventure, the Court refused to order the winding up of the company, as the majority of the shareholders was opposed to the winding up and as the loss was due to mismanagement of the former directors, and as the company was showing progress under the new management. 5 R. 685=107 I.C. 860=1928 R. 36. On the other hand, where owing to the fraudulent and undue influence exercised by the directors, a majority of shareholders and creditors happened to prefer a voluntary winding up conducted by some of the directors themselves, the Court ordered compulsory liquidation at the instance of a minority. 16 L. 1029=38 P.L. R. 166=1935 L. 779. Where in consequence of an onerous contract with a creditor the company loses its identity, and the creditor becomes *de facto* the company with a power to bring it to an end whenever it suited him and in accordance with the stipulations of the contract he seizes the machinery and plant

of the company with the result that the company is unable to carry on its business and to pay its debts it is just and equitable to wind up the company. 1941 P.C. 106 (P.C.). As to right of policyholder of life Assurance company to apply for winding up. See 40 Bom. L.R. 52=1938 Bom. 182.

Sec. 162, Cl. (1): JURISDICTION.—An order for voluntary liquidation under supervision passed by the Court, consequent upon the resolution passed at the extraordinary meeting of the company, is not without jurisdiction merely by reason of the fact that the meeting was convened within 14 days of the issue of notice, or that the resolution was conditional. It may be a bad order, but it is not without jurisdiction. 126 I.C. 74=1930 L. 721.

PROPER APPLICATION NECESSARY FOR COURT TO ACT.—An application for the appointment of an Official Liquidator cannot be treated as one for compulsorily winding up the company when on the face of it the rules to be strictly observed have not been observed. The Court is not concerned merely with the litigants or the parties before it in the jurisdiction conferred upon it under the Companies Act, but is concerned with the creditors or contributories and the public generally, and indeed it has no power to waive any irregularity as regards the strict compliance with the law laid down in the Act and the rules made thereunder. 162 I.C. 218=1936 P. 468.

Sec. 162; Cl. (iii).—Where the firm of managing agents of a company was dissolved; and steps were being taken at extraordinary general meetings to appoint new managing agents, it was held that there was sufficient indication that it was possible to carry on the business of the company and that there was no complete deadlock necessitating the compulsory winding up of the company. 47 C. 654=59 I.C. 542.

Sec. 162, Cl. (v).—The Court has to see under this clause whether the company is commercially insolvent, *i.e.*, whether it is unable to meet its current demands, although the assets when realised may exceed its liabilities. If the company is commercially insolvent, it may be wound up. 143 I.C. 135=1933 L. 301. When the Court is called upon to wind up a company under S. 162 (v) on the ground that it is unable to pay its debts, what has to be ascertained is not whether the company, if it converted all its

(vi) if the Court is of opinion that it is just and equitable that the company should be wound up.

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assets into cash, would be able to discharge its debts, but whether, in a commercial sense, the Company is solvent. In deciding whether a company is able to pay its debts, the subscribed capital of the company which is due and which he has not yet been called up can be taken into account as money available for the discharge of the debts. A company is entitled to regard money which it is entitled to call up on account of shares from the contributories as money available for the discharge of its debts. 20 Pat. 538 = 1941 Pat. 603. See also 1941 P.C. 106 (P.C.). There is obviously a great difference between a question of positive fact; such as the pecuniary position of a trading company, at a particular date, and a question of the prospectus of such a company in the future, a matter which must depend on all sorts of views as to the state of world trade, the confidence of the public, the price at which articles can be sold, a matter which depends very largely upon the number of such sales and an infinity of other considerations very difficult either to summarise or to define. It is not the function of a Court to determine such a matter on its own views as to probable success or failure, but to form the best opinion it can upon the evidence given by persons with a practical knowledge of the trade in question and the local conditions where these affect the matter. 161 I.C. 539 = 1936 P.C. 114 (P.C.). The debt referred to in this sub-clause is one which is presently payable; and in respect of which the title of the petitioner must be complete. It is not sufficient to show that some other debt is due or even that there is something over Rs. 500, due in respect of the claim made if that is not the sum in respect of which the statutory demand (*vide* S. 163, *infra*) was made. The law requires that a demand must be made for a debt that is due, and it is not permissible to support a petition by alleging that something else is due. 62 C. 294. And where there is a *bona fide* dispute as to the company's liability to pay the debt of any creditor, the creditor's application for its winding up will not be granted. The Court will not allow in such a case the provisions of this section being used for getting the payment of his debts, but he will be referred to a suit to recover his claim. 106 I.C. 423 = 1929 M. 265; 2 R. 575 = 1925 R. 128. But where there is no trace of any *mala fides*, and the object of the creditor is simply to recover his debts out of the assets as may be available and the company is not in a position to pay the debt, the creditor is *prima facie* entitled to an order of winding up. A shareholder who was also the principal creditor of a company applied for winding up of the company. Before filing his application, he had served on the company a notice of demand requiring payment of his

debt, but the company failed to pay the same. The company was in a moribund condition, its main assets had fallen much in value, and it had suffered heavy losses. It was held that there were proper reasons for granting a winding up order. 11 L. 80 = 1929 L. 651.

Sec. 162, Cl. (vi): JUST AND EQUITABLE GROUNDS, GENERAL PRINCIPLES.—No general rule can be laid down as to the nature of the circumstances which have to be borne in mind in considering whether the case comes within the phrase 'just and equitable' for purposes of winding up. The decisive question must be whether at the date of the presentation of the winding up petition there is any reasonable hope that the object of trading at a profit, with a view to which the company is formed, can be attained. In considering that question, the guarantee of the preference shares should be left out of sight, except in so far as it may have biased the evidence on either side. Where there was no question of a deadlock, nor was there any question of shareholders who have the voting power using that power for their own commercial interests outside the company in disregard of the interests of a minority, nor again was there any question involved of an improper management of the company by the directors who were in control and the problem involved was of the nature of a business problem. *Held*, that if there was at the relevant time a reasonable hope of tiding over the period of deep depression and of emerging into a region in which the company might reasonably expect to carry on at a profit, there would seem to be no sufficient reason why the Court should wind up the company under the just and equitable clause. 161 I.C. 539 = 1936 P.C. 114 (P.C.). The position of the Court in determining whether it is just and equitable to wind up the company requires a fair consideration of all the circumstances connected with the information and the carrying on of the company; and the common misfortune which had befallen some shareholders in the company does not involve the consequence that the ultimate desires and hopes of the ordinary shareholders should be disregarded merely because there is a strong interest in favour of liquidation naturally felt by the holders of the preference shares. 161 I.C. 539 = 1936 P.C. 114 (P.C.). See also 1936 A. 840. In deciding whether it is just and equitable to wind up a company under S. 162 (vi) the decisive question is whether at the date of the presentation of the petition there is any reasonable hope that the object of trading at a profit is attainable. The onus of proof is on the petitioning creditor or contributory. It is not the function of the Court to determine the question of the prospects of the company in future on its own views as to probable success or failure, but to form the best opinion it can

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upon the evidence of persons given with a practical knowledge of the trade in question and the legal conditions where these affect the matter. If at the relevant time, there is a reasonable hope of trading over a period of difficulty and emerging into a region in which the company might reasonably expect to carry on at a profit, there is no sufficient reason why the Court should wind up the company under class (vi) of S. 162. Where there is no evidence of persons with practical knowledge of the business in question, the fact that a public officer, whose duty it is to intervene in cases where a company's affairs are not conducted in a sound manner, has not taken action to wind up the company is, of course, not a deciding factor in determining whether a petition for winding up by a contributory should be granted or not, but it is a fact which is deserving of consideration under the just and equitable clause. 20 Pat. 538=1941 Pat. 603.

"JUST AND EQUITABLE", CONSTRUCTION OF.—This term is not to be construed *ejusdem generis* with the preceding clauses of the section. 48 M. 448=48 M.L.J. 118=1925 M. 489; 30 Bom.L.R. 1509=114 I.C. 849=1929 B. 8. But the Courts will yet require grounds of a like magnitude before acting under this clause, and it is only in extreme cases that the Court will at the suggestion of the minority disregard the wishes of the domestic forum and condemn the company to extinction. 13 Bur.L.T. 51=59 I.C. 524. In the case of a *non-trading private* company the object of which was to pay off family debts and the shareholders of which were mainly the members of that family, to bring the company within 'the just and equitable' clause of this section, it must be shown that the substratum of the company, (i.e., the family property) has gone, or that a deadlock has arisen in the sense that it is now impossible for the company to carry on the objects for which it was formed. 58 C. 716=132 I.C. 321=1931 C. 692. Where the company is in a moribund condition and has sustained heavy losses, and was unable to pay its creditors, and its assets have considerably fallen in value. 11 L. 80=1929 L. 651. Where the company's business was at a standstill and it was unable to pay its debts or the salaries of its employees for several months, and had no cash nor credit to raise money, and where there was no prospect of work being resumed for an appreciable time. 126 I.C. 185=1930 L. 777. Where a person who had been adjudicated insolvent transferred large estates to a private limited company in which he had 90 per cent. of shares and over which he had complete control. 5 R. 685=107 I.C. 860=1928 R. 36. Where there was a lack of confidence in the conduct and management of the company owing to the management being held in one family which was in a position to dominate the other shareholders

and monopolise the company's affairs for its own benefit. 48 M.L.J. 232=21 L.W. 36=86 I.C. 914. A press which was a limited concern was leased to a certain person who subsequently subleased it to another at large profits. Numerous shareholders had also to file suits against the company for recovering the dividends due to them. The Chairman of the press was found not authorised by the persons whose names appeared in the dividend warrants to give an acquittance or receipt on their behalf. *Held*, that under the circumstances it was just and equitable that the company should be wound up. 53 M. 38=1930 M. 240=57 M.L.J. 426. Where there was no properly constituted directorate, nor had a single balance sheet been issued during five years of the company's existence, and the cash balance was alleged to have dwindled to nothing and the company was unable to pay its debts. 13 L. 603=1932 L. 571. Where the substantial part of the business of the company was illegal and constituted an offence under S. 294-A, I.P.C., although the object of the company was to benefit some charities. 56 M. 26=63 M.L.J. 554=1933 M. 16. See also 66 M.L.J. 76=57 M. 844. In the following cases it was held that there were no just and equitable grounds for ordering a winding up.—

(i) Where the ground of the application was only an *ultra vires* transaction on the part of the directors; and where there were other remedies open to the aggrieved shareholder in respect of it. 55 M. 180=61 M.L.J. 783=1932 P.C. 1=58 I.A. 416 (P.C.).

(ii) Mere misconduct of directors. *Re Gold Company*, (1879) 11 Ch.D. 731, C.A. No doubt the mere misconduct of directors or of managing agents or the fact that the business of the company has not resulted in profit is not *per se* a ground for winding up. But where the cumulative effect of these facts does demonstrate that the company is insolvent, that its affairs have been mismanaged from the very outset, that debts have been recklessly incurred and never paid; that the provisions of the Companies Act as regards the maintenance and publication of true balance sheets have been deliberately contravened, and the information necessary to keep the shareholders cognizant of the true state of affairs has been studiously concealed from them all through, the company ought to be compulsorily wound up. 166 I.C. 238=1936 A. 840=I.L.R. (1937) All. 210.

(iii) The mere fact that the business is carried on at a heavy loss (where the company is not insolvent) especially when the loss was due to previous mismanagement and it was shown that it would be in a sound position under the new management. 30 Bom.L.R. 1549=114 I.C. 849=1929 B. 8.

(iv) That the company has acted dishonestly in its dealings with outsiders especially when such dealings are not connected with the promotion or formation of the company

Company when deemed unable to pay its debts.

163. ¹[(1)] A company shall be deemed to be unable to pay its debts—

LEG. REF.

¹ S. 163 was re-numbered as sub-S. (1) of that section by S. 88 of Act XXII of 1936.

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and are not dealings with the shareholders as regards their membership in the company. *Re Medical Battery Co.* (1894) 1 Ch. 444.

(v) The mere fact that there has been a fraud in the promotion of the company or fraudulent representation in the prospectus, would be insufficient to found a winding up order on, as the majority of the shareholders may waive the fraud. 49 C. 399=69 I.C. 241=1922 C. 365.

(vi) A mere apprehension on the part of the applicants that loss may occur from a further working of the company, where there has been no fraud in the conception of the company and where its substratum had not gone. 39 A. 334=15 A.L.J. 193=39 I.C. 570.

(vii) The mere fact that a majority of shareholders in meeting directed to be held by Court voted in favour of the winding up of the company either under the supervision of the Court or by the Court compulsorily, where there was no valid resolution for voluntary winding up. 49 C. 399=69 I.C. 241=1922 C. 365.

(viii) The mere fact that the managing director had a preponderating voice in the company by reason of his owning or controlling a large number of shares or that dividends had not been paid regularly, in the absence of other circumstances to prove a lack of confidence in the conduct and management of the company's affairs. 55 M. 180=61 M.L.J. 783=1932 P.C. 1=58 I.A. 416 (P.C.).

(ix) Where a minority of creditors seek a compulsory winding up order, while the majority of the creditors are opposed to the winding up by the Court and prefer voluntary liquidation with a view to reconstruction. 10 R. 143=1932 R. 75. Where the report of the auditors shows that there had been defalcation of certain funds of the company and that attempts were made to cover up the defalcation by various devices, and the contributories level charges of dishonesty and mismanagement against each other, the case is one in which the conduct of some officers of the company would require investigation which can only be obtained in winding up by the Court. In such circumstances, considerations of justice and equity are more in favour of a compulsory winding-up than voluntary liquidation. 168 I.C. 185=1937 O.W.N. 627=1937 Oudh 377.

PETITION BY CREDITOR FOR WINDING UP—OPPOSITION BY DEBENTURE-HOLDERS—WHEN SUSTAINABLE.—The debenture-holders who oppose a petition by a creditor for the winding up of the company, must show that there is no possibility of any benefit accruing

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to the unsecured creditors from an order for the winding up. Otherwise their opposition to the petition is without substance. The unsecured creditors are entitled to ask the Court to pass a winding up order so that the question whether the debentures were *bona fide* issued for value may be enquired into and they may, before it is too late, be able to realize, if not the whole, at least a portion of their unsecured debts. 166 I.C. 238=1936 A. 840=I.L.R. (1937) All. 210.

COSTS.—Where on the presentation of a winding-up petition, some of the creditors appeared to support it, in answer to a notice issued under R. 27 of the Companies Act rules of the Original Side of the Madras High Court and where neither the petitioning creditor nor any of the supporting creditors was willing to continue the petition, the petition was dismissed. *Held*, that the supporting creditors are not entitled to costs as against the petitioning creditor. 1937 M. W.N. 1106=46 L.W. 768=(1937) 2 M.L. J. 825.

Sec. 163: AMENDMENT BY ACT XXII OF 1936.—(i) In cl. (i) for the words 'by leaving the same' the words 'by causing the same to be delivered by registered post or otherwise' have been substituted; (ii) The present sub-section (2) has been newly added. The amendment in cl. (i) relating to the manner of serving on a company a demand for payment of debts, has been made with a view to avoid disputes as to whether there was due service or not. In fact in a case in Calcutta it was doubted whether the words 'by leaving the same' included transmission by post. The present sub-section (2) has been inserted on account of the trouble created by the use of the words 'under his hand' in the section. In 54 C. 345 the phrase was construed to mean 'under the signature of the creditor himself'; and it was held in fact that a notice signed by an agent was not a valid notice within the meaning of this section. The necessary consequence of this decision was that where the creditor was a partnership firm, the notice had to be signed by all the partners individually. Similarly, in the case of foreign creditors, the signature by the constituted attorney would not have been sufficient. The practical inconveniences and difficulty of such requirements are obvious, and they were never intended by the legislature. Hence, the explanation of the phrase: 'under the signature' has been added by the amendment.

APPLICATION OF SECTION.—The statutory notice under this section is a highly formal and important document and to give rise to the presumption afforded by the section, the provisions of the Act as to its service upon the company must be strictly observed. 58 C. 716=1931 C. 692. The company to be

(i) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company,¹ [by causing the same to be delivered by registered post or otherwise] at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(ii) if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(iii) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

²[(2) The demand referred to in clause (i) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by an agent or legal adviser duly authorised on his behalf, or in the case of a firm if it is signed by such agent or by a legal adviser or any one member of the firm on behalf of the firm.]

LEG. REF.

¹ These words were substituted for the words "by leaving the same," Act XXII of 1936.

² Sub-S. (2) was added by S. 88 of Act XXII of 1936.

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served with notice must be in default at the time of service, and it is to be served with the demand under special precautions so that if it makes a further default for a period of 3 weeks the question of its inability to pay its debts may be set at rest. 54 C. 345=103 I.C. 629=1927 C. 625. But once a notice is properly given and default is made it is not open to the company to show that, in spite of the non-payment of the debt, the company is in a position to pay the debts as, e.g., where on account of temporary embarrassment it was unable to meet the particular liability, though it has had ample assets in its hands. The default will be treated as conclusive evidence of the company's inability to pay its debts. 5 R. 483=105 I.C. 534=1927 R. 306. See also 1936 A. 840. It does not follow from the fact that all the three clauses of S. 163 are mutually exclusive of each other, that cl. (i) of the section does not apply to a judgment-debt. Cl. (i) is general in its terms and has application to all sorts of debts, be it a simple money debt, a mortgage debt, or a judgment debt. In the case of a judgment-debt, if execution for the recovery of that debt has been taken and has remained unsatisfied, the Court is, in accordance with cl. (ii) of S. 163, bound to presume that the company is unable to pay its debts. Nevertheless, the decree-holder is not barred from making a demand for the payment of the judgment-debt by a notice in accordance with cl. (i) without having recourse to execution proceedings. In such a case, if the demand remains unsatisfied for three weeks, the presumption enjoined by S. 163 necessarily follows. 166 I.C. 238=1936 A. 840=I.L.R. (1937) All. 210.

'UNABLE TO PAY ITS DEBTS'.—This term includes commercial insolvency, i.e., inability to pay debts as they become due, although when all the assets of the company should be realised they may be found to be in excess of the liabilities of the company. 143 I.C. 135=1933 L. 301.

'DEMAND'.—The demand must be for a debt that is due, i.e., the debt must be presently payable and the title of the petitioner must be complete. It is not open to the applicant to show that some other debts besides the one for which the statutory demand was made was due. 62 C. 294. In the case of a petition by a creditor of the company for winding up, on the ground that his statutory demand for payment was not complied with by the company, and the company contested that the claim made by the creditor was fraudulent and unsustainable in law, the Court has to see whether the plea of the company is *bona fide* or merely a cloak to screen its real inability to pay its debts. The Court should also see whether the creditor was acting *bona fide*, and has not filed his petition with a view to bring the pressure of insolvency proceedings to bear upon the company in order to make it pay cheaply and expeditiously a heavy debt which the company desires to dispute in civil Courts. 39 B. 47=16 Bom.L.R. 692=27 I.C. 44. A notice of demand by the solicitors, advocates, or agents of the creditors was held in some cases, as not being sufficient compliance with the provisions of this section. But now the sub-section (2) has been added by the Amending Act, explaining the term 'demand'. The provisions in cl. (i) of S. 163 that the notice by the creditor must be a "demand under his hand" asking for the payment of the debt must be strictly complied with, otherwise, the demand, though followed by neglect of the company to pay the debt demanded, cannot be made the basis of presumption that the company is unable to pay its debts. Clause (i) of S. 163 imposes a penal obligation

164. Where the High Court makes an order for winding up a company under this Act, it may, if it thinks fit, direct all subsequent proceedings to be had in a District Court; and thereupon such District Court shall, for the purpose of winding up the company, be deemed to be "the Court" within the meaning of this Act, and shall have, for the purposes of such winding up, all the jurisdiction and powers of the High Court.

165. If during the progress of a winding up in a District Court it is made to appear to the High Court that the same could be more conveniently prosecuted in any other District Court having jurisdiction to wind up companies, the High Court may transfer the same to such other Court, and thereupon the winding up shall proceed in such other District Court.

166. An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately ²[or by the registrar];

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² These words were inserted by S. 89. Act XXII of 1936.

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upon the company; and has therefore, to be strictly construed. A demand by a limited liability company under the hand of its manager must be deemed to be a demand by the company under its hand. 166 I.C. 238=1936 A.W.R. 1113=1936 A. 840. No doubt the mere service of a notice by a creditor on a solvent company does not entitle the creditor to a winding up order if the company *bona fide* disputes the existence of the debt. But this principle has no application where the denial by the company of its liability is *mala fide* and dishonest. 166 I.C. 238=1936 A. 840=I.L.R. (1937) All. 210.

'NEGLECTED'.—If omission to pay the debt on account of a *bona fide* dispute, it would not amount to 'neglect' within the meaning of this section. 2 R. 575=84 I.C. 1021; 1929 M. 265=106 I.C. 423; 58 C. 716=1931 C. 692.

Sec. 164: JURISDICTION OF DISTRICT JUDGE.—Under this section, the District Judge has, for the purpose of winding up a company, all the jurisdiction and powers of the High Court, and he can therefore order attachment before judgment of property situated beyond his jurisdiction. 106 I. C. 809=1928 L. 376. The Additional District Judge also has jurisdiction to make all the orders which the District Judge can make in the winding up of a company. 47 M.L.J. 322=27 C.W.N. 509=69 I.C. 356 (P.C.).

PROCEDURE.—Where applications are made by the official liquidator to the High Court for an order directing the District Court within whose jurisdiction the property of the contributory may be situated, to enforce the payment orders made by another High Court in the matter of the winding up of a com-

pany, it is not competent for the High Court to authorise the official liquidator to apply to the District Court concerned for enforcing the orders under this section. 25 L.W. 113=100 I.C. 744=1927 M. 271. But a contrary view has been taken by the Allahabad High Court in 54 I.C. 384. According to the Madras High Court the proper procedure in such a case would be as indicated by the conjoint effect of Ss. 199 and 200 of the Act, viz., that the order of another High Court filed in this High Court should be treated in the same manner as a decree passed by this High Court in which it is filed, and transferred for execution to the respective District Courts concerned. 25 L.W. 113=1927 M. 271.

Sec. 166: AMENDMENTS BY ACT XXII OF 1936.—(i) After the words 'together or separately' the words 'or by the Registrar' have been inserted. (ii) Cl. (aa) has been newly added. The first amendment makes provision for enabling the Registrar of Joint Stock Companies also to present a petition for the winding up of any company. The second amendment defines the circumstances and conditions in which the power may be exercised by the Registrar.

'CREDITOR'.—In cases decided under the corresponding S. 170 (1) of the English Act, the following persons have been included under the term 'creditors': (i) The assignee of a debt, provided the assignment has not been made while the creditor's petition is pending; (ii) The equitable assignee of part of a debt; (iii) The executor of a creditor, even before probate; (iv) a creditor; in respect of a debt incurred by voluntary liquidators, (v) A secured creditor; (vi) A judgment-creditor; (vii) The holder of a debenture including a bearer debenture; and (viii) The holder of an investment bond (of an insolvent company which has not yet matured for payment). (See Halsbury, Vol. V, 549.).

Provided that—

(a) a contributory shall not be entitled to present a petition for winding up a company unless—

(i) either the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven ; or

(ii) the shares in respect of which he is a contributory or some of them either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder ;

¹[(aa) the registrar shall not be entitled to present a petition for winding up a company—

(i) except on the ground that from the financial condition of the company as disclosed in its balance-sheet or from the report of an inspector appointed under section 138 it appears that the company is unable to pay its debts, and

(ii) unless the previous sanction of the ²[Central Government] has been obtained to the presentation of the petition :

Provided that no such sanction shall be given unless the company has first been afforded an opportunity of being heard.]

(b) a petition for winding up a company on the ground of default in filing the statutory report or in holding the statutory meeting shall not be presented by any person except a shareholder, nor before the expiration of fourteen days after the last day on which the meeting ought to have been held ;

(c) the Court shall not give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a *prima facie* case for winding up has been established to the satisfaction of the Court.

167. An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory.

LEG. REF.

¹ This clause was inserted by S. 89 of Act XXII of 1936.

² These words were substituted for the words "Local Government" by A.O., 1937.

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THE FOLLOWING PERSONS WILL NOT BE CREDITORS UNDER THIS SECTION, ENTITLED TO PETITION:—(i) A person claiming unliquidated damages, (ii) A judgment-creditor who has attached a debt due from the company to his judgment-debtor; (iii) A surety in respect of a mortgage-debt of another company, which has assigned the equity of redemption to the company petitioned against, on the terms that the latter indemnifies the former; (iv) A creditor who has so charged or dealt with his debt as to pass the real interest therein to another person; and (v) A person whose debt is *bona fide* disputed by the company. (*Halsbury*, Vol. V, p. 550.).

'CONTRIBUTORIES'.—A person who has fully paid up his shares is included in the term 'contributory' and he is entitled to present a petition for winding up. 53 M. 38=57 M. L.J. 426=1930 M. 240; 91 P.R. 1917=36 I.C. 980. Also person holding power of attorney from executors under a will of deceased

contributory. 1937 O.W.N. 627=1937 Oudh 377. Persons who do not cease to be members of the company for one year or more before the commencement of the winding up proceedings are also contributories within the meaning of this section and they are entitled to apply for winding up if the shares were held by them and registered in their names for more than six months before the commencement of the winding up proceedings. 13 L. 603=1932 L. 571. The provision contained in the proviso to cl. (a) (ii) is for the purpose of preventing shares being transferred to any body; e.g., the nominee of a rival in trade, to qualify him to present a petition. The circumstances in which a contributory can file a petition for winding up are set forth in cl. (a).

SECS. 166 and 287.—Applicability—Life Assurance Company—Policy holder—Right to apply to wind up as contributory or creditor. 40 Bom.L.R. 52=1938 Bom. 182.

SEC. 167.—When once a winding up order is made, the company becomes as from the date of the petition incapable of entering into contracts without the sanction of the Court. 59 M.L.J. 826.

SECURED CREDITOR.—A secured creditor will not be affected by an order for winding up so far as his security is concerned. He

Commencement of winding up by Court.

168. A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.

169. The Court may, at any time after the presentation of the petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company or of any creditor or contributory of the company, restrain further proceedings in any suit or proceeding against the company, upon such terms as the Court thinks fit.

170. (1) On hearing the petition the Court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally, or make any interim order or any other order that it deems just, but the Court, shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(2) Where the petition is presented on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default.

¹[(3) Where the Court makes an order for the winding up of a company it shall, except where a liquidator is appointed simultaneously, forthwith cause intimation thereof to be sent to the official receiver.]

LEG. REF.

¹ This sub-section was added by S. 90 of Act XXII of 1936.

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may proceed in any manner that may be open to him to realise his amount from the security. If that should not be sufficient to satisfy his debt in full, he may also like the other creditors of the company prove in the liquidation proceedings in respect of the outstanding balance. The remaining assets will be liable for such principal and interest as was due on the day of the winding up order. 3 L. 59=74 I.C. 187.

LIMITATION.—As regards the application of the statute of limitation there is no analogy between the position of a debtor to, and creditor of, a company in liquidation. The winding up does not prevent the statute from running in favour of persons indebted to the company. 54 A. 1067=64 M.L.J. 403=1933 P.C. 63=60 I.A. 13 (P.C.); 55 A. 912. But now see the amended S. 235, which provides a period of three years from the date of the appointment of the first liquidators, in respect of various claims mentioned therein.

Sec. 168: "COMMENCEMENT OF WINDING UP".—The date of commencement of the winding up order is important to decide several matters. (*Vide* Ss. 156, 157, 227, 230, 232, 233 and 234.) Any contract entered into by the company without the sanction of the Court after the presentation of the petition is not valid. 59 M.L.J. 826=129 I.C. 40=1930 M. 1012. So also all

dispositions of property and payments made by the company. 59 M.L.J. 826. But a contract for purchase of goods made honestly and in the ordinary course of business may be sanctioned by the Court. 59 M.L.J. 826. Where a company went into voluntary liquidation while a petition by the creditors for winding up was pending in Court, the appointment of the liquidator by the company being *pendente lite* he would not be entitled to contest the order directing the compulsory winding up, in pursuance of the petition. 73 P.R. 1914=25 I.C. 553.

Sec. 169: APPLICATION AND SCOPE OF SECTION.—The power of Court under this section to stay the execution of a decree may be exercised even in cases of voluntary liquidation. 28 O.C. 197=91 I.C. 1053=1925 O. 630. The Judge conducting the liquidation has power to recall a wrong order, and rectify a mistake. 13 P.L.R. 1919=51 I.C. 723. But he will not be justified on the ground of discovery of fresh matter and of expediency to pass a fresh order in the place of the old one. (*Ibid.*) This section does not bar an application to set aside an *ex parte* order. 72 I.C. 106=1923 A. 429.

Sec. 170: AMENDMENT BY ACT XXII OF 1936.—Sub-section (3) now provides for notice of a Court's order for winding up being sent to the official receiver. (*See also* notes under S. 171-A amendment, *infra*.)

APPEAL.—An appeal lies from an order refusing to wind up a company. 39 B. 47=16 Bom.L.R. 692=27 I.C. 44.

171. When a winding up order has been made ¹[or a provisional liquidator has been appointed] no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.

LEG. REF.

² These words were inserted by S. 91, Act XXII of 1936.

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Sec. 171: AMENDMENT BY ACT XXII OF 1936.—After the words 'has been made' the words 'or a provisional liquidator has been appointed' have been added. Under the law as it stood before this amendment, it was only after the winding up order was made, that all proceedings against the company were stayed and that proceedings could not be commenced or continued without the leave of the Court. In the interregnum between the presentation of a petition for the winding up and the order for winding up, the Court to which the petition has been presented had no power to stay proceedings in a proper case. Provisional liquidators were often appointed to protect the assets, but their appointment did not operate as a stay of proceedings. A stay under such circumstances could not possibly prejudice any party as matters would only be kept *in statu quo ante*. There are provisions in the English law for stay under such circumstances, and the present amendment follows the English Act and provides that the appointment of a provisional liquidator should operate as a stay.

POWERS OF COURT.—Leave of liquidation Court must be taken before unsuccessful claimants can sue the company which is in liquidation. 70 P.R. 1919=50 I.C. 645. Leave to continue an action should be given only where there arises some question which cannot be determined satisfactorily in the winding up proceedings. 93 P.R. 1919=47 I.C. 1005. Under this section the Court has very wide powers. It may grant leave unconditionally or it may grant it on terms, or it may refuse it absolutely. But in the exercise of its discretion, the Court cannot act arbitrarily or capriciously. Thus leave to sue should ordinarily be granted to a secured creditor, unless there are special grounds to refuse the grant; and the Court will not be justified in forcing him to prove his debt in liquidation. 139 I.C. 504=1932 L. 475. See also 51 A. 695=1929 A.L.J. 811=1929 A. 353 (F.B.).

SCOPE AND APPLICATION.—The provisions of this section apply both to liquidation by the Court itself and liquidation under the supervision of the Court. 50 A. 419=26 A. L.J. 131=1928 A. 165. Once a winding up order is made, the provisions of this section would automatically apply. 58 C. 946=133 I.C. 186=1932 C. 76. Where the original proceedings have been begun by a company, as the plaintiff and decree-holder, no permission of the liquidating Court as required

by this section is necessary for appeals or revisions which may be presented by the unsuccessful defendants or judgment-debtors against orders passed in the proceedings. 1936 Pesh. 97; 62 P.R. 1918=47 I.C. 392 (F.B.). Where a company in liquidation itself files execution proceedings, it cannot invoke the aid of this section to prevent the defendants from defending their property in the execution proceedings. Objections under O. 21, R. 58, can be raised during the proceedings and the Court is bound to hear the objections; and if it refuses to hear them on the ground that the objectors have not obtained leave of the liquidation Court, it would fail to exercise the jurisdiction vested in it by law, and its order would be open to revision. 164 I.C. 1012=1936 Pesh. 185. An appeal or an application for revision arising out of an action brought by a company does not come within the purview of S. 171 and such appeal or application can be instituted, or proceeded with, without the leave of the Liquidation Court. 1938 Lah. 754. But see 1941 All. 154; 1941 Lah. 392. Leave under this section means leave by the winding up Court. When once leave is granted, it includes all subsidiary legal proceedings, and therefore an application by the transferee of a decree for substitution, has to be made to the execution Court and not to the winding up Court. 41 A. 432=17 A.L.J. 464=50 I.C. 115. Where a decree was assigned by a company which has since gone into liquidation, the execution proceedings are maintainable at the instance of the assignee even though leave of Court had not been obtained. The only person who can object to the same is the assignor company. 37 C.W.N. 909=1933 C. 809. When once an action by the company in liquidation has been proceeded with, and is successful, there is no necessity for the defendants in the action to obtain leave for any defensive proceeding on their behalf, as the defendants cannot be said to proceed with or commence any legal proceedings against the company. 1937 Lah. 926. The word "suit" in S. 171, means a proceeding which is instituted with the presentation of a plaint in a Court of original jurisdiction. The expression "legal proceeding" in this section is coupled with "suit" and obviously means proceedings *ejusdem generis*, that is to say, original proceedings in a Court of first instance, analogous to a suit initiated by means of a petition similar to a plaint. It does not include proceedings taken in the course of the suit, nor proceedings arising from the suit and continued in a higher Court, like an appeal from an interlocutory order or final order passed in the suit. 43 P.L.R. 505=1941 Lah. 392

NOTES.

(F.B.). See also 1941 All. 154, Where in execution of a decree obtained by a company in liquidation, certain property has been attached as belonging to the judgment-debtor, and a third person has unsuccessfully objected to the attachment on the ground that the property belonged to him and not to the judgment-debtor, such person cannot bring a suit under O. 21, R. 63, C. P. Code, against the company for a declaration of his title without having first obtained under S. 171 leave of the Court which had passed the winding up order. 43 P.L.R. 505=1941 Lah. 392 (F.B.).

SUIT COMMENCED AFTER WINDING UP—IF LEAVE CAN BE GRANTED.—Under S. 171, Companies Act, leave to proceed with a pending legal proceeding can only be granted where that proceeding has been initiated prior to the winding up order. A Court has no jurisdiction to give a plaintiff leave to continue a suit instituted without leave subsequent to the winding up order. 40 C.W.N. 312. But a contrary view has been taken in 1936 L. 401, where it was observed that if a suit by a company in liquidation has been instituted without leave of Court under S. 171, Companies Act, but such leave has been obtained within the period of limitation, it would obviously be useless to dismiss the suit and to compel the plaintiff to bring another suit after obtaining the leave. See also 1930 A.L.J. 373=1930 A. 503; 13 P.R. 1917=37 I.C. 791.

SUITS NEWLY INSTITUTED—LEAVE SHOULD BE OBTAINED BEFORE LIMITATION PERIOD.—But even in such a case the suit can be allowed to be proceeded with only if leave is obtained within the period of limitation fixed for the suit. 1936 L. 401.

LEAVE WHEN GRANTED BY COURT.—An unregistered mortgage or charge is void under S. 109 against all creditors irrespective of the date on which the debts accrued. The fact that the charges have been merged in a decree obtained by the mortgagee or chargeholder prior to the application for winding up proceedings cannot make S. 109, inapplicable; and the decree-holder cannot, on that ground, claim to stand outside the winding up and realise his security. An application by such a decree-holder under this section (S. 171) for leave to execute his mortgage decree should not be allowed. 40 C.W.N. 1171.

SECURED CREDITORS.—Secured creditors are not obliged to prove their debts, and can stand wholly outside the winding up proceedings if they so elect. They may rely upon their security or their decree, if they have obtained one, and proceed to realise the amount due to them. But in this case, they must obtain the leave to proceed from the winding up Judge. 51 A. 695=1929 A. L.J. 811=1929 A. 353 (F.B.). Where leave has once been granted to the secured creditors to prosecute their claim by suit, the suit should not afterwards be stayed pending the adjudication on priority among

the creditors by the winding up Court. 29 C.W.N. 715=88 I.C. 754=1925 C. 916. The winding up Court cannot annul or modify a secured creditor's security or decree. Leave should be refused absolutely only in exceptional cases. Ordinarily, leave should be refused only for such time as may be necessary for him to determine whether leave should be granted or not. 51 A. 695 (F.B.) (*supra*).

UNSECURED CREDITORS.—An unsecured creditor cannot be turned into a secured creditor after winding up by granting him specific performance of an agreement to create a charge. A rigid line is drawn at the winding up, and creditors should not be allowed to change their position after that date. 29 Bom.L.R. 253=101 I.C. 144=1927 B. 167.

RECOVERY OF CROWN DEBTS IF EXEMPTED FROM SECTION.—The provisions of this section apply also to Crown debts; and therefore, the Crown has no right to recover its debts in priority which it might possess on account of its prerogative. 59 C. 327=137 I.C. 870=1932 C. 430 (not following, 53 C. 328=96 I.C. 37=1926 C. 781). The leave of the Court is essential to an application for execution, even if it be by the Government. 134 I.C. 429=1932 P. 1.

PROCEEDINGS UNDER S. 145, C. P. CODE.—The provisions of this section are not meant to override S. 145, Cr.P. Code. So, if a Magistrate is satisfied that a dispute likely to cause a breach of the peace exists, he is bound to call on the parties to attend his Court and put in their claims as regards actual possession. 37 C.W.N. 932=143 I.C. 795=1933 C. 433.

INSOLVENCY PROCEEDINGS.—The provisions of S. 171 are very wide and though an application for discharge may not start independent proceedings, the section would seem to require leave of the High Court even for the continuation of the insolvency proceedings already taken. 169 I.C. 625=39 P.L.R. 717.

PRACTICE.—Leave to sue under this section is never given on an *ex parte* application. The grant of leave *ex parte* is against the usual practice. 39 C.W.N. 1259. An objection as to want of leave under this section, which was not taken in the Court of first instance, should not be allowed to be raised in appeal. 37 C.W.N. 909=146 I.C. 502=1933 C. 809. In the case of a heavy contested claim against the company and its agents, where the allegations were that the large debt in question was really a personal debt of the agents which they fraudulently attempted to foist on the company, and that the company was not liable for that debt, the usual practice is to leave the matter to be decided by a suit in the ordinary way and not in proceedings in the winding up. 29 Bom.L.R. 253=101 I.C. 144=1927 B. 167. In a suit on a promote in favour of a liquidated bank but endorsed in favour of another bank, where the latter

¹[171-A. (1) For the purposes of this Act, so far as it relates to the winding up companies by the Court, the term 'official receiver' means the official receiver attached to the Court, or, if there is no such official receiver, then such person as the ²[Central Government] may, by notification in the Official Gazette, appoint for the purpose.

(2) On the making of a winding up order, the official receiver shall become the official liquidator of the company and shall continue to act as such until his further continuance is terminated by an order of the Court.

(3) The official receiver shall as such official liquidator forthwith take into his custody and control all the books, documents and the assets of the company.

(4) The official receiver shall be entitled to such remuneration as the Court shall fix.]

LEG. REF.

¹ This section was inserted by S. 92, Act XXII of 1936.

² These words were substituted for the words "Local Government" by A.O., 1937.

NOTES.

Bank wanted to implead the former Bank also as a party to the suit, permission should be granted to do so, irrespective of the fact whether any relief could be granted or not in the suit against the bank in liquidation. 36 P.L.R. 217=150 I.C. 670=1934 L. 328. If after an order for the winding up of a company is passed, a suit is instituted against the company without obtaining leave to sue under S. 171, the Court has inherent jurisdiction to dismiss the suit as incompetent on an interlocutory application under S. 171, the winding-up Court has no jurisdiction to give the plaintiff leave to continue a suit instituted without leave subsequent to the winding-up order. I.L.R. (1939) 2 Cal. 425=1940 Cal. 166.

WAIVER.—The liquidators cannot waive the bar created by this section in such a way as to require them to admit a claim under decrees rendered inoperative by that bar. 50 A. 410=26 A.L.J. 131=1928 A. 168.

LIMITATION.—The liquidator of a company being a trustee for the creditors, time to recover a debt due from the company does not run after an order or resolution for winding up. The date for testing the liability is the commencement of the winding up. 49 A. 520=25 A.L.J. 277=1927 A. 161 (F.B.).

APPEAL.—An objection as to the propriety or otherwise of the grant of any leave under this section, by the company Judge, can be made only on appeal against the grant, preferred in the appellate Court. 1930 A. L.J. 373=124 I.C. 28=1930 A. 503. The Court in which proceedings are taken in pursuance of that leave, cannot question the propriety of the same. 1930 A. 503. Leave to commence an appeal cannot be granted under S. 171, when such leave is applied for at a time beyond that at which the commencement of the appeal would become time-barred. 1941 All. 335=1941 O.W.N. 838=1941 A.L.J. 385.

Secs. 171 and 230-A.—Where the Manag-

ing Director of a limited company which is being wound up by Court under a compulsory winding up order presents a claim against the company and asks that his application should be treated as an application to file a suit against the Official Liquidator or under S. 171 to prove his claim, and he is allowed time for the purpose of filing a suit, if he fails to file the suit within the time granted to him for the purpose, and the Court refuses to grant him a further extension of time, such refusal amounts to a dismissal of his claim, and he cannot turn round and ask the Court to change the procedure which he himself considered proper and to inquire into his claim and adjudicate on it in the liquidation proceedings. 54 L. W. 275=(1941) 2 M.L.J. 417.

Sec. 171-A: AMENDMENTS BY ACT XXII OF 1936.—This section has been added so as to see that the office of liquidator is not left vacant on a winding up. Previously, it was found in many cases that the office of the official liquidator was allowed to remain vacant for an inordinately long time after the order for winding up has been made. The party at whose instance the order for winding was made, on many an occasion, apprehending that the assets may not be sufficient to yield any dividends to the creditors, ceased to take any further interest, and at times never got any official liquidator appointed at all. The result was that the affairs of the company were hopelessly neglected, and the funds of the company used to be often misapplied. It was thought, therefore, essential that some provision should be contained in the Act, for some public official being automatically appointed the liquidator of every company which is ordered to be wound up, until some other person is appointed by the Court to act as permanent official liquidator, so that the properties and assets of the company may be properly protected in the meanwhile. Hence the insertion of the present section, by the Amending Act.

NOTICE UNDER S. 80, C. P. CODE.—The official liquidator like the official receiver appointed in insolvency cases is an official of the Court and has got definite powers conferred on him by this Act. He is therefore a public servant, and as such is entitled

172. ¹[(1) On the making of a winding up order it shall be the duty of the petitioner in the winding up proceedings and of the company to file with the registrar a copy of the order within a month from the date of the making of the order.]

(2) On the filing of a copy of a winding up order, the registrar shall make a minute thereof in his books relating to the company, and shall notify in the Official Gazette that such an order has been made.

(3) Such order shall be deemed to be notice of discharge to the servants of the company, except when the business of the company is continued.

173. The Court may at any time after an order for winding up, on the application of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.

Court may have regard to wishes of creditors or contributories.

174. The Court may, as to all matters relating to a winding up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

LEG. REF.

¹ This sub-section was substituted by S. 93 of Act XXII of 1936.

NOTES.

to notice under S. 80 of the C. P. Code. 11 O.W.N. 398=1934 O. 158; 44 B. 895 (40 C. 894, Dist.).

Sec. 172: AMENDMENT BY ACT XXII OF 1936.—The present sub-section (1) has been substituted in the place of the old one. Under the previous sub-section (1) the duty was cast only on the company to file a copy of the order with the registrar and giving an option to the petitioner to do so if he chose; and, further, there was no time-limit fixed within which it had to be done. As a matter of fact, the provisions of the section were rarely complied with, and, if at all, only after unreasonable delay. The present sub-section (1) makes the filing compulsory both on the petitioner and the company, and also prescribes a time-limit within which it has to be done.

Sec. 173: SCOPE AND APPLICATION.—The Court has to see whether a stay of the proceedings will be conducive or detrimental to commercial morality and to the interest of the public at large. 24 P.W.R. 1919=49 I.C. 412. The Courts in India have the power to make an order for stay of the proceedings even under a voluntary winding up. 49 I.C. 412. A petition was filed by a creditor of a company for compulsory winding up. The petition was opposed by the company and certain other large creditors on the ground that the company, though involved, had, since the petition, entered into an agreement for sale of its property to a new company to be formed and the order, if made, would cause loss to the creditors and the shareholders. Under the circumstances the Court properly ordered the petition to stand over and allowed time upon the company undertaking not to part with

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any portion of the purchase money except for preliminary expenses. The company was also allowed to complete the sale, liberty being given to the parties to apply in the meantime. 1924 R. 108=88 I.C. 138.

Sec. 174: SCOPE.—Although a creditor who is unable to obtain payment of his debt is entitled *ex debito justitiæ* to an order for the compulsory winding up of the company, still that right is not an individual right but a representative right. His application is not on his individual behalf alone but it is in fact on behalf of the entire body of the creditors. So, it is but fair and reasonable that the wishes of the majority of creditors should be given much value by the Court. 10 R. 143=1932 R. 75. Where a scheme of reconstruction suggested by a majority of the creditors was entirely illusory and impractical, and was in essence but a scheme for the voluntary liquidation of the company without the intervention of the Court, the Court is not bound to accept it when the company is in a hopelessly involved condition and its liquidation must be made officially. 126 I.C. 185=1930 L. 177.

CONTRIBUTORIES.—In the case of a solvent company, the Court and also the official liquidator should have particular regard to the wishes of the contributories as to all matters affecting them as a class. 58 I.A. 416=55 M. 180=61 M.L.J. 783=1932 P. C. 1 (P.C.).

FULLY PAID UP SHAREHOLDERS.—For the purpose of this section, a fully paid up shareholder is in an entirely different position from a creditor or contributory. And consequently he has a right to appear and to be heard upon any application to wind up the company; and this right is not curtailed by the use of the word "contributories" in S. 174. 58 C. 62=1931 C. 391.

SHAREHOLDER, NOT TO BE IDENTIFIED WITH COMPANY.—Where any shareholder is refused a hearing by the Court, the party

Official Liquidators.

175. (1) For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a person or persons ⁴[other than the official receiver] to be called an official liquidator or official liquidators.

(2) The Court may make such an appointment provisionally at any time after the presentation of a petition and before the making of an order for winding up ²[but shall before making any such appointment give notice to the company, unless for reasons to be recorded it thinks fit to dispense with notice.]

(3) If more persons than one are appointed to the office of official liquidator, the Court shall declare whether any act by this Act required or authorised to be done by the official liquidator is to be done by all or any one or more of such persons.

(4) The Court may determine whether any, and what, security is to be given by any official liquidator on his appointment.

(5) The acts of an official liquidator shall be valid notwithstanding any defect that may afterwards be discovered in his appointment: Provided that nothing in this sub-section shall be deemed to give validity to acts done by an official liquidator after his appointment has been shown to be invalid.

(6) A receiver shall not be appointed of assets in the hands of an official liquidator.

LEG. REF.

¹ These words were inserted by S. 94 of Act XXII of 1936.

² These words were added by *ibid.*

NOTES.

aggrieved is only that shareholder and not the company. It would be improper to allow the company to come in and fight the battle or the grievances of the individual shareholder, as there is a great difference between the company opposing an application for winding up and a person coming with a right to be heard merely as a shareholder. 58 C. 62=1931 C. 391.

Sec. 175: AMENDMENT BY ACT XXII OF 1936.—The amendment in sub-section (1) has been consequential on the amendment of S. 171. The amendment in sub-section (2) adds a provision requiring notice to be normally given to the company before the Court appoints a liquidator. The absence of any provision as to notice in the Act as it previously stood resulted in the provision of the section being abused in many cases where a creditor or a contributory who had maliciously presented a winding up petition had followed it up by an *ex parte* application for the appointment of a provisional liquidator. Statements were generally made which the company had no opportunity of rebutting. An order for appointment of a provisional liquidator, in these circumstances led very often to disastrous results, and many companies became practically ruined because of the appointment. The remedy ordinarily available in cases of such malicious petitions, would hardly be sufficient to compensate the loss caused to the credit of

the company by the appointment of the provisional liquidator. The decided cases in England also have laid down under an analogous section that although the Courts had jurisdiction to make an order appointing a provisional liquidator *ex parte*, it ought not to be made except in cases of very great urgency and unless the application was by the company itself. With a view to protect the company from the abuse of the provisions of the Act, the present amendment requiring notice, has been made in the section.

CONSTRUCTION OF SUB-SECTION (6).—The intention of sub-section (6) is to avoid any question of competition between a receiver and an official liquidator. To construe it in such a way as to give preference to a receiver appointed in a suit brought by a secured creditor would result in defeating its apparent object. 58 C. 940=1932 C. 76. The word 'assets' in this sub-section (6) means the assets of the company and includes property which is subject to a charge. 58 C. 940. Where, therefore, there is a question of competition between a liquidator and a receiver appointed by the Court at the instance of debenture-holders or mortgagees, the Court will ordinarily in the exercise of its discretion give preference to the liquidator. 58 C. 940.

DISCRETION OF TRIAL COURT.—The appointment of a liquidator is a matter which is purely in the discretion of the trial Court, and the appellate Court should not interfere in the matter except under very special circumstances. 5 R. 685=1928 R. 36; 5 Bur. L. T. 193=17 I. C. 835.

Resignations, removals, filling up vacancies and compensation.

176. (1) Any official liquidator may resign or be removed by the Court on due cause shown.

(2) Any vacancy in the office of an official liquidator appointed by the Court shall be filled up by the Court ¹[and until the vacancy is so filled up the official receiver shall be and act as the official liquidator].

(3) There shall be paid to the official liquidator such salary or remuneration, by way of percentage or otherwise, as the Court may direct; and, if more liquidators than one are appointed, such remuneration shall be distributed amongst them in such proportions as the Court directs.

177. The official liquidator shall be described by the style of the official liquidator of the particular company in respect of which he is appointed, and not by his individual name.

²[177-A. (1) Where the Court has made a winding up order or appointed an official liquidator provisionally, there shall, unless the Court thinks fit to order otherwise and so orders, be made out and submitted to the official liquidator a statement as to the affairs of the company verified by an affidavit and containing the following particulars, namely:—

(a) the assets of the company, stating separately the cash balance in hand and at the bank, if any;

(b) the debts and liabilities;

LEG. REF.

¹ These words were added by S. 95 of Act XXII of 1936.

² This section was inserted by S. 96, *ibid.*

NOTES.

Sec. 176: AMENDMENT BY ACT XXII OF 1936.—The amendment in sub-section (2) has been consequential on the amendment of S. 171.

RESIGNATION.—An official liquidator cannot resign at will without securing the concurrence of the liquidating Court out of mere caprice or resentment at inquiries regarding the nature of his past operations. If he does so, he is liable to forfeit his pay. 51 P.R. 1919=53 I.C. 649. Where an official liquidator fails to maintain a position of complete impartiality as between all the individuals whose interests are involved in the winding up and shows unusual partisan activity, the Court will be justified in removing him and appointing another in his place. 55 M. 180=61 M.L.J. 783=58 I.A. 416 (P.C.).

REMOVAL.—"Due cause" for removal of a liquidator under S. 176 (1) of the Companies Act is to be measured by the real, substantial, and honest interest of the liquidation and to the purpose for which the liquidator is appointed. Fair play to the liquidator himself is not to be left out of sight. Although the liquidator has been found to be negligent in carrying out the specific orders of the Court and the specific rules laid down in the Rules of Court, the Court will not remove the liquidator, if it appears that it is not in the "real, substantial, honest

interest of the liquidation" that he should be removed from his post. 40 C.W.N. 857.

Sec. 177.—The Official Liquidator representing a company is in no different position from any one else against whom a stranger or a third party makes a claim. His only duty is to consider and if he thinks it is an admissible claim to admit, and if he thinks it an inadmissible claim to reject it; and accordingly he is not bound to call on the claimant to appear before him and make enquiry. 180 I.C. 69=1939 Rang. 46.

Sec. 177-A: AMENDMENT BY ACT XXII OF 1936.—This section and S. 177-B now added adopt Ss. 181 and 182 of the English Act. This section gives a slightly extended time for submission of the statement referred to in sub-section (3), and it has been necessitated on account of the difficulty which the liquidators have been often put to owing to the apathy and negligence of the directors in furnishing to the liquidators the necessary particulars as to the affairs of the company. It also makes it obligatory upon the directors and other persons who are ordinarily in charge of the company and its assets before its liquidation to disclose to the liquidator full particulars as to the assets and liabilities. This also obviates the examination which liquidators have had very often to resort to, to find out the details of the assets, etc., from unwilling and obstructing directors and other officers of the company, and enables them to get along with work expeditiously. A penalty also has been provided in respect of non-compliance with the provisions of this section.

(c) the names, residences and occupations of the creditors stating separately the amount of secured debts and unsecured debts, and in the case of secured debts particulars of the securities, their value and the dates when they were given ;

(d) the debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realised therefrom.

(2) The statement shall be submitted and verified by one or more of the persons who are at the relevant date the directors and by the person who is at that date, the secretary, manager or other chief officer of the company, or by such of the persons hereinafter in this sub-section mentioned as the official liquidator subject to the direction of the Court may require to submit and verify the statement, that is to say, persons—

(a) who are or have been directors or officers of the company ;

(b) who have taken part in the formation of the company at any time within one year before the relevant date ;

(c) who are in the employment of the company, or have been in the employment of the company within the said year, and are in the opinion of the official liquidator capable of giving the information required ;

(d) who are or have been within the said year officers of or in the employment of a company, which is, or within the said year, was, an officer of the company to which the statement relates.

(3) The statement shall be submitted within twenty-one days from the relevant date, or within such extended time as the official liquidator or the Court may for special reasons appoint.

(4) Any person making or concurring in making the statement and affidavit required by this section shall be allowed, and shall be paid by the official liquidator or provisional liquidator, as the case may be, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the official liquidator may consider reasonable subject to an appeal to the Court.

(5) If any person, without reasonable excuse, knowingly and wilfully makes default in complying with the requirements of this section he shall be liable to a fine not exceeding one hundred rupees for every day during which the default continues.

(6) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled by himself or by his agent at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof or extract therefrom.

(7) Any person untruthfully so stating himself to be a creditor or contributory shall be guilty of an offence under section 182 of the Indian Penal Code and shall on the application of the liquidator or of the official receiver, be punishable accordingly.

(8) In this section the expression “the relevant date” means, in a case where a provisional liquidator, is appointed, the date of his appointment and, in the case where no such appointment is made, the date of the winding up order.]

¹[177-B. (1) In a case where a winding up order is made, the official liquidator shall, as soon as practicable after receipt of the statement to be submitted under section 177-A, and not

Statement by liquidator.

LEG. REF.

¹ This section was inserted by S. 96 of Act XXII of 1936.

NOTES.

Sec. 177-B: AMENDMENTS BY ACT XXII OF 1936.—This section adopts S. 182 of the

English Act. The making of the preliminary report will give the creditors and contributories and also the winding up Court a general idea as to the affairs of the company and the length of time which is likely to be taken in completing the winding up.

later than four, or with the leave of the Court, six months from the date of the order, or in a case where the Court orders that no statement shall be submitted, as soon as practicable after the date of the order, submit a preliminary report to the Court—

(a) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities, giving separately under the heading of assets particulars of—

- (i) cash and negotiable securities ;
- (ii) debts due from contributories ;
- (iii) debts due to and securities, if any, available to the company ;
- (iv) movable and immovable properties belonging to the company ;
- (v) unpaid calls ; and

(b) if the company has failed, as to the causes of the failure ; and

(c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company or the conduct of the business thereof.

(2) The official liquidator may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matter which in his opinion it is desirable to bring to the notice of the Court.]

178. (1) The official liquidator ¹[whether appointed provisionally or not] shall take into his custody, or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled.

²[(2) All the property and effects of the company shall be deemed to be in the custody of the Court as from the date of the order for the winding up of the company.]

³[178-A. (1) The official liquidator shall within a month from the date of the order for the winding up of a company convene a meeting of the creditors of the company (as ascertained from the books and documents of the company) for the purpose of determining whether or not a committee of inspection shall be appointed to act with the liquidator, and who are to be members of the committee, if appointed.

LEG. REF.

¹ These words were inserted by S. 97 of Act XXII of 1936.

² This sub-section was substituted by *ibid.*

³ This section was inserted by S. 98, *ibid.*

NOTES.

Sec. 178: AMENDMENT BY ACT XXII OF 1936.—The amendment in sub-section (1) enables the provisional liquidator also to take into his custody the assets of the company automatically on his appointment. The substitution of sub-section (2) is consequential on the amendment of S. 171. A sale of the assets of the company after the wind-

ing up order in execution of a decree passed before that order, if it was without the leave of the winding up Court is voidable at the instance of the liquidator. 2 Pat.L. J. 77=38 I.C. 91. Under S. 178, the Official Liquidator should take into his custody or under his control all the assets of the company, but the company's property does not vest in the liquidator. I.L.R. (1941) Lah. 680=1941 Lah. 134.

Sec. 178-A: AMENDMENT BY ACT XXII OF 1936.—This section is based on S. 199 of the English Act. It adopts the provision contained in the Bankruptcy laws for the appointment of a committee of inspection to

(2) The official liquidator shall within a week from the date of the creditors' meeting convene a meeting of the contributories to consider the decision of the creditors and to accept the same with or without modifications.

(3) If the contributories do not accept the decision of the creditors in its entirety, it shall be the duty of the official liquidator to apply to the Court for directions as to whether there shall be a committee of inspection and, if so, what shall be the composition of the committee, and who shall be members thereof.

(4) A committee of inspection appointed under this section shall consist of not more than twelve members being creditors and contributories of the company or persons holding general or special powers of attorney from creditors or contributories in such proportions as may be agreed on by the meetings of creditors and contributories, or as, in case of difference, may be determined by the Court.

(5) The committee of inspection shall have the right to inspect the accounts of the official liquidator at all reasonable times.

(6) The committee shall meet at such times as they may from time to time appoint, and, failing such appointment, at least once a month, and the liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary.

(7) The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee are present.

(8) A member of the committee may resign by notice in writing signed by him and delivered to the liquidator.

(9) If a member of the committee becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or contributories, as the case may be, his office shall thereupon become vacant.

(10) A member of the committee may be removed by an ordinary resolution at a meeting of creditors if he represents creditors, or of contributories if he represents contributories, of which seven days' notice has been given, stating the object of the meeting.

(11) On a vacancy occurring in the committee the liquidator shall forthwith summon a meeting of creditors or of contributories, as the case may require, to fill the vacancy, and the meeting may, by resolution, re-appoint the same or appoint another creditor or contributory to fill the vacancy.

(12) The continuing members of the committee, if not less than two, may act, notwithstanding any vacancy in the committee.]

Powers of official liquidator. 179. The official liquidator shall have power, with the sanction of the Court, to do the following things :—

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be chosen from among the creditors of the bankrupt by the official assignee. In the case of companies also it has been thought desirable to enable the creditors and contributories of the company which is being wound up compulsorily to have a right through their chosen representatives to supervise the administration of the affairs and properties of the company by the liquidators.

Sec. 179: PROCEEDINGS BY LIQUIDATOR—NATURE OF.—The proceedings started by a liquidator are not initiated in his personal capacity but in the name and on behalf of the company, and it must be deemed as if the proceedings are being continued not only in the interest of the company but actually

by the company through its liquidator. 55 A. 912=1933 A.L.J. 1203 (F.B.). The liquidator should not appeal in any case without the permission of the winding up Court, and if he does so, he runs considerable risk, in the event of failure, to pay the costs out of his own pocket. 43 A. 433=19 A.L.J. 262=60 I.C. 763. An offer to take a mortgage with possession of a mill belonging to the company, in the course of the winding up, when accepted by the Court is binding on the party offering, as the acceptance by the Court should be deemed to have been on behalf of the official liquidator, especially when the official liquidator had acted upon the offer and has changed his position. The party who has made the offer will be estopped from withdrawing the

(a) to institute or defend any suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company ;

(b) to carry on the business of the company so far as may be necessary for the beneficial winding up of the same ;

(c) to sell the immovable and movable property of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels ;

(d) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal ;

(e) to prove, rank and claim in the insolvency of any contributory, for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors ;

(f) to draw, accept, make and indorse any bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with

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same. 1930 A.L.J. 305=127 I.C. 428=1930 A. 330.

SUITS AGAINST CONTRIBUTORIES.—As soon as the company goes into liquidation, the shareholders are saddled with a new liability in respect of unpaid calls. 16 L. 1055=1935 L. 335; 155 I.C. 16=1934 L. 1015. The cause of action for the liquidator to realise contributions from the contributories arises only on the appointment of the liquidator. 48 A. 580=24 A.L.J. 691=1926 A. 550; 23 A.L.J. 473=1925 A. 519. The fact that the calls are barred by time as against the company and that the company could not realize them on account of lapse of time is no answer to the liquidators' claim for contribution. 10 P. 249=12 Pat.L.T. 215=1931 P. 44; 38 A. 347; 31 M. 66; 22 Bom. 654.

'LEAVE TO BID' TO LIQUIDATOR.—The Court in which winding up proceedings are pending has jurisdiction only to sanction the liquidators applying to the executing Court either in a particular case or generally in all cases in which it thinks it desirable, for leave to bid as a decree-holder under O. 21, R. 72, C.P. Code. It has no jurisdiction itself to make an order giving the liquidator 'leave to bid'. The liquidator has to apply to the executing Court for 'leave to bid' at the sale, and the granting or refusing the same is entirely a matter for the executing Court to decide. 25 A.L.J. 891=1927 A. 681.

Sec. 179 (f).—The power given to the liquidator under S. 179 (f) to indorse a promissory note is a statutory power and it cannot be delegated in the absence of a statutory provision permitting such delegation. *Held*, that the indorsements of certain promissory notes by the agents appointed by the liquidators conveyed no title in law to

the assignees. No subsequent ratification of such indorsements by the liquidator could make them valid as they were void *ab initio*. 52 L.W. 342=1940 Mad. 882=(1940) 2 M.L.J. 309.

Secs. 179 and 183 (5).—Any sales or contracts of sale effected by the official liquidator of a company which has gone into liquidation in pursuance of the Court's sanction previously obtained are not mere conditional agreements subject to subsequent confirmation by the Court. Once the Court has sanctioned the sale of the company's property and has fixed a reserve price, the matter is closed so far the Court is concerned and the liquidator is free to dispose of the property provided he observes the conditions previously imposed by the Court under S. 179 of the Act, the liquidator can finally dispose of the property once he has got the sanction of the Court. It is not as if he has power merely to invite offers and to submit them to the Court for approval. Where the Court has given the official liquidator a general permission to sell the property of the company (provided that a certain price was obtained) and has expressly sanctioned a contract of sale entered into by him for a sum considerably in excess of the stipulated price, the Court cannot, by passing an order purporting to revoke its own sanction, nullify the contract of sale. Neither S. 179 nor any other provision in the Companies Act gives any authority to the Court to revoke the sanction granted by it. S. 183 (5) of the Act is also of no avail, because S. 183 (5) clearly cannot apply to a case in which the act or decision of the official liquidator has been performed or made in pursuance of the Court's express sanction. Nor has the Court any inherent power to revoke its own sanction after the sanction has been acted upon. 50 L.W. 879=1940 Mad. 179=(1940) 1 M.L.J. 107.

respect to the liability of the company as if the bill, hundi or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;

(g) to raise on the security of the assets of the company any money requisite ;

(h) to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company ; and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself : Provided that nothing herein empowered shall be deemed to affect the rights, duties and privileges of any Administrator-General ;

(i) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

180. The Court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the Court, and, where an official liquidator is provisionally appointed, may limit and restrict his powers by the order appointing him.

181. The official liquidator may, with the sanction of the Court, appoint an advocate, attorney or pleader entitled to appear before the Court to assist him in the performance of his duties : Provided that, where the official liquidator is an attorney he shall not appoint his partner, unless the latter consents to act without remuneration.

182. ¹[(1)] The official liquidator of a company which is being wound up by the Court shall keep, in manner prescribed, proper books in which he shall cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor or contributory may subject to the control of the Court, personally or by his agent inspect any such books.

¹[(2) Every official liquidator shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, present to the Court an account of his receipts and payments as such liquidator.]

¹[(3) The account shall be in the prescribed form, shall be made in duplicate, and shall be verified by a declaration in the prescribed form.]

¹[(4) The Court shall cause the account to be audited in such manner as it thinks fit and for the purpose of the audit the liquidator shall furnish the Court with such vouchers and information as the Court may require, and the Court may

LEG. REF.

¹ S. 182 was re-numbered as sub-S. (1) of that section and sub-Ss. (2) to (5) were added by S. 99 of Act XXII of 1936.

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Sec. 181: PRACTICE.—The usual practice for the Court is to appoint the petitioning creditor's attorneys as attorneys for the official liquidator, and it is based on sound reasons. Where the proceedings have been complicated and have gone on for some time, the petitioning creditor's attorneys who are acquainted with the proceedings ought to be

preferred to a new firm of attorneys who would require considerable time and labour before getting themselves familiar with the proceedings. 37 Bom.L.R. 401=157 I.C. 1093=1935 B. 337.

Sec. 182: AMENDMENTS BY ACT XXII OF 1936.—The added sub-sections make specific provisions for keeping of proper books of accounts; and if the winding up continues for more than a year, for the making of proper statements periodically, as also rendition of accounts and for the auditing of such accounts.

at any time require the production of and inspect any books or accounts kept by the liquidator.]

¹[(5) When the account has been audited, one copy thereof shall be filed and kept by the Court, and the other copy shall be delivered to the registrar for filing, and each copy shall be open to the inspection of any creditor, or of any person interested.]

183. (1) Subject to the provisions of this Act the official liquidator of a company which is being wound up by the Court shall, in the administration of the assets of the company and in the distribution thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting ²[or by the committee of inspection, and any directions given by the creditors or contributories at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection].

(2) The official liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories, by resolution, may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be.

(3) The official liquidator may apply to the Court in manner prescribed for directions in relation to any particular matter arising in the winding up.

(4) Subject to the provisions of this Act, the official liquidator shall use his own discretion in the administration of the assets of the company and in the distribution thereof among the creditors.

(5) If any person is aggrieved by any act or decision of the official liquidator, that person may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just in the circumstances.

LEG. REF.

¹ Inserted by S. 99 of Act XXII of 1936.

² These words were added by S. 100, *ibid.*

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Sec. 183: AMENDMENTS BY ACT XXII OF 1936.—The insertion of words in sub-S. (1) has been consequential on the enactment of S. 178-A.

Sec. 183, sub-Sec. (1).—See notes under S. 174, *supra*. Where a company was compulsorily wound up by order of Court and the liquidators felt a certain asset in the shape of a decree in favour of the directors of the company should be sold by auction and accordingly applied to the District Judge for directions under S. 183 of the Companies Act and having obtained sanction sold the decree to the highest bidder and executed a deed assigning the decree to him, but the sale was later attacked by one of the liquidators on the ground of some irregularity in the conduct of the sale and the District Judge set aside the sale. *Held*, that in the absence of fraud the District Judge had no power to set aside the sale, as the official liquidators with the sanction of the Court assigned the decree to the person who became the purchaser. The principles of O. 21, R. 90, C.P. Code, do not apply, but even if they do, there would be no ground for setting aside the sale. 46 C.C.M.—213

L.W. 925=(1937) 2 M.L.J. 926. See also 1940 Mad. 179=(1940) 1 M.L.J. 107.

Sec. 183, sub-Sec. (5).—The petitioner-creditor is interested in the appointment of solicitors for the official liquidator, and he is a person aggrieved if the official liquidator should obtain an *ex parte* order appointing a particular firm of attorneys to act for him. The petitioner-creditor will be entitled to apply to the Judge who passed the order to have it set aside, and he will certainly do so if proper grounds exist therefor. 37 Bom.L.R. 401=1935 B. 337. Where the prospectus issued by a company is a false and misleading document and contained untrue statements and representations, a person who has agreed to take shares in such a company has a right to repudiate or avoid the contract, provided he does so within a reasonable time and before the commencement of proceedings for the winding up of the company. But an application under S. 183 (5) after the list of contributories had been settled, and nearly eleven years after the agreement to take the shares, is too belated an application to be allowed. I.L.R. (1938) All. 301=1938 A.L.J. 94=1938 All. 193. Act or decision of liquidator in pursuance of express sanction of Court cannot be cancelled. See 1940 Mad. 179=50 L.W. 879=(1940) 1 M.L.J. 107. Cited under S. 179 *supra*.

Ordinary powers of Court.

184. (1) As soon as may be after making a winding up order, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities.

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Sec. 184: COURT'S POWER TO RECTIFY THE REGISTER OF MEMBERS.—The powers of the Court to rectify the register in winding up proceedings will be governed by the same principles which apply to its powers to rectify while the company is a going concern. The Court has power to decide any question relating to the title of the aggrieved party whose name has been omitted from the register, and generally to decide any question necessary or expedient to be decided for rectification of the register. The exercise of the power is, however, discretionary, having regard to the person who is the applicant before the Court, and to all the facts and circumstances of the case. 37 Bom. L.R. 904=160 I.C. 638=1936 B. 24.

FINALITY OF ORDER.—Any order passed by the Court bringing the name of a person as a contributory on the list of contributory is a final order, if not appealed against; and the question as to the liability of such person as contributory cannot be re-opened. 95 I.C. 252=1926 L. 414.

BURDEN OF PROOF AND COSTS OF CONTEST.—The burden of proving that his name was entered in the register fraudulently or without sufficient cause under S. 38 (1) of the Act, is upon the applicant under this section who applies for removing his name from the register of shareholders; and if he fails to discharge the same, he will be mulcted with the costs of the contest except under very special circumstances. 37 Bom. L.R. 904=160 I.C. 638=1936 B. 24.

SUBSCRIBER TO MEMORANDUM OF ASSOCIATION, WHEN CEASES TO BE MEMBER.—A subscriber to the memorandum of association of a company remains a member until such time as either the company, which is authorized by its Articles of Association to do so, accepts surrender of the shares for valid reasons or the subscriber himself pays for the shares and validly transfers them to somebody else. The mere fact that the subscriber did not pay the share amounts and the managing agent thereupon struck off the name of the subscriber from the list of directors and communicated to the Registrar that he had ceased to be not only a director but also ceased to be a member, will not have the effect of ceasing his membership. Hence, when the company went into liquidation, the Official Liquidator was held entitled to have such person included in the list of contributories. 133 I.C. 424=1931 A. 701. If such member is dead, his legal representatives would be liable, but in this case if the parties had acted for a long time on the footing

that the member had ceased to be a member, the legal representatives, though made liable as contributories, would not be charged with interest. 1931 A. 701. It is well-settled that the signatories to the memorandum of association of a company become the first members of the company as from the date of incorporation mentioned in the Registrar's certificate. They are deemed to have become members of the company, and, on its registration, to be entered as members on its register of members. But neither this entry in the register nor the allotment of shares is a condition precedent. Each subscriber at once by subscribing irrevocably agrees to take from the company the number of shares placed opposite his signature unless all its share capital has already been allotted to other persons. The fact that no shares are allotted to him and that he has ceased to be treated as a member for a considerable time would not relieve him from liability as a member and to be included in the list of contributories settled under S. 184. 32 S. L.R. 167=1938 Sind 187. Where a father applied for shares in a company for his minor sons, signed the application form on their behalf, paid the purchase-money by his own cheque out of the Bank accounts opened by him in their names, and dividends were credited to those accounts and the balance in those accounts was drawn out by the minors when they became of age. *Held*, that the father, when he signed the applications on behalf of his minor sons, must be taken to know that the sons were incapable of contracting being minors, that therefore, he must be treated as the owner of the shares, and that consequently he, and not his sons, was liable to be put upon the list of contributories. I.L.R. (1939) Lah. 299=1939 Lah. 515.

PLEDGE OF SHARES.—Where shares are pledged with the company, the legal owner thereof is the shareholder and not the company and it is the shareholder alone that will be held liable for the unpaid calls thereon. 24 I.C. 236=69 P.R. 1914.

RECTIFICATION, WHEN ORDERED.—When a shareholder's estate has been taken over by the Court of Wards (this case was in U. P.), the register may be rectified by placing the name of the Estate Collector in the place of the shareholder. 1930 A. 617=124 I.C. 726. A person cannot be included in the list of contributories, if before the winding up proceedings he has not only repudiated his shares but has also asserted his right in an action by the company to enforce calls upon him; and he will also be entitled to have the register rectified by removing his

(2) In settling the list of contributories, the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others.

185. The Court may, at any time after making a winding up order, require any contributory for the time being settled on the list of contributories and any trustee, receiver, banker, agent, or officer of the company to pay, deliver, surrender or transfer forthwith, or within such time as the Court directs, to the official liquidator any money, property or documents in his hands to which the company is *prima facie* entitled.

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name therefrom. 1926 L. 414=95 I.C. 252.

WHEN RECTIFICATION NOT ORDERED.—If a person has been treated as a shareholder and he has acted as such, though there may have been some irregularity in the issue of shares to him, he will be estopped from denying his membership, and he will not be entitled to the removal of his name from the register. 54 P.R. 1915=28 I.C. 53. A person purchased some shares on condition that he would be appointed chairman of the Local Board, and he was allotted shares and was also appointed chairman. But subsequently there was a breach of the condition by his dismissal from chairmanship. The remedy of such a person is only by an action for damages and not by getting his name removed from the register of shareholders. 1936 L. 700.

Sec. 185: SCOPE OF SECTION.—Apart from this section, the Court possesses ample powers *ex debito justitiæ* to pass interim orders for protection and preservation of the subject-matter in dispute, pending the result of the litigation. 14 L. 68=1933 L. 437. S. 185 only applies when it can be shown that the money or property covered by the order is, at the time of the order, in the hands of the party ordered to deliver them up. 41 C.W.N. 975. The Court is not authorized to come to any final decision as to title under this section. 163 I.C. 378=1936 L. 408. That may subsequently be done under S. 186 or S. 235. 1936 L. 408. The section applies even where a lien is claimed on the property of the company, and the Court can order the property to be put into Court before adjudicating the truth or validity of the lien claimed. 1936 L. 408. The Court cannot, by a summary order under this section, order the refund of money realized by a creditor of the Bank under liquidation before the order of winding up was passed but after the Bank had passed a resolution stopping payment of debts. 46 P.R. 1915=29 I.C. 265. The proper course for the liquidator will be to file a regular suit like other claimants to recover the amount realized by such a creditor. 29 I.C. 265. S. 185 does not of course contemplate an elaborate enquiry, but the Court has a discretion to decide whether any particular claim made can or cannot be conveniently dealt with under the

section. An application by the Official Liquidator under the section against an ex-managing agent of the company for payment of sums overdrawn by him while he was managing agent is maintainable and not excluded by the mere fact that he had ceased to be an agent before the commencement of liquidation proceedings. If in such application, the agent prays, that his claims to credit as against the company in respect of arrears of salary due to him and in respect of expenses of suits against him as agent it will not be proper to disallow the claims and to drive him to a separate suit, it is only fair that his claims against the company must be considered in the application itself. Nor will the Court be justified in treating an application under the section as if it were an ejectment suit and seeking to ascertain the rights of the parties only as on the date of the initiation of the proceedings. The proper course would be to take an account in respect of such of the items as the agent would be entitled to retain either under S. 217 of the Contract Act or under the terms of the agreement between the parties and of the Articles of the Association of the company; and the balance of the amount claimed by the liquidator would be the amount *prima facie* payable by the agent to the liquidator. 45 L.W. 119=(1937) 1 M.L.J. 219.

EX PARTE ORDERS—PRACTICE.—It should not be laid down as a rule of procedure that *ex parte* orders should be passed ordinarily where proceedings are taken under this section. *Ex parte* orders should be granted with the greatest caution and where rapid action is desired, it is always possible under the rules of the Court to serve with leave, short notice of any application to the Court. 6 Bom.L.R. 790.

Secs. 185 and 188: DIRECTION TO REFUND MONEYS PAID—JURISDICTION OF COURT—LIMITS.—Where an application was made by the liquidators, asking the Court to direct certain persons to refund sums paid to them by the managing agents, after winding up petition, it was *held* that S. 185 empowered the Court exercising jurisdiction under the Act to require contributories and certain others to deliver up money, etc., in their hand to the liquidator and that neither S. 185 nor S. 188 gave the Court any power to pass orders against persons other than those mentioned

186. (1) The Court may, at any time after making a winding up order, make an order on any contributory for the time being settled on the list of contributories to pay, in manner directed by the order, any money due from him or from the estate of the person whom he represents to the company exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.

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in S. 185 of the Act, and that hence the Court had no jurisdiction to pass orders for the payment asked for by the liquidators. 1940 A.L.J. 739=I.L.R. (1940) All. 730=1940 All. 514.

Sec. 186: SCOPE OF SECTION.—This section as well as S. 235 empowers the Court to make an order against the person complained against, but neither of them professes to confer a new right on the person applying. The power of the Court is, however, restricted from proceeding *suo motu*. 55 A. 912=1933 A.L.J. 1203=1933 A. 789 (F.B.). This section does not create new liabilities or confer new rights on the liquidator but merely provides a summary procedure in the winding up Court against debtor-contributories for enforcing existing liabilities. The power of the Court under this section is discretionary, and it is not bound to pass an order for payment under this section and may order the liquidator to file a separate suit. 54 A. 1067=64 M.L.J. 403=1933 P.C. 63=60 I.A. 13 (P.C.); 59 P.R. 1915=31 I.C. 54; 4 L. 109=74 I.C. 600. Though the jurisdiction under this section is permissive, it ought not to be refused in the absence of cogent reasons, when a fit case is made out for its exercise. 36 P.R. 1916=31 I.C. 746. When there has been a valid call prior to liquidation and the date for its payment has passed, it becomes a debt due from the shareholder to the company and is just like any other debt. When subsequently the company goes into liquidation, that debt, becomes an asset of the company which have to be realised by the liquidator. It has lost its character as a call has become a debt and as such is realisable by the liquidator as any other debt or asset. The Court has no jurisdiction at all to question the propriety of a liquidator seeking to get in a debt due to the company prior to the liquidation under S. 186 of the Companies Act. 1942 A.W.R. (H.C.) 4.

APPLICATION OF SECTION.—It is not competent to a transferee of the debts and calls due from contributories to obtain an order under this section. An application by such a person, not being one on behalf of the company or for its benefit, is not maintainable. 59 I.C. 538. An order passed under this section in any person's favour is executable by him. But if he transfers the order in favour of any other person, that other person (the transferee) should first apply to the Court to get himself substituted in the place of his transferor, and it is only then that he would be entitled to apply

for execution. Ss. 200 and 201 of this Act are subject to the provisions of O. 21, R. 15, C. P. Code. 92 P.R. 1918=47 I.C. 907. Where the Memorandum of Association shows that one of the objects of the company is to manage estates, it entitles the company to act as a liquidator of another company; and once the company having been appointed a liquidator and having accepted the position the legality of the appointment cannot be questioned in proceedings of a payment order under S. 186. 1936 L. 276=162 I.C. 306.

DEFENCE.—In summary proceedings instituted under this section, every objection is just as open to the person sought to be charged as it would have been if a suit had been brought by the liquidator in the company's name for the same money. Thus, if at the date of the application by the liquidator under this section to recover certain monies, a suit by him in the name of the company for the recovery of the said monies would have been dismissed as barred by the Limitation Act, the Court would have no power to order payment of such monies to the liquidator under this section. 54 A. 1067 (P.C.) (noted *supra*). But it is not open to a shareholder who has been settled on the list of contributories to plead, in proceedings taken against him under this section, that he was improperly so settled. 41 P.L.R. 1915; 71 I.C. 724=1923 A. 85.

"MONEY DUE", MEANING OF.—The words "money due" in S. 186 refer to money due and recoverable in a suit instituted by the liquidator in the company's name at the date of the application under the section. 54 A. 1067 (P.C.) (noted *supra*). This meaning has been given to the expression on the basis that the section deals only with procedure for enforcing payment and does not purport to impose any liability. The term "money due" in its primary sense denotes an existing debt whether or not the right to recover the same is barred under the Limitation Act. Under the Limitation Act the debt is not extinguished but only the remedy to recover it is barred. The term used in the articles of association or any contract may be taken to include a barred debt also, if the context permits. 36 Bom.L.R. 32=1934 B. 97.

"AT ANY TIME".—The use of the words "at any time" in the section was not intended to over-ride the provisions of the Limitation Act. The Court cannot order payment of a time barred debt, under this section. The words can only mean at any time in the course of liquidation proceedings, commencing from the date of the winding

(2) The Court in making such an order may, in the case of an unlimited company, allow to the contributory by way of set-off any money due to him or to the estate which he represents from the company on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit; and may, in the case of a limited company, make to any director whose liability is unlimited or to his estate the like allowance :

Provided that, in the case of any company, whether limited or unlimited, when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

187. (1) The Court may, at any time after making a winding up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of the contributories to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.

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up order. 4 L. 109=174 I.C. 600=1924 L. 53.

CONTRIBUTORY, PARTNER OF FIRM.—Where the principal partner of a firm had signed the promissory notes in favour of the company which went into liquidation subsequently, and the principal partner has been settled on the list of contributories and not the firm, still it is open to the liquidator to select him from among the partners and call upon him as contributory to liquidate the whole debt. 4 L. 239=77 I.C. 338.

Sec. 186 (2): CONTRIBUTORY OF LIMITED COMPANY, IF ENTITLED TO SET-OFF.—Sub-S. (2) to S. 186 permits a limited right of set-off to a contributory when the company is unlimited and as no mention whatsoever is made as to his rights where the company is limited, it follows, that he has no such right of set-off, if the company be limited. 1938 A.L.J. 925=1938 All. 613. See also 1942 A.W.R. (H.C.) 4. There is nothing in S. 186 which can reasonably be construed as a general deprivation of contributories to companies in liquidation of the right of set-off. 1940 A.L.J. 826=I.L.R. (1941) All. 153=1940 All. 544 (F.B.). See also 1942 A.W.R. (H.C.) 4.

LIABILITY OF REPRESENTATIVE CONTRIBUTORY—EXTENT OF.—The contributory who is called by the Court to pay as the representative of a deceased shareholder is liable to contribute only to the extent of the assets, if any, which may have come into his hands from the deceased shareholder. 10 P. 249=12 P.L.T. 215=1931 P. 44.

JURISDICTION.—A District Judge, who has been empowered under S. 3 of the Act, has jurisdiction to order payment under this section, even if some of the contributories reside outside British India. 15 L. 302=1934 L. 362. The provisions of S. 186 (1) are not mandatory and it is open to the Court exercising jurisdiction in the winding up of a company in its discretion to grant

or to reject an application under S. 186. If the Court refuses to make an order under S. 186 (1) the liquidator to enforce his claim against the contributory must proceed by way of a civil suit in which the contributory is entitled to maintain the ordinary legal defences to such a claim. 1940 A.L.J. 826=I.L.R. (1941) All. 153=1940 All. 544 (F.B.). Order under S. 186 not a decree within the meaning of that word in S. 73, C. P. Code. See 15 Luck. 332=1940 Oudh 237=1940 O.W.N. 132.

Sec. 187: SCOPE OF SECTION.—The section is not restricted to original calls but includes also unpaid calls before the winding up. 67 P.R. 1911=12 I.C. 958. So, the balance of the price of shares for which a call has been made before liquidation can be recovered by a summary action by the official liquidator. 12 I.C. 958. Where, before the settlement of the list of contributories, a liquidator called on a contributory to pay and the contributory paid the same, some years afterwards when the list was settled and the Court passed formal orders under this section, a new liquidator demanded payment from the same person, it was held that the contributory had not to pay the amount once again. 50 C. 1049=36 C.W.N. 409=1932 C. 691.

LIABILITY OF MEMBERS.—The right enforced by a Court in making calls is a statutory right of the creditors to enforce against the shareholders of the company on its insolvency, and not a right of the company being enforced by the liquidator. 38 A. 347=14 A.L.J. 349=35 I.C. 159. The calls are recoverable by the liquidator even though they may have been time barred under Art. 112 of the Limitation Act. So also, just as a claim, if brought by the company, might be held to be barred by limitation, but not if brought by the official liquidator, in the same manner a claim which might be held to be barred by the C. P. C. if brought by the company can be pre-

(2) In making the call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

188. The Court may order any contributory, purchaser or other person from whom money is due to the company to pay the same ¹[* * * *] the account of the official liquidator ²[in any scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934] instead of to the official liquidator, and any such order may be enforced in the same manner as if it had directed payment to the official liquidator.

189. All moneys, bills, hundies, notes and other securities paid and delivered into ³[the Bank where the liquidator of the Company may have his account], in the event of a company being wound up by the Court, shall be subject in all respects to the orders of the Court.

LEG. REF.

¹ The words "the Bank of Bengal, the Bank of Madras, or the Bank of Bombay, as the case may be, or any branch thereof, respectively, to" were omitted by S. 101 of Act XXII of 1936.

² These words were inserted, *ibid.*

³ These words were substituted for the words "the Bank of Bengal, the Bank of Madras, or the Bank of Bombay, or any branch thereof, respectively" by S. 102, *ibid.*

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ferred by the official liquidator under the Companies Act. 50 A. 476=26 A.L.J. 256=1928 A. 272.

CALLS AND PREFERENCE SHAREHOLDERS.—Uncalled share money upon issued shares at the date of the winding up of a company forms part of the assets or capital of the company. The preference shareholders being entitled in winding up to return of capital in priority to other shares, unpaid ordinary share capital can be called up to meet the amount required to pay the preference share capital, and the preference share capital can be repaid to the preference shareholders out of calls made upon the ordinary shareholders to the extent of the unpaid capital on the issued shares. Such payment of course is subject to the discharge of all debts owing by the company and payment of charges ranking prior to the preference shares. Where the memorandum of association of a company provides that "No dividend shall be payable except out of the net profits arising from the business of the company," there can be no dividend payable to the preference shareholders from the amount of the share capital when there have been no profits, although under the articles of association preference shares confer the right to a fixed cumulative preferential dividend. 1941 Mad. 806=(1941) 2 M.L.J. 94.

JURISDICTION.—The only Court which can enforce an order passed by a High Court under this section ordering payment by a contributory in respect of a call against the property of the contributory situated in a mofussil district in that province, is the High Court and not the District Court of

the mofussil district. 57 M.L.J. 723=30 L.W. 849; 6 P. 132. In a personal action, a decree pronounced by a Court of a foreign state *in absentem*, the defendant not having submitted to its authority, is by international law a nullity. Where the defendant, who is a shareholder in a company registered in an Indian State and is a resident of British India, does not appear before the State Liquidation Court, before which the liquidation proceedings in respect of the company are started, and does not submit to the jurisdiction of the Liquidation Court, a call order made against him by the Liquidation Court, in absence of an express agreement in the Articles of Association that the disputes with the shareholders should be settled by the State Court, is without jurisdiction and cannot be enforced as such in British India. It is necessary that the liquidator suing the defendant in British India should prove all necessary facts to establish his liability. It is also necessary, in order to allow the plaintiff to succeed, that the call order for the particular amount was necessary and just. The mere fact that the call order was made does not amount to such proof. 40 P.L.R. 819=1938 Lah. 559.

Sec. 188: SCOPE OF SECTION.—A company judge has no jurisdiction to pass an order against a person who has entered into a contract with the liquidator during the course of the liquidation for payment of the money due from him in a bank and to direct the execution of the order as a simple money decree. S. 188 of the Companies Act does not give jurisdiction to a Judge to enforce an order against persons other than contributories, or persons mentioned in S. 185. The word "purchaser" in S. 188 means the purchaser of the interest of a contributory. As regards the words "or other persons from whom money is due," this has a reference to a person from whom money is due under S. 185 so far as it is intended that an order enforcing payment should be made. 1936 A. 808=1936 A.L.J. 741. On this section, *see also* 1940 A.L.J. 739=1940 All. 514, cited under S. 185, *supra*.

190. (1) An order made by the Court on a contributory shall (subject to any right of appeal) be conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due.

Order on contributory conclusive evidence.

(2) All other pertinent matters stated in the order shall be taken to be truly stated as against all persons, and in all proceedings whatsoever.

191. The Court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved.

Power to exclude creditors not proving in time.

Adjustment of rights of contributories.

192. The Court shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto.

193. The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as the Court thinks just.

Power to order costs.

194. (1) When the affairs of a company have been completely wound up, the Court shall make an order, that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

Dissolution of company.

(2) The order shall be reported within fifteen days of the making thereof by the official liquidator to the registrar, who shall make in his books a minute of the dissolution of the company.

(3) If the official liquidator makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which he is in default.

Extraordinary powers of Court.

195. (1) The Court may, after it has made a winding up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company, or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the date, dealings, affairs or property of the company.

Power to summon persons suspected of having property of company.

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Sec. 191: FAILURE TO PROVE WITHIN TIME.—A creditor failing to prove his debt in time is not precluded from coming in at a later stage to prove his claim, and it does not necessitate his resorting to a suit with special leave of the Court. The only penalty is that prescribed in the latter part of the section. He will be excluded from the benefit of any distribution that may have been made before he proved his debt, and he can only claim a proportionate share in such assets as may remain undistributed at the time when he proves his claim and without disturbing any distribution made before such proof. 27 M. 496.

PROOF BEFORE APPOINTMENT OF LIQUIDATOR.—The Court cannot pass an order in the winding up proceedings admitting the proof of any debt due to any particular creditor, before a liquidator is appointed. 9 A. 180.

SECURED CREDITOR, PROOF BY.—See 16 A. 53; 55 P.W.R. 1907.

Sec. 194.—An assignee of a payment order from the liquidation Court, can get relief from the Court even after the dissolution of the company. 67 I.C. 443; 40 P. R. 1915=28 I.C. 286. The liquidator may, although he becomes *functus officio* in liquidation, complete a formal act like giving a transfer in writing for a decree which has already been transferred, even after dissolution. 54 M.L.J. 663=1928 M. 478.

DISSOLUTION MAY BE DECLARED VOID.—It is open to the Court under S. 243 of the Act to declare the dissolution to be void, and thereupon all proceedings may be taken as might have been taken if the company had not been dissolved.

Sec. 195: SCOPE OF SECTION.—An order under this section will be made only if it is likely to lead to some benefit to the credi-

(2) The Court may examine him on oath concerning the same, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.

(3) The Court may require him to produce any documents in his custody or power relating to the company; but, where he claims any lien on documents produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to that lien.

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tors. It is in the discretion of the Court, although such discretion has to be exercised judicially. 40 P.R. 1915=28 I.C. 286.

SCOPE OF SECTIONS 195 AND 196 DISTINGUISHED.—The scope of an examination under S. 195 is to seek information on matters which may be just or beneficial for the winding up of the company. If the conduct of persons connected with the information or management of the company is to be investigated, that must be done under S. 196. The scope of these two sections is quite different. The first one is intended to be used for the purpose of promoting the liquidation proceedings while the second section is primarily intended to investigate the conduct of those who have been charged with its affairs. 130 I.C. 409=1931 L. 8.

POWER OF COURT.—The powers of the Court given by this section are very wide and it is not necessary that the Court must first determine that the person called upon to furnish information does actually possess that information. If the Court has reason to think or even if an allegation is made that a certain person is in possession of information which would be useful for the purposes of the winding up of the company, the Court is entitled to call upon him to appear in Court and to examine him. If a party is entitled to take part in or to conduct an examination, the ordinary rule is that he is entitled to do so with the help of counsel. There is nothing in this section which bars the assistance of counsel for the Official Liquidator for an inquiry under this section; although the Court has a discretion as to whether the services of a counsel should be allowed to the Official Liquidator or not. 130 I.C. 407=1931 L. 8.

RIGHT OF PETITIONING CREDITOR TO ATTENDANCE AND CONDUCT OF EXAMINATION.—Where the liquidator refuses to act or where he has not the means to act, the Court can give the conduct of the examination to a petitioning-creditor; and the Court has a discretion also to allow a creditor to attend, even while the official liquidator has the conduct of the examination. But such discretion has not to be exercised except in very extreme cases. The examination under this section is a private one, and it would be an invasion of this privacy if petitioning creditors and others were allowed to attend, and particularly so when the petitioning creditor who seeks to attend is engaged in litigation with the company in liquidation. 1924 R. 24=1 R.

384=83 I.C. 3. The depositions made under the provisions of S. 195 and obtained by the Liquidator under R. 174 of the Ch. XXXI of the Original Side Rules made under the Companies Act, are to be regarded as private documents. The Liquidator is, therefore, not entitled to refer to them in any other proceedings. I.L.R. (1940) 1 Cal. 28=44 C.W.N. 512=1940 Cal. 488. A suit was filed by the Liquidator on behalf of a company for setting aside the purchase of the stock-in-trade and assets of the company by one of the defendants. In that suit, the Liquidator applied for the appointment of a receiver of the assets of the company and in the petition in support of his application, while referring to the examination under S. 195, stated that the facts elicited by such examination clearly indicated a well-designed conspiracy to defraud the creditors of the company. Thereupon, the defendants who were examined under S. 195 of the Act at the instance of the Liquidator, applied for obtaining copies of their depositions. *Held*, that in the above circumstances, each of the defendants was entitled to have a copy of his own deposition upon his counsel undertaking on his behalf to prevent communication of his deposition to his co-defendants or their solicitors or counsel. I.L.R. (1940) 1 Cal. 28=44 C.W.N. 512=1940 Cal. 488.

INSPECTION BY PUBLIC OFFICER.—Public officers charged with the investigation of criminal offences, such as the Deputy Superintendent of Police, may be allowed by the Court to inspect the depositions made by a person under this section who is believed to be involved in a criminal offence, so as to inform himself of anything that may come to light on such inspection. He should not, however, be allowed to take copies of the depositions but may be allowed to take notes. 57 I.C. 424=1930 C. 521.

APPEAL.—An order directing the directors of a company to appear before the Court for examination as to their dealings in respect of the affairs of the company made by the High Court is not a judgment within the meaning of Cl. 15 of the Letters Patent, and hence is not appealable. 55 C. 262=109 I.C. 704=1928 C. 295. However, when a District Judge disallowed the objections raised by the managing agents on summons issued to them for their examination under this section, and ordered their examination, it was held that this final order determining their liability to be examined was appealable.

(4) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause him to be apprehended and brought before the Court for examination.

196. (1) When an order has been made for winding up a company by the Court, and the official liquidator has applied to the Court stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company, in relation to the company since its formation, the Court may, after consideration of the application, direct that any person who has taken any part in the promotion or formation of the company, or has been a director, manager or other officer of the company shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director, manager or other officer thereof.

(2) The official liquidator shall take part in the examination, and for that purpose may, if specially authorised by the Court in that behalf, employ such legal assistance as may be sanctioned by the Court.

(3) Any creditor or contributory may also take part in the examination either personally or by any person entitled to appear before the Court.

(4) The Court may put such questions to the person examined as the Court thinks fit.

(5) The person examined shall be examined on oath, and shall answer all such questions as the Court may put or allow to be put to him.

(6) A person ordered to be examined under this section may at his own cost employ any person entitled to appear before the Court, who shall be at liberty to

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10 L. 806 (F.B.)=117 I.C. 985=1929 L. 707; 1931 L. 8. But the appeal will lie against the final order only, and not against the preliminary order merely issuing the summons. 10 L. 806.

Sec. 196: SCOPE OF THE SECTION.—See 130 I.C. 407=1931 L. 8; noted under S, 195, *supra*. See also 98 I.C. 599=1926 L. 385 to the same effect.

DUTY OF COURT.—The terms of this section are very wide and the Court should consider the matter judicially and can pass order only on being satisfied that there is reasonable ground for the allegation of fraud upon the facts stated in the application. It is not, however, necessary that the charge of fraud should be specified in the application with the same precision and particularity as may be necessary in a criminal complaint under the I.P. Code. 56 A. 496=1933 A.L.J. 229=1933 A. 366.

EFFECT OF EX PARTE ORDER.—When the Court has passed an *ex parte* order for the public examination of an officer on an application of the liquidator, the only objection that can be raised by the officer for his examination is one of jurisdiction. He will not be entitled at that stage (*i.e.*, before his public examination) to show that the charge of fraud is incorrect. 56 A. 496.

APPEAL.—An order passed for the public examination of an officer of the company is

appealable. I.R. 1932 L. 658, and in the particular facts of that case, the appeal was held to be barred by limitation. An order refusing an application for inspection under sub-section (7) is also appealable. 96 I.C. 755=1926 L. 246.

Sec. 196; Cl. (5): EXAMINATION, SCOPE OF.—When once the official liquidator has made out a *prima facie* case of fraud against an officer, the examination need not be confined to the particular fraud mentioned in the application of the liquidator. 56 A. 496=1933 A.L.J. 229=1933 A. 366.

Sec. 196; Cl. (7). 'IN CIVIL PROCEEDINGS.'—The use of the words 'in civil proceedings' show that the statement of the person examined is *unconditionally* admissible in evidence in civil proceedings only; and that in criminal proceedings also against him it would be admissible *but only subject* to S. 132 of the Evidence Act. It was never intended by the use of these words that such statements should be entirely excluded in criminal proceedings against him. This section was not intended in any way to override the provisions of the Evidence Act. 98 I.C. 599=1926 L. 385.

RIGHT TO INSPECT.—The right of inspection is confined to the creditors and contributories and the parties to the proceedings which are pending. 96 I.C. 755=1926 L. 246.

put to him such questions as the Court may deem just for the purpose of enabling him to explain or qualify any answers given by him : Provided that if he is, in the opinion of the Court, exculpated from any charges made or suggested against him the Court may allow him such costs as in its discretion it may think fit.

(7) Notes of the examination shall be taken down in writing and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him in civil proceedings, and shall be open to the inspection of any creditor or contributory at all reasonable times.

(8) The Court may, if it thinks fit, adjourn the examination from time to time.

(9) An examination under this section may, if the Court so directs, and subject to any rules in this behalf, be held before any District Judge or before any officer of the High Court, being an official referee, master, registrar or deputy registrar, and the powers of the Court under this section as to the conduct of the examination, but not as to costs, may be exercised by the person before whom the examination is held.

197. The Court, at any time either before or after making a winding up order on proof of probable cause for believing that a contributory is about to quit British India or otherwise to abscond or to remove or conceal any of his property, for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested and his books and papers and moveable property to be seized and him and them to be safely kept until such time as the Court may order.

198. Any powers by this Act conferred on the Court shall be in addition to, and not in restriction of, any existing powers of instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any call or other sums.

Enforcement of and Appeal from Orders.

199. All orders made by a Court under this Act may be enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced.

200. Any order made by a Court for or in the course of the winding up of a company shall be enforced in any place in British India other than that in which such Court is situate, by the Court that would have had jurisdiction in respect of such company if the registered office of the company had been situate

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Sec. 199: POWER OF COURT.—The company judge has jurisdiction to enforce compliance with the provisions of the Act, though there is no express power conferred on him by the Act. Thus, he may order a company to deliver a copy of the register of members to a shareholder even though there may be no express provision in the Companies Act, empowering him to do so. 1936 A. 568. The Court has also power to issue a mandatory injunction for enforcing compliance with the provisions of the Act, even though the proceedings are of a summary nature. 1936 A. 568.

Sec. 200: EXECUTION OF ORDERS OF HIGH COURT IN DIFFERENT PROVINCE.—An order made by the High Court of one province can be enforced in another province; only

by the High Court of that province; and the order cannot be sent to a District Court of that province directly nor could the liquidator be allowed to directly apply for execution in the District Court where the property of the contributory may be situate. 6 P. 132=8 Pat.L.T. 577; 53 M. 147=57 M.L.J. 723=1930 M. 74. Where an application is made by the official liquidator to the High Court for an order directing the District Court within whose jurisdiction the property of a contributory is situated; to enforce the payment order made by the High Court of another province in the matter of the winding up of a company; it is not competent for the High Court to authorize the official liquidator to apply to the District Court concerned for enforcing the order. 38 M.L.J. 377=1927 M. 271. But a con-

at such other place, and in the same manner in all respects as if such order had been made by the Court that is hereby required to enforce the same.

201. Where any order made by one Court is to be enforced by another Court, a certified copy of the order so made shall be produced to the proper officer of the Court required to enforce the same, and the production of such certified copy shall be sufficient evidence of such order having been made; and thereupon the last-mentioned Court shall take the requisite steps in the matter for enforcing the order, in the same manner as if it were the order of the Court enforcing the same.

202. Re-hearings of and appeals from, any order or decision made or given in the matter of the winding up of a company by the Court may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction.

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trary view has been taken in Allahabad. 54 I.C. 384. According to the Madras High Court, the proper procedure to be adopted on such an application would be to treat the order passed by another High Court in the same manner as a decree passed by this High Court; and to transfer it for execution to the District Court concerned. 25 L.W. 113.

Sec. 202: SCOPE OF SECTION.—This section is wide enough to cover appeals against any order made in the matter of winding up of a company; provided such an order finally decides a dispute between the parties or deprives the appellant of an important and substantial right and is not a mere formal or an interlocutory order. 10 L. 806=1929 L. 707 (F.B.); 1926 L. 246; 130 I.C. 407=1931 L. 8. An order refusing copies of certain documents to the appellants was held appealable in 10 L. 806. So also in respect of an order passed for the examination of a director. 28 I.C. 280=40 P.R. 1915; and in respect of an order passed against the managing agents for their examination being conducted by the Official Liquidator through a counsel. 130 I.C. 407=1931 L. 8.

RE-HEARING.—The re-hearing of any order made in the matter of winding up can only take place before a Court of appeal. But an order which has been obtained *ex parte* or which is in truth a nullity may be discharged by the Court which made it. 1 L. 187=55 I.C. 820. See also 72 I.C. 106=1923 A. 429. A liquidating judge may recall a wrong order and rectify a mistake. 13 P.L.R. 1919.

RIGHT OF APPEAL.—There is no right of appeal under this section to persons who were neither auditors nor contributories of the company under liquidation, but who had only a prospective interest to be appointed as secretaries and agents if the company should be revived. Nor does it matter that they were the persons who originally propounded the scheme and were parties in the lower Court. 33 Bom.L.R. 1495. Where the directors of a company wish to prefer an appeal against an order directing the winding up, they should, notwithstanding the

official liquidator's appointment in the meanwhile, prefer the appeal in the company's name. If a majority of the contributories concur in the filing of the appeal, the appeal is, in truth, that of the contributories. 38 C.W.N. 54=61 M.L.J. 783=55 M. 180 (P.C.). An appeal against a compulsory winding up order is not incompetent merely by reason of the fact that the company as such has not been impleaded as a party; when it is in fact substantially represented before the Court by its director shareholders, all of whom are parties to the appeal. I.L.R. (1941) Lah. 680=1941 Lah. 134. The Official Liquidator is not a necessary party to an appeal against a compulsory winding up order. On the other hand, it is desirable that as a general rule, he should be made a party to such appeals in order to prevent possible collusion amongst interested parties and to ensure that all the necessary facts are laid before the Court and that the proceedings are conducted according to law. I.L.R. (1941) Lah. 680=1941 Lah. 134.

ONLY SINGLE APPEAL AGAINST ORDER OF DISTRICT JUDGE.—There is only one appeal against the decision or order of a District Judge, in cases which are within his ordinary original jurisdiction, and; hence; there can be only one appeal against any decision or order passed by him in the winding up proceedings. 34 P.R. 1913=22 I.C. 250.

APPEAL FROM ORDERS IN WINDING UP UNDER SUPERVISION OF COURT.—Under S. 225 orders passed in winding up *under supervision of Court* are placed on the same footing as orders passed in winding up *by the Court*. Hence an appeal is competent from such orders also. 158 I.C. 853=1935 L. 174.

APPEALS WERE HELD TO LIE IN THE CASE OF THE FOLLOWING ORDERS.—(i) An order refusing copies of certain documents to the appellants. 10 L. 806. (ii) An order passed for the examination of a director under S. 196. 28 I.A. 286=40 P.R. 1915. (iii) An order passed against the managing agents for their examination being conducted by the official liquidator through a counsel. 130 I.C. 407=1931 L. 8. (iv) An order passed under S. 237 directing the official liquidator to pro-

Voluntary winding up.

Circumstances in which company may be wound up voluntarily.

203. A company may be wound up voluntarily—

(1) when the period if (any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;

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secute certain persons for criminal offence. 1931 C. 12=132 I.C. 474. (iv) The order of Judge sitting on the original side of the High Court, declaring that certain proxies, used in the statutory meeting held under S. 153 for the purpose of approving a scheme of arrangement, were invalid, and that another meeting should be held. 10 R. 189=137 I.C. 444=1932 R. 96. (vi) An order rejecting a scheme. 10 R. 438=1932 R. 154; 10 R. 189; 27 Bom.L.R. 655. A creditor who is aggrieved by an order sanctioning a scheme could also apply to the Court for leave to appeal against the order. 41 C.W.N. 599=1937 Cal. 667. (vii) An order passed by the Court bringing or refusing to bring the name of a person as a contributory in the book. 41 P.L.R. 1915=28 I.C. 95. See also 79 P.R. 1919.

APPEALS WERE HELD NOT TO LIE IN THE CASE OF THE FOLLOWING ORDERS.—(i) The framing of issues by a Court in a petition for the winding up of the company is not an "order" and is not appealable. 16 I.C. 794. (ii) An order of the liquidating Judge reducing the remuneration of an employee of the official liquidators sanctioned by the predecessor of the Judge. 1 L. 73=55 I.C. 928.

REVISION.—Where the Registrar declared a certain company dissolved; and an application for restoration of the same was rejected; the order not being one passed in winding up proceedings, was held open to revision only, and an appeal memorandum which was filed against the rejection was, however, treated as a revision petition. 86 I.C. 652=1925 L. 443.

SECS. 202 AND 235.—S. 202 is very wide in its terms and covers appeals against any order in the matter of the winding up of a company, provided such order finally decides a dispute between the parties or deprives the appellant of a substantial and important right and is not a mere formal and interlocutory order. The last part of S. 202 which lays down that 'appeal will be heard in the same manner, etc.' merely regulates the procedure to be followed in the presentation and hearing of such appeals. Where a Petition under S. 235 is presented to the High Court against certain persons and the High Court passes an order holding the application to be maintainable, its order is not of a merely formal or ministerial character, but finally decides points between the parties relating to substantial and important rights. Such an

order is appealable under S. 202 and a party aggrieved by the order is entitled to appeal to a Division Bench of the High Court under Cl. 10 of the Letters Patent. 1938 Lah. 658.

SEC. 203: AMENDMENTS BY ACT XXII OF 1936.—In clause (3) the words "and the expression of this section" have been inserted by the Amending Act. This is a mere consequential amendment.

NO VALID RESOLUTION FOR VOLUNTARY WINDING UP, POWER OF COURT.—Where there was no valid resolution for voluntary winding up and no valid ground for making a winding up order, but the Court passes the order for the compulsory winding up of the company on the ground that the majority of the shareholders at a meeting were in favour of the winding up, it was held that it did not constitute sufficient ground for the compulsory winding up order. 49 C. 399=69 I.C. 241.

DEFECTIVE EXTRAORDINARY RESOLUTION, EFFECT.—If an extraordinary resolution passed under the section does not provide that, by reason of its liabilities, the company cannot continue its business and that it is advisable to wind up, the defect is very serious. 35 P.R. 1917=36 I.C. 943. If any irregularity is discovered in the passing of the extraordinary resolution, after the supervision order was passed, the order may be discharged on application to the appellate Court, and, if necessary, the time for filing the appeal may be extended. 36 I.C. 943. See also 151 I.C. 987=1934 R. 271; where an extraordinary resolution passed for voluntary winding up was considered invalid on the ground that the notice calling the general meeting at which the resolution was discussed did not specify the intention to propose the resolution as an extraordinary one, and that the Court was not competent to pass an order for public examination under S. 196, because the company was not in liquidation in accordance with law.

RESOLUTION FOR WINDING UP ALONG WITH OTHER *ultra vires* RESOLUTIONS—EFFECT OF.—A resolution passed properly for winding up voluntarily will not become inoperative merely because other *ultra vires* resolutions also were passed at the same meeting. See 26 Bom.L.R. 987=1925 B. 49, where the resolution for voluntary winding up was mixed up with other matters relating to the agreement of amalgamation with another company.

(2) if the company resolves by special resolution that the company be wound up voluntarily ;

(3) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up

¹[and the expression 'resolution for voluntarily winding up' when used hereafter in this Part means a resolution passed under clause (1), clause (2) or clause (3) of this section.]

Commencement of voluntary winding up.

204. A voluntary winding up shall be deemed to commence at the time of the passing of the resolution ²[for voluntarily winding up.]

Effect of voluntary winding up on status of company.

205. When a company is wound up voluntarily, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof :

Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved.

206. (1) Notice of any special resolution or extraordinary resolution for winding up a company voluntarily shall be given by the company within ten days of the passing of the same by advertisement in the official Gazette, and also in some newspaper (if any) circulating in the district where the registered office of the company is situate.

Notice of resolution to wind up voluntarily.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues ; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to a like penalty.

³[207. (1) Where it is proposed to wind up a company voluntarily, the directors of the company or, in the case of a company having more than two directors, the majority of the directors may, at a meeting of the directors held before the date on which the notices

Declaration of solvency.

LEG. REF.

¹ These words were added by S. 103 of Act XXII of 1936.

² These words were substituted for the words "authorising the winding-up" by S. 104, *ibid.*

³ Sections 207 to 218 were substituted for the original Ss. 207 to 219 by S. 105 of Act XXII of 1936.

NOTES.

Sec. 207: AMENDMENT BY ACT XXII OF 1936.—For Ss. 207 to 219 of the previous Act, the present Ss. 207, 208 to 208-E, 209 to 209-H, 210 to 218 have been substituted. S. 207 deals with the declaration as to the solvency of the company by the directors. Ss. 208 to 208-E lay down the provisions regulating the members' voluntary winding up. Ss. 209 to 209-H lay down the provisions regulating the creditors' voluntary winding up. Ss. 210 to 218 contain provisions common both to the members' as well as to the creditors' voluntary winding up. The present Ss. 207 to 218 are copied from Ss. 230 to 255 of the English Act, the only changes made in this Act being that (i) in S. 208-D, a time period of 90 days has been fixed, and in S. 215-E, the provisions of the

corresponding S. 253 of the English Act, have been slightly expanded in form. Under the Act as it previously stood, no distinction was made between a members' voluntary winding up and a creditors' voluntary winding up. The distinction between them has been introduced by this amending Act. In the English Act also, this distinction was introduced only by the Consolidating Act of 1929. Companies going into voluntary liquidation may be either solvent or insolvent. In the former case the matters connected with the winding up are primarily the concern of the shareholders themselves, and in the latter case they are primarily the concern of the creditors. Hence it was thought necessary to introduce a distinction between them and enact separate provisions regarding each of these cases. With the intention of enabling the creditors to secure control of any winding up in which they are primarily interested, that is to say, any winding up in which the directors of the company cannot guarantee that the company will be solvent at the expiration of 3 years from the commencement of the winding up. Ss. 209 to 209-H have been enacted. Under

of the meeting at which the resolution for the winding up of the company is to be proposed are sent out, ¹* make a declaration verified by an affidavit to the effect that they have made a full inquiry into the affairs of the company, and that, having so done, they have formed the opinion that the company will be able to pay its debts in full within a period, not exceeding three years, from the commencement of the winding up.

(2) Such declaration shall be supported by a report of the company's auditors on the company's affairs, and shall have no effect for the purposes of this Act unless it is delivered to the registrar for registration before the date mentioned in subsection (1) of this section.

(3) A winding up in the case of which a declaration has been made and delivered in accordance with this section is in this Act referred to as 'a member's voluntary winding up,' and a winding up in the case of which a declaration has not been made and delivered as aforesaid is in this Act referred to as 'a creditor's voluntary winding up.']

Member's voluntary winding up.

Provisions applicable to a member's voluntary winding up.

²[208. The provisions contained in sections 208A to 208E, both inclusive, shall apply in relation to a member's voluntary winding up.]

Power of company to appoint and fix remuneration of liquidators.

²[208A. (1) The company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them.

(2) On the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof.]

²[208B. (1) If a vacancy occurs by death, resignation or otherwise in the office of liquidator appointed by the company, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy.

(2) For that purpose a general meeting may be convened by any contributory or, if there were more liquidators than one, by the continuing liquidators.

(3) The meeting shall be held in manner provided by this Act or by the articles, or in such manner as may on application by any contributory or by the continuing liquidators, be determined by the Court.]

LEG. REF.

¹ The word "to" was omitted by S. 2 and Sch. I of Act XXXIV of 1939.

² See footnote 3 on pre-page.

NOTES.

the Act as it previously stood, although there were certain provisions relating to the participation and control by the creditors in the matter of the winding up proceedings, they were very ineffective, and in practice, the shareholders usually retained control over a voluntary winding up, except where the creditors were so prejudiced by the voluntary winding up as to justify the Court in making an order for the winding up compulsorily or subject to the supervision of the Court. The present sections enable the creditors in circumstances clearly affecting them, to have practically effective control of the voluntary winding up of the

company. So also in the case of clearly solvent companies, the winding up proceedings being essentially in the interests of the members themselves, the interference of the creditors would be unnecessary and sometimes will prove also inconvenient. It is the shareholders themselves that must have to appoint the liquidators and have the control of the liquidation proceedings. It is in view of these above-mentioned different considerations which will have to be taken into account in cases of clearly solvent companies and companies which cannot be said to be so, that different sections have been enacted in the case of each. No doubt there will be several matters which will be common to both, and in respect of these matters Ss. 210 to 218 have been enacted and made applicable both to the members' voluntary winding up and to the creditors' voluntary winding up.

¹[208C. (1) Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company, whether a company within the meaning of this Act or not (in this section called "the transferee company"), the liquidator of the first-mentioned company (in this section called "the transferor company") may, with the sanction of a special resolution of that company conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive, in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may in lieu of receiving cash, shares, policies, or other like interests or in addition thereto, participate in the profits of or receive any other benefit from the transferee company.

(2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3) If any member of the transferor company who did not vote in favour of the special resolution expresses his dissent therefrom in writing addressed to the liquidator and left at the registered office of the company within seven days after the passing of the special resolution, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration in manner hereafter provided.

(4) If the liquidator elects to purchase the member's interest, the purchase money must be paid before the company is dissolved and be raised by the liquidator in such manner as may be determined by special resolution.

(5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for voluntary winding up or for appointing liquidators, but if an order is made within a year for winding up the company by or subject to the supervision of the Court, the special resolution shall not be valid unless sanctioned by the Court.

(6) The provisions of the ²[Arbitration Act, 1940] other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations in pursuance of this section.]

¹[208D. (1) In the event of the winding up continuing for more than one

LEG. REF.

¹ See footnote 3 on page 1709 *supra*.

² Substituted by Act XXXII of 1940.

NOTES.

Sec. 208-C: POWER OF LIQUIDATOR NOT TO BE RESTRICTED BY RESOLUTION.—Where at the time of the amalgamation of a company with another, the shareholders of the former passed a special resolution under this section appointing liquidators for the purpose of adopting the amalgamation agreement and carrying the same into effect, under supervision of directors of both the companies, powers of directors of one of which were to continue for carrying agreement into effect, the resolution is illegal to the extent of the restrictions imposed on the statutory powers of the liquidators. 52 B. 571=55 I.A. 274=32 C.W.N. 1038=55 M. L.J. 697 (P.C.).

APPLICATION TO CREDITORS' VOLUNTARY WINDING UP.—The provisions of this section apply to the case of a creditors' voluntary

winding up with the modification that the liquidator in the latter case can exercise the powers only with the sanction either of the Court or of the Committee of Inspection. (*Vide* S. 209-F.)

RESOLUTION FOR AMALGAMATION.—A resolution for amalgamation even though it may be mixed up with other matters is not illegal and void. 26 Bom.L.R. 987=90 I.C. 580=1925 B. 49. It is sufficient if the resolution authorises the liquidator to adopt the agreement and to carry it into effect, and it is not necessary that the authorization should be in the words of this section. 1925 B. 49.

TRANSFeree COMPANY MUST BE EMPOWERED BY ITS MEMORANDUM.—Every company has, under this section, a right of amalgamation with another company irrespective of its own constitution in the memorandum and articles, but the amalgamation will not bind the transferee company unless its constitution empowers it to effect such an acquisition. 52 B. 571 (P.C.).

Duty of liquidator to call general meeting at end of each year.

year, the liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding up and of each succeeding year, or as soon thereafter as may be convenient within ninety days of the close of the year, and shall lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement in the prescribed form containing the prescribed particulars with respect to the position of the liquidation.

(2) If the liquidator fails to comply with this section, he shall be liable to a fine not exceeding one hundred rupees.]

¹[208E. (1) As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company for the purpose of laying before it the account, and giving any explanation thereof.

(2) The meeting shall be called by advertisement specifying the time, place and object thereof, and published one month at least before the meeting in the manner specified in sub-section (1) of section 206 for publication of a notice under that sub-section.

(3) Within one week after the meeting, the liquidator shall send to the registrar a copy of the account, and shall make a return to him of the holding of the meeting and of its date, and if the copy is not sent or the return is not made in accordance with this sub-section the liquidator shall be liable to a fine not exceeding fifty rupees for every day during which the default continues :

Provided that, if a quorum is not present at the meeting, the liquidator shall, in lieu of the said return, make a return that the meeting was duly summoned and that no quorum was present thereat, and upon such a return being made the provisions of this sub-section as to the making of the return shall be deemed to have been complied with.

(4) The registrar on receiving the account and either of the returns mentioned in sub-section (3) shall forthwith register them and on the expiration of three months from the registration of the return the company shall be deemed to be dissolved :

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5) It shall be the duty of the person on whose application an order of the Court under this section is made, within twenty-one days after the making of the order, to deliver to the registrar a certified copy of the order for registration, and if that persons fails so to do he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.]

LEG. REF.

² See footnote 3 on page 1709.

NOTES.

Sec. 208-E: MEANING OF TERMS.—The words "*are fully wound up*" whenever used in this section must not be construed so narrowly and so strictly as to bring about a deadlock in the proceedings. The insertion of the words "*from the registration of the return*" in Cl. (4) of the section can only mean that time runs from that date and not from the date of filing of the return before the registrar. If the registrar does

not do his duty, or the necessary preliminaries which would justify registration have not been observed and he insists on something more being done before he can take action, time does not begin to run until he does take such action. If the liquidator is not satisfied with the decision of the registrar, or if any contributory or creditor is dissatisfied with the conduct of the liquidator, either can go under S. 215, and claim that in the exercise of the powers conferred by that section the Court shall take whatever action may be necessary. 13 L. 190=1931 L. 500.

Creditor's voluntary winding up.

Provisions applicable to a creditor's voluntary winding up.

¹[209. The provisions contained in sections 209A to 209H, both inclusive, shall apply in relation to a creditor's voluntary winding up.]

¹[209A. (1) The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day next following the day, on which there is to be held the

Meeting of creditors. meeting at which the resolution for voluntary winding up is to be proposed, and shall cause the notices of the said meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notices of the said meeting of the company.

(2) The company shall cause notice of the meeting of the creditors to be advertised in the manner specified in sub-section (1) of section 206 for the publication of a notice under that sub-section.

(3) The directors of the company shall—

(a) cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims to be laid before the meeting of creditors to be held as aforesaid; and

(b) appoint one of their number to preside at the said meeting.

(4) It shall be the duty of the director appointed to preside at the meeting of creditors to attend the meeting and preside thereat.

(5) If the meeting of the company at which the resolution for voluntary winding up is to be proposed is adjourned and the resolution is passed at an adjourned meeting, any resolution passed at the meeting of the creditors, held in pursuance of sub-section (1) of this section, shall have effect as if it had been passed immediately after the passing of the resolution for winding up the company.

(6) If default is made—

(a) by the company in complying with sub-sections (1) and (2);

(b) by the directors of the company in complying with sub-section (3);

(c) by any director of the company in complying with sub-section (4); the company, directors or director, as the case may be, shall be liable to a fine not exceeding one thousand rupees and, in the case of default by the company, every officer of the company who is in default shall be liable to the like penalty.]

¹[209B. The creditors and the company at their respective meetings mentioned in section 209A may nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company, and of the creditors and the company nominate different persons, the person nominated

LEG. REF.

¹ See footnote 3 on page 1709 *supra*.

NOTES.

Secs. 209 and 209-A to H: CREDITORS' VOLUNTARY WINDING UP—PROVISIONS NOT COMPLIED WITH—PROCEDURE TO BE FOLLOWED.—S. 209 and Ss. 209. A to H of the Companies Act make provision for the procedure to be followed in a creditors' voluntary "winding up". If owing to an oversight these provisions have not been followed in the winding up, the best course to adopt will be for the Court to order that a meeting of the creditors should be held and that notices of the meeting should be sent by post to the creditors forthwith, and the company should cause notice of the meeting of the creditors

to be advertised in the manner specified in S. 206 (1) for the publication of a notice under that sub-section, and the directors of the company should cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims to be laid before such meeting of creditors, and the directors of the company should appoint one of their number to preside at the said meeting. At such meeting the creditors should consider the question of nomination of a liquidator under S. 209-B, and the appointment of a committee of inspection under S. 209-C, and other questions dealt with in Ss. 209-D to H. 1941 Cal. 30—I.L.R. (1940) 2 Cal. 325.

by the creditors shall be liquidator, and if no person is nominated by the creditors the person, if any, nominated by the company shall be liquidator :

Provided that in the case of different persons being nominated, any director, member or creditor of the company may, within seven days after the date on which the nomination was made by the creditors, apply to the Court for an order either directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors, or appointing some other person to be liquidator instead of the person appointed by the creditors.]

¹[209C. The creditors at the meeting to be held in pursuance of section 209A or at any subsequent meeting may, if they think fit, appoint a committee of inspection consisting of not more than five persons, and if such a committee is appointed the company may, either at the meeting at which the resolution for voluntary winding up is passed or at any time subsequently in general meeting, appoint such number of persons as they think fit to act as members of the committee not exceeding five in number :

Provided that the creditors may, if they think fit, resolve that all or any of the persons so appointed by the company ought not to be members of the committee of inspection, and, if the creditors so resolve, the persons mentioned in the resolution shall not, unless the Court otherwise directs, be qualified to act as members of the committee, and on any application to the Court under this provision the Court may, if it thinks fit, appoint other persons to act as such members in place of the persons mentioned in the resolution.]

¹[209D. (1) The committee of inspection, or if there is no such committee, the creditors, may fix the remuneration to be paid to the liquidator or liquidators, and where the remuneration is not so fixed, it shall be determined by the Court.

(2) On the appointment of a liquidator, all the powers of the directors shall cease, except so far as the committee of inspection, or if there is no such committee, the creditors, sanction the continuance thereof.]

¹[209E. If a vacancy occurs, by death, resignation or otherwise, in the office of a liquidator, other than a liquidator appointed by or by the direction of, the Court, the creditors may fill the vacancy.

¹[209F. The provisions of section 208C shall apply in the case of a creditors' voluntary winding up as in the case of members' voluntary winding up with the modification that the powers of the liquidator under the said section shall not be exercised except with the sanction either of the Court or of the committee of inspection.]

¹[209G. (1) In the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company and a meeting of creditors at the end of the first year from the commencement of the winding up, and of each succeeding year, or as soon thereafter

LEG. REF.

¹ See footnote 3 on page 1709, *supra*.

NOTES.

Sec. 209-C: OBJECT OF COMMITTEE.—The Committee of inspection is intended to watch and supervise the proceedings of the liquidator. No member of the Committee

can directly or indirectly purchase any of the company's assets or derive any profit from any transaction arising out of the winding up, or receive out of the assets payments for services rendered or goods supplied to the liquidator. In *re Gallard*, (1896) 1 Q.B. 68.

as may be convenient, and shall lay before the meetings an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement in the prescribed form containing the prescribed particulars with respect to the position of the winding up.

(2) If the liquidator fails to comply with the section, he shall be liable to a fine not exceeding one hundred rupees.]

¹[209H. (1) As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before the meetings and giving any explanation thereof.

(2) Each such meeting shall be called by advertisement specifying the time place and object thereof and published one month at least before the meeting in the manner specified in sub-section (1) of section 206 for the publication of a notice under that sub-section.

(3) Within one week after the date of the meetings, or, if the meetings are not held on the same date, after the date of the later meeting, the liquidator shall send to the registrar a copy of the account, and shall make a return to him of the holding of the meetings and of their dates, and if the copy is not sent or the return is not made in accordance with this sub-section the liquidator shall be liable to a fine not exceeding fifty rupees for every day during which the default continues :

Provided that, if a quorum (which for the purposes of this section shall be two persons) is not present at either such meeting, the liquidator shall, in lieu of such return, make a return that the meeting was duly summoned and that no quorum was present thereat, and upon such a return being made the provisions of this sub-section as to the making of the return shall in respect of that meeting, be deemed to have been complied with.

(4) The registrar on receiving the account and in respect of each such meeting either of the returns mentioned in sub-section (3) shall forthwith register them, and on the expiration of three months from the registration thereof the company shall be deemed to be dissolved :

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5) It shall be the duty of the person on whose application an order of the Court under this section is made, within ten days after the making of the order, to deliver to the registrar a certified copy of the order for registration, and if that person fails to do so he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.]

Members' or creditors' voluntary winding up.

¹[210. The provisions contained in sections 211 to 218, both inclusive, shall apply to every voluntary, winding up whether a members' or a creditors' winding up.]

¹[211. Subject to the provisions of this Act as to preferential payment, the property of a company shall, on its winding up be applied in satisfaction of its liabilities *pari passu* and, subject to such application, shall, unless the articles

otherwise provide, be distributed among the members according to their rights and interests in the company.]

Powers and duties of liquidator in voluntary winding up.

¹[212. (1) The liquidator may—

(a) in the case of a members' voluntary winding up, with the sanction of an extraordinary resolution of the company, and in the case of a creditors' voluntary winding up, with the sanction of either the Court or the committee of inspection, exercise any of the powers given by clauses (d), (e), (f) and (h) of section 179 to a liquidator in a winding up. The exercise by the liquidator of the powers given by this clause shall be subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers ;

LEG. REF.

¹ See footnote 3 on page 1709 *supra*.

NOTES.

TARY LIQUIDATION.—When a company goes into liquidation, though a voluntary one, the right of the creditor is only to take what he can take under the scheme of liquidation and nothing more. A creditor who obtains a decree against the company going into liquidation cannot recover the whole amount due under the decree but only a share of the decree in the terms of the scheme of liquidation. 118 I.C. 387=1930 L. 299; 1925 O. 483. This is not a correct statement of the position so far as the executing Court is concerned. It cannot stay or avoid execution proceedings and it is only the Court having jurisdiction under the Company Law that can order stay of execution and enable equal distribution of assets. 1931 C. 569. S. 171 of the Companies Act provides that when a winding up order has been made by Court, no suit or other legal proceedings shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose. S. 222 provides that in the case of winding up under the supervision of Court, any attachment, distress, or execution put in force without the leave of the Court against the estate or effects of the company after the commencement of the winding up shall be void. But no such corresponding provision is to be found in the case of "voluntary winding up". It is no doubt laid down in S. 211 that the assets of the company in voluntary liquidation shall be applied in satisfaction of its liabilities *pari passu*. But this is intended for the guidance of the private liquidator as the Legislature did not like to leave him with an unlimited power so as to enable him to give unfair or fraudulent preference to a particular creditor. This provision does not by itself oust the jurisdiction of any subordinate Court to continue execution against the assets of the company by any creditor and to realise the full amount and pay the same to him to the detriment of the other creditors, and, in fact, the subordinate Court has no jurisdiction to dismiss an execution petition pending before it merely on the ground that the Company had gone

into voluntary liquidation. If the liquidator is confronted with a decree which has to be satisfied out of the assets of a company before the distribution of the assets among the creditors the proper procedure for him is to apply under S. 215 of the Act to the Court which has jurisdiction within the meaning of Companies Act, S. 2 (3) for necessary direction. The Court having jurisdiction under the Companies Act has power to order under S. 215 of the Act in cases of voluntary liquidation, the stay of any action, proceeding, attachment, distress or execution against the company or its estate or effects upon such terms as it thinks fit, and unless such an order is passed the subordinate executing Court cannot refuse execution. 58 C. 913=35 C.W.N. 299=1931 C. 569; 38 A. 407=14 A.L.J. 513=36 I.C. 397.

COURT GENERALLY ORDERS STAY OF EXECUTION.—Even in cases of voluntary liquidation, the Court generally stays execution of the decree obtained against the company. The mere fact that the decree-holder has obtained an order of attachment before the liquidation is immaterial. To allow the execution to be proceeded with in such a case would be going against the provisions of this section. 131 I.C. 379=1931 A. 589.

Sec. 212: POWERS OF LIQUIDATOR.—The powers of the liquidator in a voluntary winding up are more liberal than those of an official liquidator, inasmuch as he can exercise many of the powers mentioned in S. 179 of the Act without the sanction of the Court which the latter cannot do. He may also settle the list of contributories, make calls, summon meetings, and do several acts without reference to the Court at all.

SUIT TO RECOVER CALLS—JURISDICTION.—A suit brought by the liquidator for the recovery of calls in liquidation, is one which can be entertained by the Court of a Subordinate Judge. Neither S. 187 nor S. 212 presents any bar to the jurisdiction of the Court. 9 Bom.L.R. 825.

DUTIES OF LIQUIDATOR TO CREDITORS.—The liquidator occupies more or less the position of a receiver in insolvency, and is entitled to ask the Court ordering liquidation, to go behind a judgment against the company, and to determine whether any particular debt in respect of which the judgment had

(b) without the sanction referred to in clause (a), exercise any of the other powers by this Act given to the liquidator in a winding up by the Court ;

(c) exercise the power of the Court under this Act of settling a list of contributories, and the list of contributories shall be *prima facie* evidence of the liability of the persons named therein to be contributories ;

(d) exercise the power of the Court of making calls ;

(e) summon general meetings of the company for the purpose of obtaining the sanction of the company by special or extraordinary resolution or for any other purpose he may think fit.

(2) The liquidator shall pay the debts of the company and shall adjust the rights of the contributories among themselves.

(3) When several liquidators are appointed, any power given by this Act may be exercised by such one or more of them as may be determined at the time of their appointment, or, in default of such determination, by any number not less than two.]

Power of Court to appoint and remove liquidator in voluntary winding up.

¹[213. (1) If from any cause whatever there is no liquidator acting, the Court may appoint a liquidator.

(2) The Court may, on cause shown remove a liquidator and appoint another liquidator.]

Notice by liquidator of his appointment.

¹[214. (1) The liquidator shall, within twenty-one days after his appointment, deliver to the registrar for registration a notice of his appointment in the form prescribed.

(2) If the liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.]

¹[215. (1) Any arrangement entered into between a company about to be or in the course of being, wound up and its creditors shall, subject to the right of appeal under this section, be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors.

Arrangement when binding on creditors.

(2) Any creditor or contributory may, within three weeks from the comple-

LEG. REF.

¹ See footnote 3 on page 1709, *supra*.

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been obtained was really true and binding on the company. It is not necessary for him to allege or prove fraud, and it is sufficient if he shows that there ought not to have been a judgment, *e.g.*, that the mortgage on which an *ex parte* decree was obtained was one that the managing agents had no power to execute or that it is void against the liquidator for not having been registered under S. 109 of the Act. 34 Bom.L.R. 411=138 I.C. 442=1932 B. 253.

JOINT LIQUIDATORS.—Where two persons are appointed liquidators jointly, the refusal of one of them to act renders abortive the resolution appointing them. One of them cannot take up the work alone, it clearly being the intention of the shareholders that they should act jointly and not separately. 50 A. 419=26 A.L.J. 131=1928 A. 165.

Sec. 214: NOTICE.—When a person is

appointed liquidator, however imperfect he may consider his appointment to be, if he is nominally a liquidator and acts as such, he must carry out the duties or exercise the rights of the liquidator, and the filing of the notice of his appointment is one of such duties; and if he fails to do so, he becomes liable to the penalty provided in the section. 39 A. 412=39 I.C. 478=15 A.L.J. 346.

Sec. 215: SCOPE OF SECTION.—The provisions of this section are mandatory. Where they are not complied with, parties cannot seek to enforce the transaction by invoking the doctrine of part performance. Where the original composition deed was modified at a meeting of the debenture-holders but it appeared that the resolution was not acceded to by $\frac{3}{4}$ in number and value of the creditors, it was held that the resolution was not binding on the creditors, and that the fact that the original scheme was modified by an application to the Court did not matter. 1930 A.L.J. 1157=1930 A. 59.

tion of the arrangement, appeal to the Court against it, and the Court may thereupon, as it thinks just, amend, vary or confirm the arrangement.]

¹[216. (1) The liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding

Power to apply to Court to have questions determined of powers exercised.

up of a company, or to exercise, as respects the enforcing of calls, staying of proceedings or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court.

LEG. REF.

¹ See footnote 3 on page 1709, *supra*.

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Sec. 216: SCOPE OF SECTION—COURTS' POWERS TO DECLARE WINDING UP BAD.—S. 216 is exhaustive of the persons who are entitled to make applications and the Registrar of Joint Stock Companies has no *locus standi* to make an application to the Court for an order removing a voluntary liquidator and appointing another liquidator for a Company which is under voluntary liquidation. 42 Bom.L.R. 1021=I.L.R. (1941) Bom. 39=1941 Bom. 25. There is no power under the Companies Act for a creditor to come and say that the winding up resolution is bad, and he has no *locus standi* under S. 216 to ask for a declaration that the winding up is void. The powers of a Court under that section are strictly limited and the Court is empowered, on the petition of persons named in the first sub-section, to exercise certain powers for the "assistance" of the winding up, for it speaks of determining any question arising in the winding up. Further the exercise of such powers must be, under the second sub-section, in cases which are just and beneficial, not only just and beneficial to the petitioner but just and beneficial to all parties. 162 I.C. 218=1936 P. 468. But a contrary view has been taken in Lahore High Court. See 1931 L. 500=131 I.C. 747, where it was held that the powers of Court described in this section are exactly the same as those of which the Court is seized in a case of compulsory liquidation as given in S. 194, and include the declaration of the *factum* of dissolution, and that the word "where" in this section was used to designate a class of cases rather than the stage of the proceedings at which the action is contemplated.

POWER TO ORDER PAYMENT OF CALLS.—The liquidator may under this section apply to the Court for an order directing the defaulting contributory to pay the unpaid calls, whether the calls were made by himself or had been made by the directors before the winding up. *Stone v. City and County Bank*, (1877) 3 C.P.D. 282 (A.C.) In such cases, it is open to the alleged contributory to resist the call on the ground that his name was improperly included in the list of contributories, although he may not have raised the objection till then. 3 C.P.D. 282 (C.A.) This section does not take away the ordinary power of the liqui-

dator to enforce calls by means of suits. 51 A. 406=1929 A.L.J. 103=1928 A. 675.

POWER TO ORDER PUBLIC EXAMINATION UNDER S. 196.—The liquidator may apply under this section for the public examination of directors and other persons, provided for under S. 196 of the Act in the case of a winding up by Court. 44 B. 659=22 Bom. L.R. 219=55 I.C. 831.

NO POWER TO COURT TO DECLARE COURT AUCTION SALE INVALID.—When once an auction sale of the company's properties has been held by a competent Court in execution of a decree against the company, the liquidating Court has no power to declare the sale invalid and to set it aside at the instance of a liquidator in voluntary liquidation. 1935 L. 991.

POWER OF COURT TO STAY EXECUTION.—A purely voluntary winding up does not by itself prevent a person who holds a money decree against the company taking or continuing execution proceedings against it, but under this section the Court has the power to stay the same, if it is satisfied that the exercise of such power will "be just and beneficial". The Court has a wide discretion in the matter, but the discretion must be exercised according to sound judicial principles. The invariable practice of the Court is to stay execution of the decree unless there are very exceptional reasons for exercising its discretion otherwise. The reason for this rule is that the execution if followed would necessarily interfere with the distribution of the assets *pari passu*. The mere fact that a creditor has attached the properties of the company does not render him a "secured creditor" entitling him to any preferential claim since an attachment neither confers title nor creates any charge or lien under the Civil Procedure Code. Until the property is actually sold the position of the attaching creditor is not higher than that of one who has a mere money claim against the judgment-debtor, and it would be going against the provisions of S. 207 of the Act to allow the execution to proceed. 131 I.C. 379=1931 L. 589.

JURISDICTION TO GRANT STAY.—The High Court alone has jurisdiction to grant stay of execution of a decree obtained against the company before it went into a voluntary liquidation. 38 A. 407=14 A.L.J. 513=36 I.C. 397. So, where after the passing of a decree against the company, it went into voluntary liquidation, and the decree-holder subsequently applied to the lower Court for execution, and obtained the

(2) The liquidator or any creditor or contributory may apply for an order setting aside any attachment, distress or execution put into force against the estate or effects of the company after the commencement of the winding up.

Such application shall be made—

(a) if the attachment, distress or execution is levied or put into force by a High Court, to such High Court, and

(b) if the attachment, distress or execution is levied or put into force in any other Court, to the Court having jurisdiction to wind up the company.

(3) The Court, if satisfied that the determination of the question or the required exercise of power or the order applied for will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.]

¹[217. All costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, shall, subject to the rights of secured creditors, if any, be payable out of the assets of the company in priority to all other claims.]

¹[218. The winding up of a company shall not bar the right of any creditor or contributory to have it wound up by the Court, but in the case of an application by a contributory, the Court must be satisfied that the rights of the contributories will be prejudiced by a voluntary winding up.]

¹219.

LEG. REF.

¹ See footnote 3 on page 1709, *supra*.

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attachment of certain properties belonging to the company, an application for stay made to the *lower Court* by the liquidator was held to be incompetent. 58 C. 913=35 C. W.N. 299=1931 C. 569. But note now the amendment made in the section.

APPEAL BY AGGRIEVED CREDITOR.—An order depriving a creditor, who has a claim which has been duly proved and admitted by the liquidator, of the benefit of the winding up of the company, is an order which deprives him of a substantial and important right, and it cannot be held that such an order is not appealable by reason that it is not a judgment under Cl. 15 of the Letters Patent. 31 C.W.N. 894=103 I.C. 659=1927 C. 689.

Sec. 217.—Where a mortgagee of the machinery of a company agreed to the liquidator selling the machinery, but there was no waiver of the security, on a question as to whether the landlord of the premises in which the machinery was kept pending sale negotiations was entitled to a priority of payment in respect of the rent due as against the mortgagee, it was held that it was no doubt true that the Companies Act provided that expenses incurred in winding up shall be payable out of the assets in priority to all other claims subject to the rights of secured creditors if any and that if the mortgagee had chosen to enforce his security personally, he would have been entitled to satisfaction before any expenses of liquidation were paid; but as he had invoked the

assistance of the liquidator he must bear the expenses incidental to the assistance he had received and that rent was one of such expenses. 1938 A.M.L.J. 100.

Sec. 218: SCOPE OF SECTION.—The right of the general body of creditors to have effect given to their wishes is untouched by this section. It is true that in the absence of proof that the rights of the creditors or contributories will be prejudiced by the voluntary winding up, the application for compulsory winding up must be dismissed. But the question whether the company should be allowed to go into voluntary liquidation or whether the Court should wind it compulsorily, depends upon the facts of each particular case. 1930 S. 71=119 I.C. 539. For the Court to order compulsory winding up it is necessary to show that the rights of creditors or contributories are prejudiced by reason of the voluntary winding up; and it is not sufficient that allegations have been made in an application for compulsory winding up which was filed before the company decided to go into voluntary liquidation. 6 L. 340=89 I.C. 613=1925 L. 527. The present S. 218 means that any creditor who would otherwise be entitled to a compulsory order for winding up may apply to the Court for such an order though the company is at the date of such application in the process of being wound up voluntarily. There is no section in the Act which enables a voluntary liquidator to ask for an order to compulsorily wind up to company. I.L.R. (1938) All. 945=1938 A. L.J. 898=1938 All. 623.

Sec. 219.—The Amending Act XXII of 1936, deleted the old Ss. 207 and 219 and

220. Where a company is being wound up voluntarily, and an order is made for winding up by the Court, the Court may, if it thinks fit, by the same or any subsequent order, provide for the adoption of all or any of the proceedings in the voluntary winding up.

Power of Court to adopt proceedings to voluntary winding up.

Winding up subject to supervision of Court.

221. When a company has by special or extraordinary resolution resolved to wind up voluntarily, the Court may make an order that the voluntary winding up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories or others to apply to the Court, and generally on such terms and conditions as the Court thinks just.

Power to order winding up subject to supervision.

222. A petition for the continuance of a voluntary winding up subject to the supervision of the Court shall, for the purpose of giving jurisdiction to the Court over suits, be deemed to be a petition for winding up by the Court.

Effect of petition for winding up subject to supervision.

223. The Court may, in deciding between a winding up by the Court and a winding up subject to supervision, in the appointment of liquidators, and in all other matters, relating to the winding up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

Court may have regard to wishes of creditors and contributories.

224. (1) Where an order is made for a winding up subject to supervision, the Court may by the same or any subsequent order appoint any additional liquidator.

Power for Court to appoint or remove liquidators.

(2) A liquidator appointed by the Court under this section shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if he had been appointed by the company.

(3) The Court may remove any liquidator so appointed by the Court or any liquidator continued under the supervision order, and fill any vacancy, occasioned by the removal or by death or resignation.

225. (1) Where an order is made for a winding up subject to supervision, the liquidator may, subject to any restrictions imposed by the Court, exercise all his powers, without the sanction

Effect of supervision order.

NOTES.

substituted in their place, the present Ss. 207 to 218. There is no S. 219 in the Act now.

Sec. 221: ORDER FOR SUPERVISION—WHEN CAN BE MADE.—An order for supervision of the Court can be made only where there is a valid winding up of the company. Where the whole case of the petitioner is that the whole winding up proceedings are *ultra vires* and void, his petition cannot be treated as one for an order for supervision. 162 I.C. 218=1936 P. 468. Mere irregularity in the proceedings of a limited company is not a matter for the Court but it is to be dealt with by the majority of the shareholders; and it will not justify an order for supervision under this section. 47 B. 915=25 Bom.L.R. 1083=1924 B. 102. The Courts will interfere only if the rights of the shareholders are infringed or if a case of fraud or *ultra vires*, is made out. 47 B. 915; 46 P.R. 1911=101 I.C. 515.

In making order for supervision under this section, all transactions made between the dates of the presentation of the petition and the winding up order, if they had been done in the ordinary course of business, will be confirmed by the Court. 59 M.L.J. 826=1930 M. 1012.

Sec. 222: OBJECT AND SCOPE OF SECTION.—The object of this section is to enable the Court to pass the necessary orders that all unsecured creditors may be paid *pari passu*. 54 B. 718=32 Bom.L.R. 953=1931 B. 2. This section is wide enough to cover appeals against any order made in the matter of winding up of the company, provided such an order finally decides a dispute between the parties and deprives the appellant of a substantial and important right and is not a mere formal or interlocutory order. 130 I.C. 407=1931 L. 8.

Sec. 225: SCOPE OF SECTION.—Under this section, the orders passed by the Court in

or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily.

(2) Except as provided in sub-section (1), and save for the purposes of section 196, any order made by the Court for a winding up subject to the supervision of the Court shall for all purposes, including the staying of suits and other proceedings, be deemed to be an order of the Court for winding up the company by the Court, and shall confer full authority on the Court to make calls or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court.

(3) In the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidator, the expression "official liquidator" shall be deemed to mean the liquidator conducting the winding up subject to the supervision of the Court.

226. Where an order has been made for the winding up of a company subject to supervision, and an order is afterwards made for winding up by the Court, the Court may, by the last-mentioned order or by any subsequent order, appoint the voluntary liquidators or any of them, either provisionally or permanently, and either with or without the addition of any other person, to be official liquidator in the winding up by the Court.

Appointment in certain cases of voluntary liquidators to office of official liquidator.

Supplemental Provisions.

227. (1) In the case of voluntary winding up every transfer of shares, except transfers made to or with the sanction of the liquidator, and every alteration in the status of the members of the company made after the commencement of the winding up shall be void.

Avoidance of transfers, etc., after commencement of winding up.

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winding up proceedings under supervision of Court, stand for all purposes on the same footing as orders passed in winding up by Court and hence an appeal is competent from an order passed therein. 158 I.C. 853 = 1935 L. 174 (1).

Sec. 227: APPLICATION OF SECTION.—The plain reading of sub-S. (2) would show that it is within the jurisdiction of the Court at any time after his transfer of the shares, to order that the transaction is a good one and should stand. It does not mean that the transfer without previous sanction should be necessarily void. Complete discretion is left with the Court, and the same will be exercised judicially according to the circumstances of each case. 1934 A.L.J. 195 = 1934 A. 161. If it is found that the Court has not used its discretion in a just and proper manner, it is open to the appellate Court to interfere in appropriate cases and to prevent the working of injustice to the company by this section. 54 B. 718 = 32 Bom.L.R. 953 = 1931 B. 2.

Sec. 227 and Sec. 57: PRESIDENCY TOWNS INSOLVENCY ACT—DISTINCTION—NOTICE—RELEVANCY.—The difference between S. 57, Presidency Towns Insolvency Act, and S. 227, Companies Act, is that while *bona fide* payments to creditors by an insolvent, subject to the very important foregoing sections in the Insolvency Act are permissible and valid, and may generally be quite proper, payments to creditors, of debts previously incurred by a company from the

moment of the presentation of a winding up petition become improper alienations and void. It necessarily follows from this, that while such payments by an insolvent made *bona fide* to his creditors may be regarded as payments made in the ordinary course of business, payments by a company of debts existing at the time of the presentation of a petition for winding up, made after the presentation of the petition, cannot be so regarded. Transactions which the law regards as improper and declares void, and which a company conducted with due care and attention ought to avoid cannot be regarded as transactions in the ordinary course of business. Secondly for the purposes of S. 227, it is wholly immaterial whether the person making or receiving the payment had or did not have notice of the presentation of the petition for winding up, and the operation of that section is not in any way made to depend upon such notice, whereas it would be essential under S. 57, Presidency Towns Insolvency Act, for a person claiming the protection of that section to show that the transaction claimed to be valid was without notice of the presentation of any petition. I.L.R. (1939) Kar. 460 = 1939 Sind 196.

"UNLESS THE COURT OTHERWISE DIRECTS".—The Court, in the exercise of its discretion will not generally order the annulment of transactions *bona fide* entered into in the ordinary course of trade, and completed before the date of the winding up order, such as calls made or debentures issued *bona*

(2) In the case of a winding up by or subject to the supervision of the Court, every disposition of the property (including actionable claims) of the company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding up shall, unless the Court otherwise orders, be void.

228. In every winding up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of insolvency) all debts payable on a contingency, and all claims against the company,

Debts of all descriptions to be proved.

NOTES.

fide, to avert the ruin of the company. 54 B. 718=32 Bom.L.R. 953=1931 B. 2; 59 M.L.J. 826=1930 M. 1912. And mere knowledge of the presentation of the petition is not necessarily conclusive to show want of *bona fides*. 54 B. 718 (noted *supra*). A petitioning creditor cannot utilize his petition, to gain pecuniary benefit to himself in the interval between the petition and the winding up order. 54 B. 718.

TRANSACTION IN FAVOUR OF CREDITOR DIRECTOR.—A director of a company is a trustee for the benefit of the company and is a trustee for the creditors of the company only to the extent of applying all the assets for the benefit of all the creditors so far as they will extend. If a director who is also a creditor of the company knows that the company is in a state of insolvency, that it cannot avoid being wound up, and with such knowledge obtains a hypothecation of the stock-in-trade and outstandings of the company and thereby obtains undue preference to other creditors, his transaction is tainted with fraud, and the same is liable to be set aside on the ground of fraud. 40 C.W.N. 769.

Sec. 227 (2): SCOPE OF.—Transactions made after the commencement of a winding up which a Court would validate under S. 227 (2), are transactions *bona fide* entered into by a company for the benefit of the company and those interested in the assets of the company for preserving the business of the company as a going concern, and not to the detriment of other creditors. I.L.R. (1939) Kar. 460=1939 Sind 196. Where an insurance company makes payments between the commencement of the winding up and the date of the winding up order, to some of its policy-holders in respect of their policies, the amount of which had become due, such payments being payments of debts by company to its creditors clearly amount to dispositions of property within the meaning of S. 227 (2) and are not only void but cannot be validated. I.L.R. (1939) Kar. 460=1939 Sind 196.

VALIDATION OF PAYMENTS—PRINCIPLES UPON WHICH COURTS SHOULD ACT.—As regards the validation of payments under S. 227 (2) the Court will usually validate payments made in good faith in the ordinary course of business. In deciding what are such payments, the principle to be kept in mind is that all creditors to whom money is due at the date of the petition for winding up,

should be treated equally, with certain exceptions in favour of those who have priority under the express provisions of the Act. Where preferential payments are made to some creditors by the company or its officers, it is acting against this rule. Where on the other hand the business of the company is continued in good faith either because it is hoped that it may not be necessary eventually to wind up the company or because in the interests of all concerned it is better that the company should on being wound up be transferred as a going concern, it is necessary for the company to enter into various transactions and it would be impossible for it to do so if it was not able to make any transfers. Though no definite rule could be laid down to govern all cases, generally speaking, it would not be just for the Court to validate a transaction which amounted to no more than the payment of a debt which was due to one or more creditors at the date of the winding up petition, if that would result in loss to other creditors who should be treated equally with those who have been paid. 1940 A.L.J. 739=1940 All. 514=I.L.R. (1940) All. 730. See also 1939 Sind 196. Where during the pendency of winding up proceedings a Bank agrees to employ a cashier and to transfer his unsecured deposit with the Bank into a security deposit and does so transfer it, the whole transaction is void under S. 227 (2) as a disposition by the Company of its property made after commencement of winding up. Inasmuch as the cashier obtained an undue advantage over his fellow creditors, the Court would not validate the disposition by giving it its sanction. 1942 A.W.R. (H. C.) 7=1942 A.L.W. 21.

Sec. 228: LIQUIDATOR'S POSITION AND DUTY.—The case of an insolvent company and the case of an individual who is declared an insolvent are on the same footing in the eye of the law. The Official Receiver, in the case of a person who is adjudged an insolvent, and the official liquidator of an insolvent company, stand on the same footing. They are not the representatives of the insolvent, the individual or the company. On the one hand they represent the estate of the insolvent, and on the other hand they represent the interest of the whole body of creditors. The duty of the trustees in bankruptcy or the official liquidators is to distribute the assets of the insolvent, individual or the company, among such of their

present or future, certain or contingent shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or for some other reason do not bear a certain value.

229. In the winding up of an insolvent company the same rules shall prevail

Application of insolvency rules in winding up of insolvent companies. and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency

with respect to the estates of persons adjudged insolvent; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section.

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creditors as have a just claim. 49 A. 728 = 25 A.L.J. 450 = 1927 A. 426.

CLAIM BASED ON DECREE.—The decree that may be valid and binding on the insolvent is not necessarily, valid or binding against the trustee in bankruptcy or the official liquidator. Under S. 34 (2) of the Provincial Insolvency Act, the debts have got to be "proved" by claimants before they can expect to be entered in the schedule of creditors, and the same rule applies also in the case of the liquidation of a company. The proceedings in liquidation and the proceedings in insolvency are entirely in the nature of equitable proceedings. Nobody has a right to claim more than what is justifiably due to him, on the mere ground that the insolvent, the individual or the representatives of an insolvent company had agreed to pay to the claimant more than what was justly and properly due to him. As to claims based on decrees, the decrees may be binding on the company or anybody representing the company. But the official liquidators are not the company nor the representatives of the company. The official liquidator is not bound to receive the decree as *conclusive evidence* of the liability of the company, and it is open to him to ask the claimants to adduce evidence as to the truth of the claim, in certain cases. A judgment or decree no doubt would always give a *prima facie* proof of a debt. Where there has been a genuine contest between a claimant or a creditor on the one hand and the company which goes into liquidation later on, and the parties have fought out the case *bona fide*, it would not be open to the official receiver or the liquidator to re-open the case and to have, as it were, a fresh trial of strength. But where there are circumstances casting doubt on the correctness of the debt, as proved by the judgment, and the decree is found to rest on something less than a real trial on the merits of the case, the official liquidator would be justified in putting the decree aside and in calling for independent proof of the claim based on it, i.e., may ask for what has been called "the consideration for the judgment". So also in the case of compromise decrees, where the genuineness of the compromise

is doubtful, the official liquidator may call for independent proof of the claim apart from the decree. 49 A. 728 = 25 A.L.J. 450 = 1927 A. 426.

Sec. 229: CONSTRUCTION OF SECTION.—The expression "rules . . . under the law of insolvency" in S. 229, should not be widened so as to include the whole "law of insolvency" but the expression should be narrowed so as to include only "rules" as given in S. 229. This section and S. 228 do not import all the provisions of the Provincial Insolvency Act, into company law, and in particular S. 28 (2) of the latter Act is not so imported. 160 I.C. 908 = 1936 Pesh. 57. But a different view has been taken by the Allahabad High Court. See 51 A. 695 = 1929 A.L.J. 811 = 1929 A. 353. (See also notes under S. 230, *infra*, as to the construction of this section and the different view, held by the Lahore and the Bombay High Courts on this point.) Where an assessment under S. 23 (4) of the Income-tax Act has been made in respect of a company and it had also become final as against the firm and the company subsequently goes into liquidation, the assessment cannot be reopened ordinarily. There could be an interference with the assessment only, if there is reason to think that the assessment was vitiated by fraud. The case of a judgment-debt stands on a different footing, interference being allowed only because of the possibility of fraud. 16 Luck. 599 = 1941 O.W.N. 118 = 1941 Oudh 260.

REMEDIES OPEN TO A SECURED CREDITOR.—It is not necessary for the secured creditor to prove his debt in liquidation. He may rely upon his security and proceed to realise his debt in the ordinary course of law. If after exhausting the security anything more remains to be paid to him, he may prove in liquidation for the deficient amount. It is also open to him to value his security without instituting a suit thereon, and prove for the balance of the debt due to him after deducting the assessed value. In this case, the liquidators may redeem the security at the value assessed; and when not redeemed, the secured creditor will not be allowed to prove for more than the balance, even when the security realises less than the assessed value. A third course also may be adopted

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by him, *i.e.*, by surrendering his entire security and proving for the whole debt. 51 A. 695=1929 A.L.J. 811=1929 A. 353.

ATTACHING CREDITOR NOT SECURED CREDITOR.—It is well-settled law in India that an attachment creates no charge in favour of the attaching creditor but it merely prevents and avoids alienation and confers no right on him. Hence he cannot be treated as a secured creditor; and he cannot claim any priority on the basis of being a secured creditor. However it is open to him in the winding up to obtain the leave of the Court to continue the attachment and to proceed, unrestrictedly or on such terms as the Court might impose, with his application for execution. 31 Bom.L.R. 1029=122 I.C. 836=1930 B. 16.

INTEREST, CLAIM TO, BY SECURED CREDITOR AFTER DATE OF LIQUIDATION.—A secured creditor can claim interest up to the *date of payment*, when he seeks to recover what is due to him from the proceeds of the sale of the secured property. But when such proceeds are insufficient to satisfy his entire claim, and he seeks to prove against the other property as an unsecured creditor, he must confine his claim to the principal and interest which have accrued up to the *date of adjudication or liquidation*, as the case may be, deducting therefrom the amount realised by the sale of the property. He will not be allowed to deduct the *interest which has accrued due after liquidation*, from the amount realised by the sale of the security in the first instance and afterwards apply the balance to the principal and interest due up to the date of liquidation, and then to prove for the balance. 1930 R. 20=7 R. 514=120 I.C. 702; 1930 R. 47; 1922 L. 281.

INTEREST SUBSEQUENT TO WINDING UP *re* UNSECURED CREDITORS.—Where a company has been ordered to be wound up, interest on debts which carry interest ceases to run from the date of the winding up (*i.e.*, under S. 168, from the time of the presentation of the petition for the winding up) unless the assets are enough to pay all debts in full. The position of the creditors must be considered under two aspects, first when there is and next when there is not, a surplus. Where the estate is insolvent nothing should be allowed for interest, but the opposite rule applies where the estate is solvent, *i.e.*, where there is a surplus. In the latter case, in whatever manner the dividends may originally have been made, if it turns out that there is an ultimate surplus, the account must be taken as between the company and the creditors in the ordinary way, *i.e.*, by applying each dividend in the first place to the payment of interest due at the date of such dividend, and the surplus, if any, to the reduction of the principal. 32 L.W. 950=1930 M. 1012=59 M.L.J. 826. Where certain cash deposit is made with a Bank as security for

the good behaviour of an employee, the amount is received by the bank on a specific understanding to be applied for a specific purpose and as such it constitutes trust money in the hands of the Bank and does not form part of the assets of the Bank divisible among creditors. 1940 O.W.N. 1022. Where deposits were made to a bank by the employees or on their behalf as security for their faithful and honest service and interest was also payable on such deposits, on a question whether such depositors were entitled on a liquidation of the bank to a preferential payment. *Held*, that the deposits formed part and parcel of the engagement transaction and the moneys should have been held by the bank in trust, since expressly they were paid as security for good behaviour. The deposits were trust moneys and an agreement to pay interest on such deposits, could not destroy the character as such of those moneys which still remained trust moneys so long as they were in the hands of the bank. Trust moneys could be followed so as to reach the assets of the bank from whatever source they might come the tracing of the assets in that way is the proper principle of law to apply in regard to those matters. The assets of the bank coming into the hands of the Liquidator would have to be earmarked first of all to the discharge of the claim by the depositors. 47 L.W. 153=178 I.C. 428=1938 Mad. 651. *See also* 1939 M.W.N. 1069; 1940 Mad. 178; 1939 M.W.N. 1066; 52 L.W. 512=(1940) 2 M.L.J. 559=I.L.R. 1941) Mad. 125; 49 L.W. 181=1939 Mad. 337=(1939) 1 M.L.J. 209. Whenever money is paid by one person to another it can be said it is remitted for a specific purpose, *e.g.*, when a buyer pays to a seller of goods or a hirer for the hire of an article; but because money is paid that does not *ipso facto* make the recipient a trustee. A trust would exist when a banker is to collect and remit, but not when he is to use and repay. 1941 M.W.N. 1067=(1941) 2 M.L.J. 910. Payment of arrears of premia to insurance company by assignee of policy for revival of lapsed policy—Condition as to production of medical certificate not fulfilled—Company ordered to be wound up before production—Assignee has no right to rank as preferential creditor—Trust not created. 1941 M.W.N. 1067=(1941) 2 M.L.J. 910.

CROSS-CLAIMS AND SET-OFF.—Though a debt due by a company is not presently payable, it can be set-off against money owing to the company in liquidation. If a debtor of a company takes an assignment of a debt due by the company, before it goes into liquidation, a set-off of the one against the other can be allowed in liquidation proceedings, and it would not amount to a fraudulent preference. 50 L.W. 759=1940 Mad. 157. A debtor of an insolvent company in

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respect of whose debt there is a surety is entitled to set-off against the money owing by the debtor to the company moneys due to the debtor from the company, and a surety is entitled to set-off in respect of his obligation to the company moneys owing to him from the company. A debtor having a cross-claim which can be set-off against the company does not lose that right because the company has obtained a safeguard by a surety. The moneys due to the surety on the one hand and from him to the company on the other in respect of the debt of another for which he is surety, are mutual dealings, and he has the right to set-off against his indebtedness to the company the moneys due to him when the obligation to the company by the debtor and surety is one which is joint and several. Both the debtor and the surety who are under an obligation to pay moneys to the company but who themselves are creditors of the company may therefore set-off one debt against the other. 1939 M.W.N. 1231=1940 Mad. 266. See also 1941 Mad. 622=(1941) 1 M.L.J. 818. Where a person agreed to supply cotton to a company's mill for being spun into yarn and to advance sums of money for various expenses and the arrangement was that the creditor should deduct his advances from the spinning charges and the company was later on wound up, it was *held*, that the creditor had agreed to pay only the balance due from him after his advances had been deducted from the spinning charges calculated at the agreed rate and that the liquidators can recover only if the balance on such accounting is in their favour. 1940 A.L.J. 626=1940 All. 490. The effect of S. 3 of Limitation Act is to bring about the automatic dismissal of suits, appeals and applications founded upon debts or causes of action which according to their various periods of limitation are time barred. It is only the remedy that is destroyed, but the debt remains. Such a debt can be set-off by a liquidator in winding up proceedings against debts by the company to the debtor. The right of set-off exercisable in winding up proceedings is distinguishable from the set-off provided for under the C.P. Code, O. 8, R. 6. In the latter case it is required as a condition precedent that the money should be legally recoverable by the defendant from the plaintiff, but no such condition attaches to the exercise of a right of set-off by the official liquidator in winding up proceedings acting under the Companies Act. I.L.R. (1941) All. 415=1941 All. 278. Under the Indian law every case of a joint promise is treated as a joint and several promise. If a debt is incurred by the members of a partnership they are jointly and severally liable. If *A* and *B*, members of a firm, sue *C*, *C* cannot set-off a debt due by *A* alone, whereas if *C* sues *A* and *B*, *A* can set-off a debt due by *C*. Where the liability of the partners is

joint and several in a claim to enforce that joint and several liability, it is open to the partners to set-off a debt due to them. The rule of set-off in bankruptcy does not rest on the same principle as the right of set-off between solvent parties, because the principle is wider. 53 L.W. 560=1941 M.W.N. 358=1941 Mad. 654. It is no doubt true that where there is an amount due to a bank payable by *A* in his individual account, and an amount due by the bank payable to *A* and *B* in their joint account, the two accounts cannot be set-off; but if it could be shown that, though the account is in the name of *A* and *B*, *A* is solely entitled to the amount, a set-off has always been allowed. The question is whether it can be said that the money so absolutely belongs to that one of the two persons, in whose names the account stands, who has another account of his own, that the Court must treat it as his sole property and require the balance to be struck between the two accounts. Whether the property belongs solely to *A* can be found on evidence. Once it is found that the person having the sole account is solely interested in the balance of the joint account, so that equity would have compelled the other person, without imposing any terms or directing any inquiry, to transfer the account into his name alone, upon the bankruptcy of the bank a set-off must be allowed. 51 L.W. 680=1940 Mad. 436=(1940) 1 M.L.J. 115.

SECURITY GIVEN BY THIRD PARTY TO BANK IN SHAPE OF FIXED DEPOSIT IN BANK—RIGHT TO CLAIM SET-OFF.—There can be no set-off of claims under S. 229 of the Companies Act when there are no mutual dealings. A Bank lent a sum of Rs. 2,000 to the applicant on a promissory note dated 7th September 1936. As the bank was not willing to lend without security, *S*, the mother-in-law, offered to give security and gave as security a sum of Rs. 4,300 which she had in fixed deposit in the Bank under a fixed deposit receipt. This receipt was handed over to the Bank along with a letter under which *S* authorised the Bank of set-off at any time the whole or any portion of the said deposit and interest accrued thereon towards the loan granted to the applicant at any time the Bank deemed it necessary. Before the fixed deposit matured the Bank went into liquidation and the applicant claimed to set-off the amount due by the Bank to *S* against the amount due by him. *S* also filed an affidavit expressing her willingness to the set-off. *Held*, (1) that there were no mutual dealings in the case which would entitle the applicant to claim a set-off under S. 229, Companies Act; (2) that though the Bank had a right to set-off, the applicant could not say that he had a right to claim a set-off; (3) that having regard to the equity of the case, the Bank should adjust the dividend payable under the deposit receipt towards the amount due and

Preferential payments.

230. (1) In a winding up there shall be paid in priority to all other debts—

(a) all revenue, taxes, cesses and rates, whether payable to the Crown or to a local authority, due from the company at the date hereinafter mentioned and having become due and payable within the twelve months next before that date ;

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recover only the balance. 1941 Mad. 622= (1941) 1 M.L.J. 818. On a contention that a charge in respect of certain trust monies extends only to the assets in the hands of a Bank on the date of its liquidation and that the subsequent realisations of assets of the Bank were replenishments of the Bank's funds, but not necessarily of trust funds, it was held that where the subsequent realisations are only the previously existing assets changed into a different form, and not fresh funds which were not part of the previous assets, the charge would extend to those realizations also. 1940 O. W.N. 1022.

Secs. 229 and 230: SCOPE—CROWN DEBTS—PRIORITY—IF EXTENDS TO TRADE DEBTS.—The provisions of S. 49 of the Presidency Towns Insolvency Act are not incorporated by S. 229 of the Companies Act and the priority of crown debts in winding up proceedings is limited to those specifically mentioned in S. 230 of that Act. Accordingly the priority regarding Crown debts is restricted to such matters as revenue and taxation and does not extend to trade debts payable to the Crown. Apart from the exceptions contained in S. 230, the assets of a company must be applied in satisfaction of its liabilities *pari passu* in accordance with the provisions of S. 207. 41 C.W.N. 458=I.L.R. (1937) 1 Cal. 684. See also 1931 L. 351.

Sec. 230: AMENDMENT BY ACT XXII OF 1936.—It was thought inequitable to treat compensation payable to workmen under the Workmen's Compensation Act, provident fund, pension fund, gratuity, and other similar funds for the welfare of the employees of the company, as ordinary debts provable in the winding up; and hence this amendment gives them priority. This is also the case under the English law. Under S. 137, if the Registrar on the perusal of the documents submitted to him periodically by the company finds anything unsatisfactory in the conduct of the company, he may report the matter to the local Government; and the local Government may appoint one or more inspectors to investigate thoroughly and to report the result to it under S. 138 (iv). This investigation being essentially in the interests of the company, it is but proper that the expenses of the investigation should be not only borne by the company but also that preference should be given to payment thereof over the other liabilities of the company. Accordingly, this section and S. 141, have been amended. S. 141 as now amended provides for the payment of the expenses out of the assets of the company

and for their recovery as an arrear of land revenue, and this section (S. 230), gives priority to them over the other liabilities of the company. See also notes to amendment under S. 141 (*supra*).

CONSTRUCTION AND SCOPE OF Ss. 229 AND 230.—S. 229 makes the rules of insolvency law applicable as far as may be in respect of winding up proceedings; where, however, there is a conflict between the Companies Act and the Insolvency Act it is clear that the provisions of the Companies Act should be given effect to. In a case where the local Government claimed priority in respect of the amount spent by it for the purposes of investigation of the affairs of a Bank under S. 141 (3) of the Companies Act, and the official liquidator appointed on the compulsory winding up of the Bank objected to the same, it was held that even if the amount should be deemed as a Crown debt it did not come under S. 230, and was consequently not entitled to priority. 12 L. 678=1931 L. 351. See also 41 C.W.N. 458. The principle of the above ruling of the Lahore Court will still hold good, although the actual decision therein may not be correct now in view of the amendment since introduced in Ss. 141 and 230, providing for the priority of the expenses of any investigation held in pursuance of S. 138 (iv) of the Act. The Bombay High Court in 29 Bom.L.R. 1446=106 I.C. 27=1927 B. 606, has taken a different view as regards the interpretation of Ss. 229 and 230 of the Act. The Secretary of State, as a judgment creditor of a company in liquidation, claimed priority in respect of a debt due to him arising out of certain trade or commercial dealings between him and the company. Reliance was placed on S. 49 of the Presidency Towns Insolvency Act and S. 229 of this Act in support of the priority claimed, although there was no provision for the same contained in S. 230 of this Act. It was held that he was entitled to the priority claimed by him, over the other debtors of the company. This is clearly opposed to the view taken by the Lahore High Court. *Talyarkhan, J.*, who decided the Bombay case, has observed as follows: "Having regard to the different and various activities of Government in this country of a commercial nature, the legislature might well consider whether the law in India should not be brought in line with the law prevailing in England, and by express enactment confine the preferential treatment of crown debts, to the debts mentioned in S. 230." The legislature in amending Ss. 141 and 230 of this Act, appears to have impliedly accepted the correctness of the

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interpretation of the law made by the Lahore Court. *See also* 1936 Pesh. 57=160 I.C. 908, which puts a narrow construction on S. 229, and 51 A. 695=1929 A.L.J. 811=1929 A. 352, which takes a contrary view. The Patna High Court also has taken a view similar to that of Lahore, and has held that the Crown was not entitled to any preferential claim in respect of a decree obtained by it in certificate proceedings under S. 20 of the Bihar and Orissa State Aid to Industries Act, 1923. *Vide* 134 I.C. 429=1932 P. 1.

COSTS OF SUCCESSFUL LITIGANT AGAINST COMPANY—PRIORITY.—A successful litigant against a company in liquidation is entitled to be paid his costs in full in priority over other ordinary creditors except where there are other creditors in the same position as himself when they and he will rank *pari passu* as regards the fund available for the discharge of their debts. 43 P.L.R. 648=1941 Comp.C. 294. Where a *foreign company is wound up in more jurisdictions than one*, the law is that the Court of each jurisdiction will be governed by the forensic rules which govern the conduct of its own liquidation. S. 230 (1) (e) of the Act, as amended in 1936 is a forensic rule in this sense and ought to be applied in the matter of winding up of a foreign company which is an unregistered company under the Act, and that provision would therefore apply to the case of a sum due to any employee from the provident fund account maintained by the company. Where a *provident fund is established for the benefit of the employees* of a company, called the employees provident fund subscription to which is compulsory, and it is clear from the rules of the fund that the fund is held for a specific purpose, i.e., for payment to the employees or their legal representatives on the termination of their service, that fund is a trust fund and the relationship between the Bank and the employee is that of a trustee and *cestui que trust* and not that of a debtor and creditor. The fact that in certain contingencies the employee may not be paid the amount or the company may have a beneficial interest in the said moneys does not make the fund any the less a trust fund. The company holds the money standing to the credit of an employee as trust money in a fiduciary capacity, and by the combined operation of S. 229 of the Companies Act and S. 52 of the Presidency Towns Insolvency Act, the said fund does not form part of the assets of the company; the employees are therefore entitled in the winding up of the company, to be paid in full the amounts standing to their credit in the provident fund account irrespective of S. 230 (1) (e) of the Companies Act in priority to all other debts of the company. 1938 M.W.N. 1332=1939 Mad. 352. *See also* 1940 Mad. 184; 1939 M.W.N. 1069.

Sec. 230 (1) (b) and (2) (b): EFFECT OF—SALARY OF EMPLOYEE—PRIORITY OVER FLOATING CHARGE.—On the winding up of a company an employee is, by virtue of S. 230 (1) (b) and (2) (b) of the Companies Act, entitled, in respect of salary to the extent of Rs. 1,000, to priority of payment as against the holder of a floating charge created by a debenture over the book debts of the company, from the proceeds of such book debts. 1941 Mad. 586=(1941) 1 M.L.J. 577. *See also* 1938 All. 609.

REVENUE, MEANING OF—S. 230 (1) (a).—If the section had read "all taxes, cesses, rates and other revenue", the word "revenue" will have to be read, *ejusdem generis*, with the preceding words. But in this section "revenue" comes first, and therefore it must not necessarily be taken to be *ejusdem generis* with the words that come after it. Hence the word in this section means only income. The rent of the Government telephone lines and also the charge for trunk calls is the income of the Government and therefore must be taken to be "revenue" within the meaning of S. 230 (a). 53 A. 92=1931 A.L.J. 24=1930 A. 884. Where as part of the agreement of the appointment of certain persons as selling agents they deposited with a company certain amount, which was to carry interest and which was to be re-paid on the termination of the period for which those persons acted as selling agents, and such persons applied for the return as per their agreement and not succeeding in getting it applied for the winding up of the company with which they had contracted and contended that they are entitled to preferential payment, it was held that the agreement between parties did not create a trust or any other fiduciary relationship and as such the selling agents were not entitled to any preferential payment. I.L.R. (1938) All. 896=1938 A.L.J. 820=1938 All. 574.

Sec. 230 (1) (c) and (2): WORKMEN'S WAGES—RULE OF PRIORITY AS TO—EXTENT.—Under the provisions of S. 230 (1) (c) and (2) of the Companies Act, the wages of workmen have a priority of claim over the claims of debenture-holders under any floating charge created by the company. I.L.R. (1938) All. 869=1938 All. 609. *See also* (1941) 1 M.L.J. 577.

CHIT FUND—PRIZE WINNER—SECURITY—POSITION OF.—The principle in equity that a creditor is not entitled to recover the amount of his debt for which security has been given when he is not in a position to return the security applies when the debtor and the person giving the security are the same person. Where the holder of a chit in a chit fund conducted by a company bids the chit and gets payment of the prize money on getting other persons to stand surety for him and those sureties give as security their own non-prized tickets in the chit fund as security for the future subscriptions payable by the bidder, and the company therefore

(b) all wages or salary of any clerk or servant in respect of service rendered to the company within the two months next before the said date, not exceeding one thousand rupees for each clerk or servant ;^{1*}

(c) all wages of any labourer or workmen, not exceeding five hundred rupees for each, whether payable for time or piecework, in respect of services rendered to the company within the two months next before the said date ;

²[(d) compensation payable under the Workmen's Compensation Act, 1923, in respect of the death or disablement of any officer or employee of the company ;]

²[(e) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company ; and]

²[(f) the expenses of any investigation held in pursuance of clause (iv) of section 138 of this Act.]

(2) The foregoing debts shall—

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportion ; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(3) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.

(4) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof :

Provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(5) The date hereinbefore in this section referred to is—

(a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order ; and

(b) in any other case, the date of the commencement of the winding up.

LEG. REF.

¹ The word "and" was omitted by S. 106 of Act XXII of 1936.

² These clauses were added, *ibid.*

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goes into liquidation, it is not open to the bidder who has committed default in payment of future instalments to claim a set-off as against the amounts due by him the amounts due to the sureties under their tickets, which the company holds as security, though it has gone into liquidation. 50 L.W. 306=1939 Mad. 915=(1939) 2 M. L.J. 325. See also 1939 M.W.N. 1193.

COMMENCEMENT OF WINDING UP.—The date of the commencement of the winding

up in the case of a compulsory winding up which has been preceded by a voluntary winding up is the date of the voluntary winding up. 1934 A.L.J. 476=147 I.C. 332=1934 A. 114.

Sec. 230 (1) (e): APPLICABILITY—CONDITIONS.—The condition precedent to the applicability of S. 230 (1) (e), which was enacted by the Act II of 1936 and came into force on 15-1-1937, is that the employee must be an employee of the company on the date of the winding up of the company. It is immaterial when he entered service. There is no distinction between employees entering service before 15-1-1937, and those entering service after that date. 1938 M.W.N. 1332=1939 Mad. 352.

¹[230-A. (1) Where any part of the property of a company which is being wound up consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the liquidator of the company, notwithstanding that he had endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, may, with the leave of the Court and subject to the provisions of this section, by writing signed by him, at any time within twelve months after the commencement of the winding up or such extended period as may be allowed by the Court, disclaim the property :

Disclaimer of property.

Provided that, where any such property has not come to the knowledge of the liquidator within one month after the commencement of the winding up, the power under this section of disclaiming the property may be exercised at any time within twelve months after he has become aware thereof or such extended period as may be allowed by the Court.

(2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the company, and the property of the company, in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person.

(3) The Court, before or on granting leave to disclaim, may require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such other order in the matter as the Court thinks just.

(4) The liquidator shall not be entitled to disclaim any property under this section in any case where an application in writing has been made to him by any persons interested in the property requiring him to decide whether he will or will not disclaim, and the liquidator has not, within a period of twenty-eight days after the receipt of the application or such further period as may be allowed by the Court, given notice to the applicant that he intends to apply to the Court for leave to disclaim, and in the case of a contract, if the liquidator, after such an application as aforesaid, does not within the said period or further period disclaim the contract, the company shall be deemed to have adopted it.

(5) The Court may, on the application of any person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise as the Court thinks just, and any damages payable under the order to any such person may be proved by him as a debt in the winding up.

(6) The Court may, on an application by any person who either claims any interest in any disclaimed property or is under any liability not discharged by this

LEG. REF.

¹ This section was inserted by S. 107 of Act XXII of 1936.

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Sec. 230-A: AMENDMENT BY ACT XXII OF 1936.—This section has been newly inserted. This gives the liquidator power, corresponding to that of a trustee in bankruptcy, to disclaim land burdened with covenants, unprofitable contracts and property which is unsaleable. Similar provision is contained in S. 267 of the English Act. The absence of such a provision as C.C.M.—217

this in the case of companies under liquidation has been felt as a great handicap to the liquidators; and hence this section has been inserted.

Sec. 230-A (5): DISCRETION OF COURT—APPLICATION FOR RESCISSION OF CONTRACT—MAINTAINABILITY.—Under S. 230-A (5), the Court is given a discretion to make an order rescinding a contract made by a person with a company prior to the winding up on his application to the Court. If the contract has already been rescinded, an application will not lie. 52 L.W. 635=(1940) M.W.N. 1077=(1940) 2 M.L.J. 697.

Act in respect of any disclaimed property and on hearing any such persons as it thinks fit, make an order for the vesting of the property in or the delivery of the property to any persons entitled thereto, or to whom it may seem just that the property should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just, and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose :

Provided that, where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the company whether as under-lessee or as mortgagee except upon the terms of making that person—

(a) subject to the same liabilities and obligations as those to which the company was subject under the lease in respect of the property at the commencement of the winding up ; or

(b) if the Court thinks fit, subject only to the same liabilities and obligations as if the lease had been assigned to that person at that date ;

and in either event (if the case so requires) as if the lease had comprised only the property comprised in the vesting order, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and, if there is no person claiming under the company who is willing to accept an order upon such terms, the Court shall have power to vest the estate and interest of the company in the property in any person liable, either personally or in a representative character, and either alone or jointly with the company, to perform the lessee's covenants in the lease, freed and discharged from all estates, incumbrances and interests created therein by the company.

(7) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the company to the amount of the injury, and may accordingly prove the amount as a debt in the winding up].

231. (1) Any transfer, delivery of goods, payment, execution or other act relating to property which would, if made or done by or against an individual, be deemed in his insolvency a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.

(2) For the purposes of this section the presentation of a petition for winding up in the case of a winding up by or subject to the supervision of the Court, and a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond with the act of insolvency in the case of an individual.

(3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

LEG. REF.

¹ These words were inserted by S. 108 of Act XXII of 1936.

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Sec. 231: PURCHASE BETWEEN WINDING UP APPLICATION AND THE ORDER.—Where the company has contracted to purchase goods between the date of the presentation of the petition for winding up and the winding up order, and has actually taken delivery of these goods, the Court will confirm the transaction if the goods were purchased by the company in the ordinary course of business. 1930 M. 1012=59 M.L.J. 826.

TITLE OF THIRD PARTIES.—A winding up Court cannot take cognizance of and adjudicate on the title of third parties except for the limited purpose mentioned in this section, and S. 232, and if it is necessary, the liquidators must have recourse to regular suits. 51 A. 695=1929 A.L.J. 811=1929 A. 353. The official liquidator was held not entitled to a summary order for refund of the money raised by a creditor of the company before the order for winding up was passed but after the Bank had passed a resolution stopping payment of debts; and he was referred to a regular suit to recover the amount. 26 S.L.R. 102=1932 S. 106.

232. (1) Where any company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force without leave of the Court against the estate or effects ¹[or any sale held without leave of the Court of any of the properties] of the company after the commencement of the winding up shall be void.

Avoidance of certain attachments, executions, etc.

(2) Nothing in this section applies to proceedings by ²[the Crown].

233. Where a company is being wound up a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid except to the amount of any cash paid to the company at the time of, or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent. per annum.

Effect of floating charge.

234. (1) The liquidator may, with the sanction of the Court when the company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the company in the case of a voluntary winding up, do the following things or any of them :

General scheme of liquidation may be sanctioned.

LEG. REF.

¹ These words were inserted by S. 108 of Act XXII of 1936.

² These words were substituted for the words "the Government" by A.O., 1937.

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Sec. 232: AMENDMENT BY ACT XXII OF 1936.—It was held in 43 A. 433 that the section as it stood before the amendment did not apply to the case of sales of any property held after the commencement of the winding up. The real object of the section being to protect the properties of the company in liquidation, the construction put upon it by the Allahabad Court to some extent frustrated the object. With a view to render the section clear and to have the matter of "sales" also expressly included in the section, the present amendment has been made. 43 A. 433 would be no longer be good law, and this amendment forbids such sales.

APPLICABILITY OF SECTION.—The provisions of this section are applicable only to two kinds of winding up, *viz.*, either by the Court or subject to its supervision, and they do not apply to a case of voluntary winding up. S. 171 of the Act cannot be invoked to apply to a case of voluntary winding up as that section is contained in a chapter specifically headed "*Winding up by the Court*". Hence any attachment, distress or execution put in force against a company without the leave of the Court after a *voluntary winding up* shall not *ipso facto*, put an end to the attachment already in force. This is also in accordance with the English law. 1924 O. 406=79 I.C. 968. See also 38 A. 407=36 I.C. 397=14 A.L.J. 513. As to the meaning of the term "*put in force*", see 43 A. 433=19 A.L.J. 262.

EXECUTION SALE AFTER WINDING UP.—A sale of the assets of a company after the winding up order, in execution of a decree passed before the order, without the permis-

sion of the Court, is voidable at the instance of the liquidator. 2 P.L.J. 77=38 I.C. 91. A contrary view was taken in 43 A. 433; but now the Act has been amended, and 43 A. 433 will no longer be good law on this point.

Sec. 233: FLOATING SECURITY.—A floating security is not a future security or a specific security; and it is a present security which presently affects the assets of the company expressed to be included in it. 50 B. 547=28 Bom.L.R. 689=1926 B. 427.

Sec. 234: POWER OF LIQUIDATOR TO REFER TO ARBITRATION.—The powers of liquidators as regards reference of disputes to arbitration are not co-extensive with the powers of directors or managers of a living company. 50 A. 867=26 A.L.J. 10=1928 A. 553. A liquidator may, with the sanction of the Court, compromise a debt due to the company in liquidation. But the Court has no jurisdiction to compel an unwilling liquidator to compromise such debt. I.L.R. 1939 Lah. 324=1939 Lah. 497.

CREDITORS.—The creditors referred to in S. 230 of the Companies Act are persons entitled to priority under the statute and as of right, but the Court has under S. 234 been allowed a discretion to order payment in full to any class of creditors other than those referred to in S. 230. If the discretion used by the Court under S. 234 of the Act is not capricious or in disregard of any legal principle, the High Court should be very slow to interfere. 1936 O.W.N. 539=163 I.C. 194.

COMPROMISE.—Under S. 234, a winding up Court has power to pass a consent order and if such order provides for execution against a guarantor, the Court has jurisdiction to enforce the order by execution. It is not permissible to call into question the correctness of the decisions of the Court in a separate suit. 46 C.W.N. 98. Sanction by extraordinary resolution is necessary in

(i) pay any classes of creditors in full ;
 (ii) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, whereby the company may be rendered liable ;

(iii) compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future certain or contingent subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.

(2) The exercise by the liquidator of the powers of this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers.

235. (1) Where, in the course of winding up a company, it appears that any

Power of Court to assess damages against delinquent directors, etc.

person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the liquidator, or of any creditor or contributory ¹[made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer], examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just.

(2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible.

²[* * * * *]

LEG. REF.

¹ These words were inserted by S. 109 of Act XXII of 1936.

² Sub-S. (3) was omitted, *ibid.*

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order that a compromise between a liquidator of a company and contributory should bind the liquidator. 4 L. 239=77 I.C. 338=1924 L. 149. See also 71 I.C. 724=1923 L. 85.

TRUST MONIES—DISAPPEARANCE—CLAIM ENTERED AS PREFERENTIAL CLAIM UNDER S. 234—EFFECT.—Trust monies are entirely outside the liquidation and do not vest in the liquidator as assets. Trust monies never become assets of the company. Where certain G. P. Notes were deposited in a Bank as security for the good conduct of an employee and on liquidation, it was found that the notes in question were not traceable but the liquidator had entered the name of the depositor in the list of preferential claims under S. 234, it was held that it amounted to an admission that the proceeds of those notes were included in the Bank's moneys, and as such it was not open to the liquidator to disclaim all responsibility in the matter.

1941 Oudh 126=1940 O.W.N. 1022. On this point see also (1940) 2 M.L.J. 559; 1940 Mad. 184; 1939 M.W.N. 1066; 1939 M.W.N. 1069.

Sec. 235: AMENDMENT BY ACT XXII OF 1936.—Sub-section (3) which has been repealed by the Amending Act XXII of 1936, made the limitation period for a suit provided in the Limitation Act applicable to an application against the delinquent directors, etc., made under this section, i.e., the application had to be made within 3 years from the date of delinquency of the directors, etc. The consequence of this was that the delinquent directors were enabled to evade their civil liability in many cases on the ground of limitation. As a matter of fact, in liquidation proceedings it takes much time for the liquidator to ascertain exactly the real state of affairs and to determine whether and how far the directors and other officers of the company have rendered themselves liable by reason of misfeasance, breach of trust, etc. Often times, such determination involved also the taking of proceedings under Ss. 195 and 196 of the Act. When

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all these things had been done, and when at last it was found that the directors, etc., were really liable, and an application was made by the liquidators under this section the directors were enabled to plead limitation and escape the liability. Consequently all the trouble taken and expenses incurred by the liquidators in the matter practically became a waste, so far as the recovery of the moneys from the directors was concerned. As an instance in point, 54 M. 153, may be cited. In order to avoid this unfortunate result, the present amendment has deleted the old sub-section (3), and has inserted the words "made within three years, etc.," in sub-section (1). Now the limitation for an application under this section will be 3 years from the date of the appointment of the liquidator, and not as it was formerly, three years from the date of the commission of the offence by the directors, etc. The three years' period provided in this section gives a reasonable and practically sufficient time to the liquidator to determine as to the liabilities of the directors, etc., and to file, if necessary, an application under this section.

CONSTRUCTION OF SECTION.—This section has been copied from the English statute and must have the same meaning as in the parent statute. 8 L. 549=1926 L. 624. A representative of an executor can be brought within the purview of this section, only if he were himself capable of being defined or described by any of the words used therein. (*Ibid.*) The Court should not make all directors jointly and severally liable for all acts of misfeasance without finding which directors are responsible for the various acts charged; and the order should be in respect of each act of misfeasance, and also only against those who are responsible for that act. 29 C. 688. A person who merely signs the memorandum of association and takes shares, but takes no part in the formation of the company does not become a promoter of the company; nor does the fact that the money paid by him for his shares is utilized in the formation of the company make him a promoter. 46 L.W. 887=(1937) 2 M. L.J. 820.

SCOPE AND OBJECT OF SECTION.—See 1938 Lah. 638 cited under S. 202 *supra*. This section is merely a procedural one and creates no new offence and gives no new rights. It only provides a summary and efficient remedy which apart from the section might have been enforced by the ordinary jurisdiction of the Court. 54 B. 226=32 Bom. L.R. 232=1930 B. 572; 54 M. 153=1931 M. 58=60 M.L.J. 280; 55 A. 912=1933 A. L.J. 1203=1933 A. 789 (F.B.). The summary procedure contained in this section is not applicable to every claim which the company may have against any of its officers, and the same can be resorted to only when such claims are in the nature of misfeasance

or breach of trust in the performance of their duties. *Re Etic, Ltd.*, 1928 Ch. 861=97 L.J. Ch. 460; 5 L. 461=85 I.C. 126=1925 L. 194. Prejudice to the interest of the company by the acts of the directors must be shown before taking any proceedings against them under this section as well as under Ss. 236 and 237. 28 P.L.R. 1917=39 I.C. 769; 3 A.W.R. 222. Proceedings under this section are domestic proceedings between the company and its officers, and the orders are passed in a special jurisdiction investing the Court with certain powers over the internal affairs of the company; and; hence, orders in such proceedings do not bar a suit against a third party whose wrongful act has caused loss to the company. 159 I. C. 977=1935 A. 995. An application under this section is a representative proceeding filed on behalf of a class of persons and not to enforce any personal remedy or to obtain any exclusive benefit. 55 A. 912=1933 A. 789 (F.B.). If the directors enter into a contract and make a payment on it during the winding up proceedings, they do so at their peril, and excepting those cases in which it would be held that the payment was necessary for the winding up or for the carrying on of the business of the company pending the hearing of the winding up petition, the directors must be aware that there is always a risk of such payments being void under this section. It is impossible to excuse the directors on account of lack of knowledge. They, above all, must be knowing what were necessary payments, and they also must be assumed to have known that having entered into a contract which had not been completed before the winding up, the persons with whom they were contracting were entitled only to prove in the winding up for damages. In the sense therefore that the directors were aware that they were making an unauthorized payment, they were disposing of the property of the company wrongfully and therefore guilty of a breach of trust and the absence of dishonesty or fraud is immaterial. The directors, therefore, are not entitled to relief under S. 281, Companies Act. 1937 P. 293=168 I.C. 786. It is not necessary in a petition presented to the High Court under S. 235 to fully and adequately set out the particulars on which the claim is based. Neither S. 235 nor the rules framed thereunder require that the sum claimed by the liquidator from a director or officer of the company should be specifically stated in the petition. So also the rules framed under S. 235 do not require that an affidavit supporting the facts mentioned in the petition should be filed along with the petition or that if it is not filed it cannot be received at a later stage. Where therefore a petition under S. 235 does not state the sum sought to be recovered from the persons against whom the petition is presented and is not supported by affidavit, the absence of these do not render the pro-

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ceedings defective. 1938 Lah. 658. S. 237 affords no protection to company promoters and directors against prosecutions for breaches of trust. That section is intended to safeguard the interests of the share-holders of a company which has failed to prevent what remains of their money from being wasted by the liquidator on unprofitable criminal prosecutions. But there is nothing which restricts the powers of the police or of any private person to file a complaint of criminal breach of trust against a company director or any other person, and the police do not require sanction to prosecute for criminal breach of trust. 1937 M.W.N. 1122.

NATURE OF DIRECTOR'S DUTIES AND LIABILITIES.—In order to ascertain the duties that a person appointed to the board of an established company undertakes to perform, it is necessary to consider not only the nature of the company's business, but also the manner in which the work of the company is in fact distributed between the directors and the other officials of the company, provided always that this distribution is a reasonable one in the circumstances and is not inconsistent with any express provisions of the articles. In discharging his duties, a director must not only act honestly but must also exercise some degree of both skill and diligence. But a director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience; nor is he bound to give continuous attention to the affairs of the company, his duties being of an intermittent nature to be performed at periodical meetings, and in respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. Where the articles of association contain an indemnity clause which protects the directors, protectors, etc., except where loss has been incurred as the result of wilful neglect or wilful neglect on their part, a director cannot be made liable unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty. Any act, or omission to do an act, is wilful where the person concerned knows what he is doing and intends to do what he is doing. A director is entitled to rely on the judgment, information, and advice of the chairman or general manager or advisory director, as to whose integrity, skill and competence he has no reason for suspicion. 46 L.W. 869=(1937) 2 M.L.J. 848.

DIRECTOR'S LIABILITY, WHEN ARISES.—The directors, who by wilfully shutting their eyes to the acts of the agents or the managing agents and by recklessly sanctioning the acts

of such agents consciously aid in the commission of acts of misfeasance, misappropriation, and falsification of accounts and balance sheets, are themselves guilty of wilful misconduct and are liable to pay compensation if that state of affairs continues over a series of years. 55 B. 226=32 Bom.L.R. 323=1930 B. 572. But where the act of the director is not wilful or reckless, but, only amounts to mere neglect or breach of duty that will not come *ipso facto*, under this section. 1 Luck. 334=1926 O. 234. A director will not be liable for any error of judgment; and as regards imprudence, in order to fix personal liability on him, the imprudence must be so great and manifest as to amount to gross negligence, and he must not at the same time be authorized to do the imprudent act. 2 O.W.N. 920=92 I.C. 50=1926 O. 153. Further, if there is no reason for doubting the fidelity of the officers in the employment of the company, the directors will not be liable if those officers should commit any acts of misfeasance, etc., and the directors trusted them. 1 Luck. 334=1926 O. 243. The phraseology of S. 235 makes it clear that proceedings contemplated therein were intended to apply only to the Director and not to his representatives and hence proceedings brought against a Director during his lifetime cannot be continued against his sons and wife as heirs representing his estate. 1938 A.L.J. 1002. If the company is being wound up the remedy against a delinquent director whether for negligence, fraud or misfeasance is under S. 235. Where such proceedings have been taken against a director, subsequent suit against him for compensation for fraud or misfeasance is incompetent on the principle of *res judicata*. 40 P.L.R. 883=1938 Lah. 577. Where books of a company which must have some value to the company are found in the possession of the manager of the company, the Court has power to order them to be delivered to the liquidator; it is not necessary that the order should also state the amount for which the person against whom it is passed is liable in the event of non-delivery of the property. I.L.R. (1941) Mad. 120=52 L.W. 502=(1940) 2 M.L.J. 594.

BROKER.—A broker has nothing to do with the management of the company and may have no knowledge of what is being done inside the company's office. Therefore to classify him as an 'officer' or promoter of the company would be putting too great a strain on the wording of the section. 1938 M. 159=I.L.R. 1938 M. 192=(1937) 2 M.L.J. 820.

ACTS OF MISFEASANCE BY DIRECTORS.—See 46 L.W. 869=(1937) 2 M.L.J. 848. (i) Allotment of shares made without an application and allotment money not being paid. 154 I.C. 33=1934 A. 855. (ii) The director being a party to a calculated and deliberate fraud in the floatation of the company and in the conduct of its business. 1934 A.

236. If any director, manager, officer or contributory of any company being wound up destroys, mutilates, alters or falsifies or fraudulently secretes any books, papers, or securities, or makes, or is privy to the making of any false or fraudulent entry in any register, book of account or document belonging to the company with intent to defraud or deceive any person, he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine.

¹[237. (1) If it appears to the Court in the course of a winding up by, or subject to the supervision of, the Court that any past or present director, manager or other officer, or any member, of the company has been guilty of any offence in relation to the company for which he is criminally liable, the Court may, either on the application of any person interested in the winding up or of its own motion, direct the liquidator either himself to prosecute the offender or to refer the matter to the registrar.

LEG. REF.

¹ This section was substituted by S. 110 of Act XXII of 1936.

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855. (iii) An omission by directors to come to any conclusion whatsoever on an important piece of business duly proposed for the decision of the Board. 143 I.C. 713=1933 S. 103. (iv) Distribution of dividends out of capital and other funds, not being profits. 47 A. 669=23 A.L.J. 473. (v) A wilful contravention of the provisions of S. 101 of the Act. 154 I.C. 33=1934 A. 855.

LIMITATION.—Directors of companies are not trustees in whom the properties of the companies have become vested in trust for any specific purpose, so as to bring them within S. 10 of the Limitation Act. 18 B. 119; 54 M. 153=60 M.L.J. 280. See also 1937 P. 293. Hence, the articles of the Limitation Act apply to any claim against them in respect of acts of misfeasance committed by them. (*Ibid.*) This section is not intended to revive any rights that have already become barred by time. 71 I. C. 899=1923 L. 58. There has been a difference of opinion among the several High Courts as regards the period of limitation and time from which the period has to be computed; but the matter has been set at rest by the amendment introduced by the Amending Act XXII of 1936, which fixes a period of 3 years, computed either from the date of the misfeasance, etc., or from the date of the first appointment of the liquidator, whichever being longer.

Per Monroe, J.—Where in a petition under S. 235, to the High Court, the names of certain persons are added subsequently but documents relating to them which taken together fulfil the requirements of the rule framed under S. 235 are not filed at that time but later, the date of the application against the added defendants is the date on which the documents are filed. 1938 Lah. 658.

PRACTICE.—An official liquidator who files

an application under this section will not be called upon to furnish security for costs. 55 A. 250=1933 A.L.J. 199.

PROCEDURE.—*Per Monroe, J.*—An application under S. 235, is in the nature of a plaint and the proceedings under S. 235 are judicial proceedings; but the provisions of the Code of Civil Procedure are inapplicable to a petition under S. 235 because express provisions for its contents and the formalities connected with it are provided for by the Companies Act and the rules made thereunder. 1938 Lah. 658. Where in the proceedings under S. 235, instituted in the High Court against certain persons, the matters alleged against some of such persons are entirely different from those which are subject-matter of the investigation against others, the claims against all cannot be tried jointly on principles underlying O. 2, R. 6, C.P. Code; there being no real common unity between them. 1938 Lth. 658.

Sec. 236: SCOPE—IF EXHAUSTIVE.—It is not correct to hold that charges of falsification of accounts or forgery against the promoters of a company can only be tried under S. 236 of the Companies Act. A penal enactment in a special Act is no bar to a prosecution under the Penal Code. A prosecution of the promoters of a company under the Penal Code on such charges is perfectly legal, I.L.R. 1937 All. 779=1937 A.L.J. 1073=1937 All. 714.

Sec. 237: AMENDMENT BY ACT XXII OF 1936.—The present section has been substituted for the old S. 237, and it now contains the more adequate provisions to be found in S. 277 of the English Act. The chief amendments are with reference to prosecutions in the course of *voluntary liquidation* proceedings. The old section merely provided that the liquidator in such cases may prosecute the offender with the previous sanction of the Court. Now, the present section requires a report to be made by the liquidator to the Registrar and to put him in possession of all the facts and documents necessary so as to enable the Registrar to

(2) If it appears to the liquidator in the course of a voluntary winding up that any past or present director, manager or other officer, or any member of the company has been guilty of any offence in relation to the company for which he is criminally liable, he shall forthwith report the matter to the registrar and shall furnish to him such information and give to him such access to and facilities for inspecting and taking copies of any documents, being information or documents in the possession or under the control of the liquidator relating to the matter in question, as he may require.

(3) Where any report is made under sub-section (2) to the registrar, he may, if he thinks fit, refer the matter to the ¹[Central Government] for further inquiry, and the ¹[Central Government] shall thereupon investigate the matter and may,

LEG. REF.

¹ These words were substituted for the words "Local Government" by A.O., 1937.

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determine if any prosecution is necessary. If the Registrar thinks that any prosecution is unnecessary he has to inform the same to the liquidator; and thereupon the liquidator may apply for the sanction of the Court and if the same is granted may prosecute the offender. If, on the other hand, the Registrar thinks that the matter requires further investigation, he may refer the matter for the Local Government, which can have the matter thoroughly investigated by any person designated by it and approved by the Court. And thirdly if the Registrar thinks that a prosecution is necessary, he may place the papers before the Advocate-General or the Public Prosecutor and, if advised to do so, institute proceedings. In sub-section (5), provision has been made for the Court itself *suo moto*, or on the application of any person interested, to order the liquidator to make a report to the Registrar, when he has not himself done so. The section also provides for opportunity being given to the accused persons to make their representations to the Registrar before any prosecution should be launched by him. The section also contains a provision requiring the officers of the company, as well as bankers, legal advisers and auditors of the company to render all the necessary assistance to the Registrar in the matter of any prosecution started by him under this section.

SCOPE OF SECTION.—The fact that one of the members of a firm acting as managing agents of a company was punished in his individual capacity as a director of the company is no ground for not punishing him in his capacity as a member of the managing firm. 18 P.R. (Cr.) 1916=35 I.C. 482. The liquidator has power to take action under this section, in respect of the assets realised after the dissolution of the company, even after such dissolution. 28 P.L.R. 1917=39 I.C. 769. The Official Liquidator of a company who was appointed by the High Court during the winding up of the company wrote to the High Court stating that on going through the account books and the records of the company he found that the promoters of the company had committed

various acts of dishonesty amounting to criminal breach of trust and manipulation of accounts and instances of false affidavits and wrong returns and that it was advisable that they should be prosecuted. The Company Judges of the High Court were of opinion that there was a *prima facie* case against the promoters and desired that the matter be investigated and, if the evidence were found sufficient, that the promoters be put on their trial. The Registrar of the High Court forwarded the Official Liquidator's letter to the Police under cover of a letter which stated that the Court considered it a fit case for inquiry by the Police. The promoters who were prosecuted and put on their trial pleaded that the prosecution was illegal for the reason that the procedure laid down by S. 237, was not followed. *Held*, that the provisions of S. 237 had been substantially complied with, and even assuming that it was not so, the Act nowhere laid down that there could be no prosecution on a criminal charge otherwise than upon a direction by the Company Judge or Judges of the High Court, and the trial was consequently not at all illegal. I.L.R. 1937 All. 779=1937 A.L.J. 1073=171 I.C. 994=1937 All. 714. The whole scheme of S. 237 appears to be enabling rather than mandatory or exclusive. The Court may order the liquidator to prosecute or refer the matter to the Registrar. The Registrar may refuse to prosecute and the liquidator with the previous sanction of the Court may prosecute, but the section is not limited to the criminal liability of directors under the Companies Act, so that the section is not limited to special offences created under the Act. 1942 Sind 9. There is nothing in law to prevent a private person making a complaint to a Court of offences under the Companies Act or the Penal Code against directors or officers of the Company in relation to the company even if the company is being wound up. 1942 Sind 9. Company directors—Prosecution by police for criminal breach of trust—Sanction not necessary—also for complaint by private person. 1937 M.W.N. 1122. See also 1942 Sind 9.

APPEAL TO PRIVY COUNCIL.—An order passed under this section for the official liquidator to prosecute certain persons for a criminal offence comes within the purview of S. 202 and is appealable. But such order being

if they think it expedient, apply to the Court for an order conferring on any person designated by the ¹[Central Government] for the purpose with respect to the company concerned all such powers of investigating the affairs of the company as are provided by this Act in the case of a winding up by the Court.

(4) If on any report to the registrar under sub-section (2) it appears to him that the case is not one in which proceedings ought to be taken by him, he shall inform the liquidator accordingly and thereupon, subject to the previous sanction of the Court, the liquidator may himself take proceedings against the offender.

(5) If it appears to the Court in the course of a voluntary winding up that any past or present director, manager or other officer, or any member, of the company has been guilty as aforesaid, and that no report with respect to the matter has been made by the liquidator to the registrar, the Court may, on the application of any person interested in the winding up or of its own motion, direct the liquidator to make such a report, and on a report being made accordingly, the provisions of this section shall have effect as though the report has been made in pursuance of the provisions of sub-section (2).

(6) If, where any matter is reported or referred to the registrar under this section, he considers that the case is one in which a prosecution ought to be instituted, he shall place the papers before the Advocate-General or the public prosecutor and if advised to do so institute proceedings, ²[* * * * *]

Provided that no prosecution shall be undertaken without first giving the accused person an opportunity of making a statement in writing to the registrar and of being heard thereon.

²[* * * * *]

³[(7) Notwithstanding anything contained in the Indian Evidence Act, 1872, when any proceedings are instituted under this section it shall be the duty of the liquidator and of every officer and agent of the company past and present (other than the defendant in the proceedings) to give all assistance in connection with the prosecution which he is reasonably able to give, and for the purposes of this sub-section the expression agent in relation to a company shall be deemed to include any banker or legal adviser of the company and any person employed by the company as auditor, whether that person is or is not an officer of the company.]

³[(8)] If any person fails or neglects to give assistance in manner required by ⁴[sub-section (7)], the Court may, on the application of the registrar, direct that person to comply with the requirements of the said sub-section, and where any such application is made with respect to a liquidator, the Court may, unless it appears that the failure or neglect to comply was due to the liquidator not having in his hands sufficient assets of the company to enable him so to do, direct that the costs of the application shall be borne by the liquidator personally.

238. If any person, upon any examination upon oath authorised under this Act, or in any affidavit, deposition or solemn affirmation, in or about the winding up of any company under this Act, or otherwise in or about any matter arising under this Act, intentionally gives false evidence, he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine.

⁵[238-A. (1) If any person, being a past or present director, managing agent,

LEG. REF.

¹ These words were substituted for the words "Local Government" by A.O., 1937.

² Certain words were omitted by S. 11 of Act II of 1938.

³ This sub-section was inserted and original sub-S. (7) re-numbered (8), *ibid.*

⁴ This word, brackets and figure were substituted for the word, brackets and figure "sub-S.

(6)," *ibid.*

⁶ This section was inserted by S. 111 of Act XXII of 1936.

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criminal in nature, leave cannot be granted for appeal to the Privy Council under S. 109, C. P. Code. 132 I.C. 474=1931 S. 120.

Sec. 238-A: AMENDMENT BY ACT XXII

Penal provisions.

manager or other officer of a company which at the time of the commission of the alleged offence is being wound up, whether by or under the supervision of the Court or voluntarily, or is subsequently ordered to be wound up by the Court or subsequently passes a resolution for voluntary winding up—

(a) does not to the best of his knowledge and belief fully and truly discover to the liquidator all the property, real and personal, of the company, and how and to whom and for what consideration and when the company disposed of any part thereof, except such part as has been disposed of in the ordinary way of the business of the company ; or

(b) does not deliver up to the liquidator, or as he directs, all such part of the real and personal property of the company as is in his custody or under his control, and which he is required by law to deliver up ; or

(c) does not deliver up to the liquidator, or as he directs, all books and papers in his custody or under his control belonging to the company and which he is required by law to deliver up ; or

(d) within twelve months next before the commencement of the winding up or at any time thereafter conceals any part of the property of the company to the value of one hundred rupees or upwards or conceals any debt due to or from the company ; or

(e) within twelve months next before the commencement of the winding up or at any time thereafter fraudulently removes any part of the property of the company to the value of one hundred rupees or upwards ; or

(f) makes any material omission in any statement relating to the affairs of the company ; or

(g) knowing or believing that a false debt has been proved by any person under the winding up, fails for the period of a month to inform the liquidator thereof ; or

(h) after the commencement of the winding up prevents the production of any book or paper affecting or relating to the property or affairs of the company ; or

(i) within twelve months next before the commencement of the winding up or at any time thereafter, conceals, destroys, mutilates or falsifies, or is privy to the concealment, destruction, mutilation or falsification of any book or paper affecting or relating to the property or affairs of the company ; or

(j) within twelve months next before the commencement of the winding up or at any time thereafter makes or is privy to the making of any false entry in any book or paper affecting or relating to the property or affairs of the company ; or

(k) within twelve months next before the commencement of the winding up or at any time thereafter fraudulently parts with, alters or makes any omission in, or is privy to the fraudulent parting with, altering or making any omission in, any document affecting or relating to the property or affairs of the company ; or

(l) after the commencement of the winding up or at any meeting of the creditors of the company within twelve months next before the commencement of the winding up, attempts to account for any part of the property of the company by fictitious losses or expenses ; or

(m) has within twelve months next before the commencement of the winding up or at any time thereafter, by any false representation or other fraud, obtained any property for or on behalf of the company on credit which the company does not subsequently pay for ; or

NOTES.

OF 1936.—This section follows S. 271 of the English Act, in providing for the punishment of offences antecedent to or in the course of a winding up, *e.g.* ; non-disclosure

of assets, wrongful retention or concealment, or removal of the same, non-delivery to liquidator of the books and papers of the company, falsification, destruction or mutilation of accounts, etc.

(n) within twelve months next before the commencement of the winding up or at any time thereafter, under the false pretence that the company is carrying on its business, obtains on credit, for or on behalf of the company, any property which the company does not subsequently pay for ; or

(o) within twelve months next before the commencement of the winding up or at any time thereafter pawns, pledges or disposes of any property of the company which has been obtained on credit and has not been paid for, unless such pawning, pledging or disposing is in the ordinary way of the business of the company ; or

(p) is guilty of any false representation or other fraud for the purpose of obtaining the consent of the creditors of the company or any of them to an agreement with reference to the affairs of the company or to the winding up :

he shall be punishable, in the case of the offences mentioned respectively in clauses (m), (n) and (o) of this sub-section, with imprisonment for a term not exceeding five years, and, in the case of any other offence, with imprisonment for a term not exceeding two years :

Provided that it shall be a good defence to a charge under any of clauses (b), (c), (d), (f), (n) and (o), if the accused proves that he had no intent to defraud, and to a charge under any of clauses (a), (h), (i) and (j), if he proves that he had no intent to conceal the state of affairs of the company or to defeat the law.

(2) Where any person pawns, pledges or disposes of any property in circumstances which amount to an offence under clause (o) of sub-section (1) every person who takes in pawn or pledge or otherwise receives the property knowing it to be pawned, pledged or disposed of in such circumstances as aforesaid shall be punishable with imprisonment for a term not exceeding three years.]

239. (1) Where by this Act, the Court is authorised in relation to winding up to have regard to the wishes of creditors or contributories, as proved to it by any sufficient evidence, the Court may, if it thinks fit for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held and conducted in such manner as the Court directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the Court.

(2) In the case of creditors, regard shall be had to the value of each creditor's debt.

(3) In the case of contributories regard shall be had to the number of votes conferred on each contributory by the articles.

240. Where any company is being wound up, all documents of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded.

241. After an order for a winding up by or subject to the supervision of the Court, the Court may make such order for inspection of documents by creditors and contributories of the company of its

NOTES.

Sec. 240: BURDEN OF PROOF.—All entries in documents of the company are presumed to be true, and so the *onus* lies heavily upon those who assert that they are fictitious, incorrect, fraudulent or without sufficient cause. 1935 L. 157. Entries in the books of a company are *prima facie* evidence of the transaction to which they relate and it is for the contributory denying the transaction to rebut that evidence and disprove the entries recorded in books of the company and rebut the presumption arising against

him. The proof of the entries by the manager and the accountant of the company is sufficient to shift the onus to the contributory to disprove the transaction, and the mere fact that the contributory states on solemn affirmation that he did not enter into the transaction and has repudiated the transaction will not save him from his liability. 39 P.L.R. 136=1937 L. 61.

Sec. 241.—This section does not give the right of inspection in cases of voluntary winding up. *Morgan's case*, (1884) 2 Ch. D. 620. S. 241 places the matter of order-

documents as the Court thinks just, and any documents in the possession of the company may be inspected by creditors or contributories accordingly, but not further or otherwise.

Disposal of documents of company. 242. (1) When a company has been wound up and is about to be dissolved, the documents of the company and of the liquidators may be disposed of as follows (that is to say) :—

(a) in the case of a winding up by or subject to the supervision of the Court, in such way as the Court directs ;

(b) in the case of a voluntary winding up, in such way as the company by extraordinary resolution directs.

(2) After three years from the dissolution of the company, no responsibility shall rest on the company or the liquidators, or any person to whom the custody of the documents has been committed, by reason of the same not being forthcoming to any person claiming to be interested therein.

243. (1) Where a company has been dissolved, the Court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the Company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

Power of Court to declare dissolution of company void.

(2) It shall be the duty of the person on whose application the order was made within twenty-one days after the making of the order, to file with the registrar a certified copy of the order, and if that person fails so to do, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

244. (1) Where a company is being wound up, if the winding up is not concluded within one year after its commencement, the liquidator shall, ¹[once in each year and at intervals of not more than twelve months], until the winding up is concluded, ²[file in Court or with the registrar, as the case may be] a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in and position of the liquidation.

Information as to pending liquidations.

LEG. REF.

¹ These words were substituted for the words "at such intervals as may be prescribed" by S. 112 of Act XXII of 1936.

² These words were substituted for the words "file with the registrar," *ibid.*

NOTES.

ing inspection of documents in the discretion of the Court and when once this discretion has been exercised in favour of contributory or creditor, it will not be interfered with by the Court, merely on the ground that he is likely to use the information obtained on inspection, in the interest of directors yet to be examined. 1937 L. 82.

Sec. 243.—Even after the dissolution of a company, the liquidator has power to take action in respect of the assets realised after the dissolution of the company. 26 P.L.J. 1917=39 I.C. 769. The rule in *Morris v. Harris*, 1927 A.C. 252, that the effect of a subsequent declaration of the Court that a resolution for voluntary winding was void is not to invalidate any proceedings taken

during the interval between the dissolution and its avoidance does not apply to a case where the transaction, that is, the resolution is tainted by fraud. I.L.R. (1937) 1 C. 203=1937 C. 129=64 C.L.J. 280.

Sec. 244: AMENDMENT BY ACT XXII OF 1936.—The amendments provide that the interim report of the liquidator should be submitted to the Court or the registrar, as the case may be, but that a copy should in any case be given to the registrar, and defines the time when the report should be made. The forms and particulars to be contained in these statements are prescribed by the High Courts, which have followed Rr. 193 to 195 of the English Companies 'Winding up Rules' and have prescribed a form similar to the English Form No. 92, drawn up under those rules. The filing of the statement into Court, will keep the Court duly conversant with the purposes of the winding up proceedings and will facilitate the necessary directions being given by the Court with reference to the matters contained in such statements.

(2) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement, and to receive a copy thereof or extract therefrom ; but any person untruthfully so stating himself to be a creditor or contributory shall be deemed to be guilty of an offence under section 182 of the Indian Penal Code, and shall be punishable accordingly on the application of the liquidator.

(3) If a liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding five hundred rupees for each day during which the default continues.

¹[(4) When the statement is filed in Court a copy shall simultaneously be filed with the registrar and shall be kept by him along with the other records of the company.]

²[244-A. (1) Every liquidator of a company which is being wound up by the Court shall, in such manner and at such times as may be prescribed, pay the money received by him into a scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934 :

Payments of liquidator into bank.
 Provided that if the Court is satisfied that for the purpose of carrying on the business of the company or of obtaining advances or for any other reason it is for the advantage of the creditors or contributories that the liquidator should have an account with any other bank, the Court may authorise the liquidator to make his payments into or out of such other bank as the Court may select and thereupon those payments shall be made in the prescribed manner.

(2) If any such liquidator at any time retains for more than ten days a sum exceeding five hundred rupees or such other amount as the Court may in any particular case authorise him to retain, then, unless he explains the retention to the satisfaction of the Court, he shall pay interest on the amount so retained in excess at the rate of twenty per cent. per annum and shall be liable to disallowance of all or such part of his remuneration as the Court may think just and to be removed from his office by the Court and shall be liable to pay any expenses occasioned by reason of his default.

(3) A liquidator of a company which is being wound up shall open a special banking account and pay all sums received by him as liquidator into such account.]

³[244-B. (1) Where any company is being wound up, if the liquidator has in his hands or under his control any money of the company representing unclaimed dividends payable to any creditor or undistributed assets refundable to any contributory which have remained unclaimed or undistributed for six months after the date on which

Unclaimed dividends and undistributed assets to be paid to Companies Liquidation Account.

LEG. REF.

¹ This sub-section was added by S. 112 of Act XXII of 1936.

² This section was inserted by S. 113, *ibid.*

³ S. 244-B inserted by Act XXXVI of 1940.

NOTES.

Sec. 244-A: AMENDMENT BY ACT XXII OF 1936.—This section is now based on S. 194 of the English Act. It requires the liquidator to lodge the monies received by him during a winding up in a scheduled bank as defined in the Reserve Bank of India Act, 1934, under a special banking account. It is but proper such monies should not be mixed up with the liquidator's private monies

or kept in his private accounts in any bank. However, to provide for cases where it will clearly be of advantage to the company in carrying on its business or for obtaining advances, that the liquidator should have an account with any other bank, the section empowers the Court to sanction the same and to prescribe the necessary conditions regulating the same. The section further renders the liquidator not only liable to pay heavy interest in cases where he retains without adequate justification or authority any sum exceeding Rs. 500 for more than 10 days, but also liable to be removed without payment of any remuneration.

they became payable or refundable, the liquidator shall forthwith pay the said money into the Reserve Bank of India to the credit of the Central Government in an account to be called the Companies Liquidation Account, and the liquidator shall, on the dissolution of the company, similarly pay into the said account any money representing unclaimed dividends or undistributed assets in his hands at the date of dissolution.

(2) The liquidator shall, when making any payment referred to in sub-section (1), furnish to such officer as the Central Government may appoint in this behalf a statement in the prescribed form setting forth in respect of all sums included in such payment the nature of the sums, the names and last known addresses of the persons entitled to participate therein, the amount to which each is entitled and the nature of his claim thereto, and such other particulars as may be prescribed.

(3) The receipt of the Reserve Bank of India for any money paid to it under sub-section (1) shall be an effectual discharge of the liquidator in respect thereof.

(4) Where the company is being wound up by the Court, the liquidator shall make the payments referred to in sub-section (1) by transfer from the special banking account referred to in sub-section (3) of section 244-A, and where the company is wound up voluntarily, or subject to the supervision of the Court, the liquidator shall, when filing a statement in pursuance of sub-section (1) of section 244, indicate the sum of money which is payable to the Reserve Bank of India under sub-section (1) which he has had in his hands or under his control during the six months preceding the date to which the said statement is brought down, and shall, within fourteen days of the date of filing the said statement, pay that sum into the Companies Liquidation Account.

(5) Any person claiming to be entitled to any money paid into the Companies Liquidation Account in pursuance of this section may apply to the Court for an order for payment thereof, and the Court, if satisfied that the person claiming is entitled, may make an order for the payment to that person of the sum due :

Provided that before making such order the Court shall cause a notice to be served on such officer as the Central Government may appoint in this behalf calling on the officer to show cause within one month from the date of the service of the notice why the order should not be made.

(6) Any money paid into the Companies Liquidation Account in pursuance of this section, which remains unclaimed thereafter for a period of fifteen years, shall be transferred to the general revenue account of the Central Government ; but any claim preferred under sub-section (5) to any money so transferred shall be allowable as if such transfer had not been made, the order for payment on such claim being treated as an order for refund of revenue.

(7) Any liquidator retaining any money which should have been paid by him into the Companies Liquidation Account under this section shall pay interest on the amount retained at the rate of twenty per cent. per annum and shall also be liable to pay any expenses occasioned by reason of his default, and, where the winding up is by or under the supervision of the Court, he shall also be liable to disallowance of all or such part of his remuneration as the Court may think just and to be removed from his office by the Court.

(8) Nothing in this section shall apply in relation to companies with objects confined to a single province which are not trading corporations.]

245. (1) Any affidavit required to be sworn under the provisions or for the purposes of this Part may be sworn in British India, Court or person before whom affidavit may be sworn. or elsewhere within the dominions of His Majesty, before any Court, Judge or person lawfully authorised to take and receive affidavits, or in any part of India other than British India before any Court authorised or continued by ¹[the Central Government or the Crown Representative], or in any place outside His Majesty's dominions before any of His Majesty's Consuls or Vice-Consuls.

(2) All Courts, Judges, Justices, Commissioners, and persons acting judicially in British India shall take judicial notice of the seal or stamp or signature (as the case may be) of any such Court, Judge, person, Consul or Vice-Consul, attached, appended or subscribed to any such affidavit or to any other document to be used for the purposes of this Part.

Rules.

246. (1) The High Court may, from time to time, make rules consistent with this Act and with the Code of Civil Procedure, 1908, concerning the mode of proceedings to be had for winding up a company in such Court and in the Courts subordinate thereto, ¹[and for voluntary winding up (both members and creditors), for the holding of meetings of creditors and members in connection with proceedings under section 153 of this Act], and for giving effect to the provisions hereinbefore contained as to the reduction of the capital and the sub-divisions of the shares of a company ¹[and generally for all applications to be made to the Court under the provisions of this Act] ²[and shall make rules providing for all matters relating to the winding up of companies which, by this Act, are to be prescribed.]

(2) Without prejudice to the generality of the foregoing power, the High Court may by such rules enable or require all or any of the powers and duties conferred and imposed on the Court by this Act, in respect of the matters following, to be exercised or performed by the official liquidator, and subject to the control of the Court, that is to say, the powers and duties of the Court in respect of—

(a) holding and conducting meetings to ascertain the wishes of creditors and contributories ;

(b) settling lists of contributories and rectifying the register of members where required, and collecting and applying the assets ;

(c) requiring delivery of property or documents to the liquidator ;

(d) making calls ;

(e) fixing a time within which debts and claims must be proved :

Provided that the official liquidator shall not, without the special leave of the Court, rectify the register of members, and shall not make any call without the special leave of the Court.

Removal of defunct Companies from Register.

247. (1) Where the registrar has reasonable cause to believe that a company is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation.

Registrar may strike defunct company off register.

LEG. REF.

¹ These words were inserted by S. 114 of Act XXII of 1936.

² These words were inserted by S. 2 and Schedule I of Act XI of 1915.

NOTES.

Sec. 246: AMENDMENTS BY ACT XXII OF 1936.—The amendments supply certain omissions in the section as it previously stood. The enlargement of the powers of the High Court to make rules, has also become necessary in view of the various new forms of procedure introduced by the several amendments now made in this Act. An order for a call on contributories disregarding the requirements of any rule framed by the High Court under this section as to notice, cannot be maintained. 1 P.R. 1918=44 I.

C. 139.

Sec. 247: SCOPE AND APPLICABILITY.—The Registrar is not bound to remove the company from the register on discovering that it is not carrying on business or that its members have been reduced to less than seven, even though an application for removing it is made. 86 I.C. 652=1926 L. 443. A company may be wound up even after it has been dissolved, with this difference, *viz.* ; that in the case of a defunct company it can be done on the application of an erstwhile shareholder. 24 N.L.R. 100=1928 N. 194. The only person who can legally put in an appearance on behalf of a company in proceedings under this sub-section on the application of a shareholder, is either the secretary of the company or one of its directors though they may not have been parties to

(2) If the registrar does not within one month of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received and that, if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the Official Gazette with a view to striking the name of the company off the register.

(3) If the registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer, he may publish in the Official Gazette, and send to the company by post a notice that, at the expiration of three months from the date of that notice, the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.

(4) If, in any case where a company is being wound up, the registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of six consecutive months after notice by the registrar demanding the returns has been sent by post to the company, or to the liquidator at his last known place of business, the registrar may publish in the Official Gazette and send to the company a like notice as is provided in the last preceding sub-section.

(5) At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the Official Gazette, and, on the publication in the Official Gazette, of this notice, the company shall be dissolved: Provided that the liability (if any) of every director and member of the company shall continue and may be enforced as if the company had not been dissolved.

(6) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Court, on the application of the company or member or creditor, may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if its name had not been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

(7) A letter or notice under this section may be addressed to the company at its registered office, or, if no office has been registered, to the care of some director, manager or other officer of the company, or, if there is no director, manager or other officer of the company whose name and address are known to the registrar, may be sent to each of the persons who subscribed the memorandum, addressed to him at the address mentioned in the memorandum.

PART VI.

REGISTRATION OFFICE AND FEES.

248. (1) For the purposes of the registration of companies under this Act, there shall be offices at such places as the ¹[Central Government] thinks fit, and no company shall be

LEG. REF.

¹ These words were substituted for the words "Local Government" by A.O., 1937.

NOTES.

the original proceedings. The Registrar cannot represent the company. 116 I.C. 427

=1929 N. 185. So, where a shareholder applied to the Court under this sub-section making the Registrar alone a party, it was held the company was not properly represented, and the Court cannot set aside the order of the registrar. 1929 N. 185.

registered except at an office within the province in which, by the memorandum, the registered office of the company is declared to be established.

(2) The ¹[Central Government] may appoint such registrars and assistant registrars as it thinks necessary for the registration of companies under this Act, and may make regulations with respect to their duties.

(3) The salaries of the persons appointed under this section shall be fixed by the ¹[Central Government].

(4) The ¹[Central Government] may direct a seal or seals to be prepared for the authentication of documents required for or connected with the registration of companies.

(5) Any person may inspect the documents kept by the registrar on payment of such fees as may be appointed by the ¹[Central Government], not exceeding one rupee for each inspection; and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document, to be certified by the registrar on payment for the certificate, certified copy or extract, of such fees as the ¹[Central Government], may appoint, not exceeding three rupees for a certificate of incorporation, and not exceeding six annas for every hundred words or fractional part thereof required to be copied.

(6) Whenever any act is by this Act directed to be done to or by the registrar it shall, until the ¹[Central Government] otherwise directs, be done to or by the existing registrar of joint stock companies or in his absence to or by such person as the ¹[Central Government] may for the time being authorise, but, in the event of the ¹[Central Government] altering the constitution of the existing registry offices or any of them, any such act shall be done to or by such officer and at such place with reference to the local situation of the registered offices of the companies to be registered as the ¹[Central Government] may appoint.

249. (1) There shall be paid to the registrar in respect of the several matters mentioned in Table B in the First Schedule the several fees therein specified; or such smaller fees as the Central Government may direct.

(2) All fees paid to the registrar in pursuance of this Act shall be accounted for to the Crown.

²[249-A. (1) If a company, having made default in complying with any provision of this Act which requires it to file with, deliver or send to the registrar any return, account or other document, or to give notice to him of any matter, fails to make good the default within fourteen days after the service of a notice on the company requiring it to do so, the Court may, on an application made to the Court by any member or creditor of the company or by the registrar, make an order directing the company and any officer thereof to make good the default within such time as may be specified in the order.

(2) Any such order may provide that all costs of and incidental to the application shall be borne by the company or by any officers of the company responsible for the default.

(3) Nothing in this section shall be taken to prejudice the operation of any enactment imposing penalties on a company or its officers in respect of any such default as aforesaid.]

LEG. REF.

¹ These words were substituted for the words "Local Government" by A.O., 1937.

² This section was inserted by S. 115 of Act XXII of 1936.

NOTES.

Sec. 249-A: AMENDMENT BY ACT XXII
C.C.M.—219

or 1936.—This section reproduces S. 135 of the English Act, and enables the Registrar as well as any member or creditor of the company, to apply to the Court, for the enforcement of the duty of the company to submit to the Registrar the returns and documents which have to be submitted under the Act.

PART VII.

APPLICATION OF ACT TO COMPANIES FORMED AND REGISTERED UNDER FORMER COMPANIES ACTS.

250. In the application of this Act to existing companies, it shall apply in the same manner in the case of a limited company, other than a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by shares; in the case of a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by guarantee; and, in the case of a company, other than a limited company, as if the company had been formed and registered under this Act as an unlimited company:

Provided that—

(1) nothing in Table A in the First Schedule shall apply to a company formed and registered under Act XIX of 1857 and Act VII of 1860, or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882;

(2) reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under Act No. XIX of 1857 and Act No. VII of 1860, or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882, as the case may be.

251. This Act shall apply to every company registered but not formed under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882, in the same manner as it is hereinafter in this Act declared to apply to companies registered but not formed under this Act:

Provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under the said Acts or any of them.

252. A company registered under Act XIX of 1857 and Act VII of 1860 or either of them may cause its shares to be transferred in the manner hitherto in use, or in such other manner as the company may direct.

PART VIII.

COMPANIES AUTHORISED TO REGISTER UNDER THIS ACT.

Companies capable of being registered.

253. (1) With the exceptions and subject to the provisions mentioned and contained in this section,—

(i) any company consisting of seven or more members, which was in existence on the first day of May, eighteen hundred and eighty-two, including any company registered under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, and

(ii) any company formed after the date aforesaid whether before or after the commencement of this Act, in pursuance of any Act of Parliament or ¹[Indian law] other than this Act, or of Letters Patent, or being otherwise duly constituted according to law, and consisting of seven or more members; may at any time register under this Act as an unlimited company or as a company limited by shares, or as a company limited by guarantee; and the registration shall not be invalid by reason that it has taken place with a view to the company being wound up:

(2) Provided as follows:—

(a) a company having the liability of its members limited by Act of Parliament or ¹[Indian law] or by Letters Patent, and not being a joint-stock company as hereinafter defined, shall not register in pursuance of this section;

LEG. REF.

¹ These words were substituted for the words

“Act of the Governor-General in Council” by A.O., 1937.

(b) a company having the liability of its members limited by Act of Parliament or ¹[Indian law] or by Letters Patent shall not register in pursuance of this section as an unlimited company or as a company limited by guarantee ;

(c) a company that is not a joint stock company as hereinafter defined shall not register in pursuance of this section as a company limited by shares ;

(d) a company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person or by proxy (in cases where proxies are allowed by the articles at a general meeting summoned for the purpose);

(e) where a company not having the liability of its members limited by Act of Parliament or ¹[Indian law] or by Letters Patent is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present in person or by proxy at the meeting ;

(f) where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceased to be a member, and of the costs and expenses of winding up, and for the adjustment of the rights of the contributories among themselves such amount as may be required not exceeding a specified amount.

(3) In computing any majority under this section when a poll is demanded regard shall be had to the number of votes to which each member is entitled according to the articles.

(4) A company registered under the Indian Companies Act, 1882, shall not be registered in pursuance of this section.

254. For the purposes of this Part as far as relates to registration of companies as companies limited by shares, a joint-stock company

Definition of "joint stock company." means a company having a permanent paid up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons ; and such a company, when registered with limited liability under this Act, shall be deemed to be a company limited by shares.

Requirements for registration by joint-stock companies. 255. Before the registration in pursuance of this Part of a joint-stock company, there shall be delivered to the registrar the following documents (that is to say) :—

(1) a list showing the names, addresses and occupations of all persons who on a day named in the list, not being more than six clear days before the day of registration, were members of the company, with the addition of the shares or stock held by them respectively, distinguishing, in cases where the shares are numbered, each share by its number ;

(2) a copy of any Act of Parliament, ¹[Indian law], Royal Charter, Letters Patent, deed of settlement, contract of co-partnery or other instrument constituting or regulating the company ; and

(3) if the company is intended to be registered as a limited company, a statement specifying the following particulars (that is to say) :—

(a) the nominal share capital of the company and the number of shares into which it is divided or the amount of stock of which it consists ;

(b) the number of shares taken and the amount paid on each share ;
 (c) the name of the company, with the addition of the word " Limited " as the last word thereof ; and

(d) in the case of a company intended to be registered as a company limited by guarantee, the resolution declaring the amount of the guarantee.

Requirements for registration by other than joint-stock companies.

256. Before the registration in pursuance of this Part of any company not being a joint-stock company, there shall be delivered to the registrar—

(1) a list showing the names, addresses and occupations of the directors of the company ; and

(2) a copy of any Act of Parliament, ¹[Indian law], Letters Patent, deed of settlement, contract of co-partnery or other instrument constituting or regulating the company ; and

(3) in the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee.

257. The list of members and directors and any other particulars relating to the company required to be delivered to the registrar shall be duly verified by the declaration of any two or more directors or other principal officers of the company.

258. The registrar may require such evidence as he thinks necessary for the purpose of satisfying himself whether any company proposing to be registered is or is not a joint-stock company as hereinbefore defined.

259. (1) Where a banking company, which was in existence on the first day of May eighteen hundred and eighty-two, proposes to register as a limited company, it shall, at least thirty days before so registering, give notice of its intention so to register to every person who has a banking account with the company, either by delivery of the notice to him, or by posting it to him at, or delivering it at, his last known address.

(2) If the company omits to give the notice required by this section, then as between the company and the person for the time being interested in the account in respect of which the notice ought to have been given, and so far as respects the account down to the time at which notice is given, but not further or otherwise, the certificate of registration with limited liability shall have no operation.

260. No fees shall be charged in respect of the registration in pursuance of this Part of a company if it is not registered as a limited company, or if before its registration as a limited company the liability of the shareholders was limited by some Act of Parliament or ¹[Indian law] or by Letters Patent.

261. When a company registers in pursuance of this Part with limited liability, the word " Limited " shall form and be registered as part of its name.

262. On compliance with the requirements of this Part with respect to registration, and on payment of such fees, if any, as are payable under Table B in the First Schedule, the registrar shall certify under his hand that the company applying for registration is incorporated as a company under this Act, and in the case of a limited company that it is limited, and thereupon the company shall be incorporated, and shall have perpetual succession and a common seal.

263. All property, movable and immovable, including all interests and rights in, to and out of property, movable and immovable, and including obligations and actionable claims as may belong to or be vested in a company at the date of its registration in pursuance of this Part, shall, on registration, pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein.

264. The registration of a company in pursuance of this Part shall not affect the rights or liabilities of the company in respect of any debt or obligation incurred or any contract entered into, by, to, with, or on behalf of, the company before registration.

265. All suits and other legal proceedings which at the time of the registration of a company in pursuance of this Part are pending by or against the company, or the public officer or any member thereof, may be continued in the same manner as if the registration had not taken place; nevertheless execution shall not issue against the effects of any individual member of the company on any decree or order obtained in any such suit or proceeding; but, in the event of the property and effects of the company being insufficient to satisfy the decree or order, an order may be obtained for winding up the company.

Effect of registration under Act.

266. When a company is registered in pursuance of this Part—

(i) all provisions contained in any Act of Parliament, ¹[Indian law] deed of settlement, contract of co-partnery, Letters Patent, or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidence as if so much thereof as would, if the company had been formed under this Act, have been required to be inserted in the memorandum, were contained in a registered memorandum, and the residue thereof were contained in registered articles;

(ii) all the provisions of this Act shall apply to the company and the members, contributories and creditors thereof, in the same manner in all respects as if it had been formed under this Act, subject as follows (that is to say) :—

(a) the regulations in Table A in the First Schedule shall not apply unless adopted by special resolution;

(b) the provisions of this Act relating to the numbering of shares shall not apply to any joint-stock company whose shares are not numbered;

(c) subject to the provisions of this section the company shall not have power to alter any provision contained in any Act of Parliament or ¹[Indian law] relating to the company;

(d) subject to the provisions of this section, the company shall not have power, without the sanction of the Central Government, to alter any provision contained in any Letters Patent relating to the company;

(e) the company shall not have power to alter any provision contained in a Royal Charter or Letters Patent with respect to the objects of the company;

(f) in the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted before registration, who is liable to pay or contribute to the payment of any debt or liability of the company contracted before registration, or to pay or contribute

to the payment of any sum for the adjustment of the rights of the members among themselves in respect of any such debt or liability ; or to pay or contribute to the payment of the cost and expenses of winding up the company, so far as relates to such debts or liabilities as aforesaid ; and every contributory shall be liable to contribute to the assets of the company, in the course of the winding up, all sums due from him in respect of any such liability as aforesaid ; and in the event of the death or insolvency of any contributory, the provisions of this Act with respect to the legal representatives and heirs of deceased contributories, and with reference to the assignees of insolvent contributories, shall apply ;

(iii) the provisions of this Act with respect to—

(a) the registration of an unlimited company as limited ;

(b) the powers of an unlimited company on registration as a limited company to increase the nominal amount of its share capital and to provide that a portion of its share capital shall not be capable of being called up except in the event of winding up ;

(c) the power of a limited company to determine that a portion of its share capital shall not be capable of being called up except in the event of winding up ;

shall apply notwithstanding any provisions contained in any Act of Parliament, ¹[Indian law], Royal Charter, deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the company ;

(iv) nothing in this section shall authorise the company to alter any such provisions contained in any deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the company, as would, if the company had originally been formed under this Act, have been required to be contained in the memorandum and are not authorised to be altered by this Act ;

(v) nothing in this Act shall derogate from any lawful power of altering its constitution or regulations which may, by virtue of any Act of Parliament, ¹[Indian law], deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the company, be vested in the company.

Power to substitute memorandum and articles for deed of settlement.

267. (1) Subject to the provisions of this section, a company registered in pursuance of this Part may by special resolution alter the form of its constitution by substituting a memorandum and articles for a deed of settlement.

(2) The provisions of this Act with respect to confirmation by the Court and registration of an alteration of the objects of a company shall, so far as applicable, apply to an alteration under this section with the following modifications:—

(a) there shall be substituted for the printed copy of the altered memorandum required to be filed with the registrar a printed copy of the substituted memorandum of articles ; and

(b) on the registration of the alteration being certified by the registrar, the substituted memorandum and articles shall apply to the company in the same manner as if it were a company registered under this Act with that memorandum and those articles, and the company's deed of settlement shall cease to apply to the company.

(3) An alteration under this section may be made either with or without any alteration of the objects of the company under this Act.

(4) In this section the expression " deed of settlement " includes any contract of co-partnery or other instrument constituting or regulating the company, not being an Act of Parliament, an ¹[Indian law], a Royal Charter or Letters Patent.

268. The provisions of this Act with respect to staying and restraining suits and legal proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding up order shall, in the case of a company registered in pursuance of this Part, where the application to stay or restrain is by a creditor, extend to suits and legal proceedings against any contributory of the company.

269. Where an order has been made for winding up a company registered in pursuance of this Part, no suit or other legal proceeding shall be commenced or proceeded with against the company or any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose.

PART IX.

WINDING UP OF UNREGISTERED COMPANIES.

270. For the purposes of this Part, the expression "unregistered company" shall not include a railway company incorporated by Act of Parliament or by an ¹[Indian law], nor a company registered under the Indian Companies Act, 1866, or under any Act repealed thereby, or under the Indian Companies Act, 1882, or under this Act, but save as aforesaid, shall include any partnership, association or company consisting of more than seven members.

271. (1) Subject to the provisions of this Part, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company, with the following exceptions and additions:—

LEG. REF.

¹ These words were substituted for the words "Act of the Governor-General in Council" by A.O., 1937.

NOTES.

Sec. 269.—The dismissal of a suit against a registered company consequent on liquidation, does not operate as a bar to the maintenance and proof of the claim before the official liquidator. 24 I.C. 99.

Sec. 270.—See 1939 Mad. 318, cited under S. 153, *supra*.

CONSTRUCTION OF SECTION.—This section is not clearly exhaustive, as a matter of construction. The words "shall include" do not amount to "shall mean and include". 38 Bom.L.R. 1080=1937 Bom. 15. A Court in British India, therefore, has jurisdiction under this section read with S. 271, to wind up as an unregistered company a foreign company, whatever the number of its members, whether or not consisting of more than seven members, if it has an office and assets within its jurisdiction. The foreign company will come within the second part of S. 270, and will be an unregistered company for the purpose of Part IX of the Act. 38 Bom.L.R. 1080=1937 Bom. 15. But a contrary view has been taken by the Rangoon High Court in 8 R. 658=1931 R. 7=131 I.C. 497 as to the construction of this section and S. 271. The expression "con-

sisting of more than seven members" means consisting of more than seven members at the time of winding up, i.e., on the date of the presentation of the petition. 8 R. 658=1931 R. 7=131 I.C. 497.

Sec. 271: AMENDMENT BY ACT XXII OF 1936.—Sub-section (3) has been inserted by the amending Act XXII of 1936, and it follows S. 338 (2) of the English Act providing for the winding up of companies incorporated outside British India. This will enable the Court to deal effectively with fraudulent companies incorporated outside British India and which had been dissolved or had ceased to exist under the laws of the country in which they were incorporated. Further a provision like this is necessary to remove unnecessary burden in the office of the Registrar.

APPLICATION OF SECTION.—(See also notes under S. 153, *supra*.) When an unregistered company has less than seven members at the time when the petition for winding up is presented, the Court has no jurisdiction under S. 271 of the Act to order the winding up of the same, as such a company does not come under the definition of an "unregistered company" contained in S. 270 of the Act. 8 R. 658=131 I.C. 497=1931 R. 77. But see 30 Bom.L.R. 1080 which holds a contrary view. (*Vide* case noted under S. 270, *supra*.)

(i) an unregistered company shall, for the purpose of determining the Court having jurisdiction in the matter of the winding up, be deemed to be registered in the province where its principal place of business is situate or, if it has a principal place of business situate in more than one province, then in each province where it has a principal place of business; and the principal place of business situate in that province in which proceedings are being instituted shall, for all the purposes of the winding up, be deemed to be the registered office of the company;

(ii) no unregistered company shall be wound up under this Act voluntarily or subject to supervision;

(iii) the circumstances in which an unregistered company may be wound up are as follows (that is to say):—

(a) if the company is dissolved, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;

(b) if the company is unable to pay its debts;

(c) if the Court is of opinion that it is just and equitable that the company should be wound up;

(iv) an unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts—

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by leaving at its principal place of business, or by delivering to the secretary, or some director, manager or principal officer of the company, or by otherwise serving in such manner as the Court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks after the service of the demand neglected to pay the sum, or to secure or compound for it to the satisfaction of the creditor;

(b) if any suit or other legal proceeding has been instituted against any member for any debt or demand due or claimed to be due, from the company or from him in his character of member, and notice in writing of the institution of the suit or other legal proceeding having been served on the company by leaving the same at its principal place of business or by delivering it to the secretary, or some director, manager or principal officer of the company or by otherwise serving the same in such manner as the Court may approve or direct, the company has not within ten days after service of the notice paid, secured or compounded for the debt or demand, or procured the suit or other legal proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against the suit or other legal proceeding, and against all costs, damages and expenses to be incurred by him by reason of the same;

(c) if execution of other process issued on a decree or order obtained in any Court in favour of a creditor against the company, or any member thereof as such, or any person authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied; and

(d) if it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.

(2) Nothing in this Part shall affect the operation of any enactment which provides for any partnership, association or company being wound up, or being wound up as a company or as an unregistered company, under any enactment repealed by this Act, except that references in any such first-mentioned enactment to any such repealed enactment shall be read as references to the corresponding provision (if any) of this Act.

¹[(3) Where a company incorporated outside British India which has been carrying on business in British India ceases to carry on business in British

India it may be wound up as an unregistered company under this Part, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the company under which it was incorporated.]

272. (1) In the event of an unregistered company being wound up, every person shall be deemed to be a contributory who is liable to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves or to pay or contribute to the payment of the costs and expenses of winding up the company, and every contributory shall be liable to contribute to the assets of the company all sums due from him in respect of any such liability as aforesaid.

(2) In the event of any contributory dying or being adjudged insolvent, the provisions of this Act with respect to the legal representatives and heirs of deceased contributories, and to the assignees' of insolvent contributories shall apply.

273. The provisions of this Act with respect to staying and restraining suits and legal proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding up order shall, in the case of an unregistered company, where the application to stay or restrain is by a creditor, extend to suits and legal proceedings against any contributory of the company.

274. Where an order has been made for winding up an unregistered company, no suit or other legal proceedings shall be proceeded with or commenced against any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose.

275. If an unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the Court may, by the winding up order, or by any subsequent order, direct that all or any part of the property, movable or immovable, including all interests and rights in, to and out of property, movable and immovable, and including obligations and actionable claims as may belong to the company or to trustees on its behalf, is to vest in the official liquidator by his official name, and thereupon the property or the part thereof specified in the order shall vest accordingly; and the official liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official name any suit or other legal proceeding relating to that property, or necessary to be brought or defended for the purposes of effectually winding up the company and recovering its property.

276. The provisions of this Part with respect to unregistered companies shall be in addition to, and not in restriction of, any provisions hereinbefore in this Act contained with respect to winding up companies by the Court, and the Court or official liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed and registered under this Act; but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this Part.

PART X.

COMPANIES ESTABLISHED OUTSIDE BRITISH INDIA.

277. (1) Every company incorporated outside British India, which at the

NOTES.

Sec. 277: AMENDMENT BY ACT XXII OF 1936.—The amendment to sub-section (3) C.C.M.—220

provides for the submission of all the necessary information required to be inserted in the balance-sheet under this Act. Accord-

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Requirements as to companies established outside British India.

commencement of this Act has a place of business in British India, and every such company which after the commencement of this Act establishes such a place of business within British India, shall, within six months from the commencement of this Act or within one month from the establishment of such place of business, as the case may be, file with the registrar in the province in which such place of business is situated,—

(a) a certified copy of the charter, statutes or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof;

(b) the full address of the registered or principal office of the company;

(c) a list of the directors and managers (if any) of the company;

(d) the names and addresses of some one or more persons resident in British India authorised to accept on behalf of the company service of process and any notices required to be served on the company;

¹[(e) the full address of that office of the company in British India which is to be deemed the principal place of business in British India of the company;] and, in the event of any alteration being made in any such instrument ²[or in any such address] or in the directors or managers or in the names or addresses of any such persons as aforesaid, the company shall, within the prescribed time, file with the registrar a notice of the alteration.

(2) Any process or notice required to be served on the company shall be sufficiently served, if addressed to any person whose name has been so filed as aforesaid and left at or sent by post to the address which has been so filed.

(3) Every company to which this section applies shall in every year file with the registrar of the province in which the company has its principal place of business—

LEG. REF.

¹ This clause was inserted by S. 12 of Act II of 1938.

² These words were substituted for the words "or in such address," *ibid.*

NOTES.

ing to S. 347 of the English Act, the balance-sheets of companies incorporated outside Great Britain must comply with the same requirements as those of companies registered in Great Britain. But this provision has been somewhat relaxed in this amendment, since this requires only a supplementary statement and not an exact compliance with the requirements laid down with reference to companies registered under this Act. This has been explained by the Select Committee as follows:—"In view of the difficulty, which it is represented, would be experienced by certain companies incorporated abroad if they were required to prepare and file balance-sheets in the form required from companies incorporated in British India when the balance-sheet prescribed by the law under which they are incorporated is of a widely divergent nature, we have considered it sufficient to secure that they shall file with the registrar a copy of their own balance-sheet, but shall supplement it, if necessary by further documents giving the information which is deemed essential and which have now been tabulated in a new

form inserted as Form H in the Third Schedule of the Act. Where any such company is not required by the law of the country in which it is incorporated to file a balance-sheet, the company must comply with the requirements of the British Indian law in this respect. The old section contained a proviso to sub-section (3) which enabled the Governor-General in Council to exempt certain companies from furnishing the requirements contained in the sub-section; but this power has been taken away by the amendment. The present sub-section (5) adopts practically the provisions contained in sub-section (4) to S. 348 of the English Act; and its necessity is obvious. A foreign company registered in the foreign State is entitled to file suits and maintain actions in British India, and it is not necessary that it must register itself in British India for that purpose. The default on the part of the foreign company in fulfilling the requirements of S. 277 of the Companies Act does not disable it from maintaining a suit in British India." 38 Bom.L.R. 1092=1937 B. 24.

SERVICE OF NOTICE.—The service of notice to these companies should be only in the mode provided in the section. It is not sufficient if it is done in the manner prescribed in S. 29, R. 2, C. P. Code. 108 I.C. 660=1928 S. 111.

(i) in a case whereby the law, for the time being in force, of the country in which the company is incorporated such company is required to file with the public authority an annual balance-sheet,—

¹[three copies of that balance-sheet] ²[and if the balance-sheet does not contain all the information provided for in the form marked H in the Third Schedule, such supplementary statements ³[in triplicate] as shall furnish such information,] ; or

(ii) in a case where no such provision is made by the law, for the time being in force, of the country in which the company is incorporated,—such a statement ³[in triplicate] in the form of a balance-sheet as such company would, if it were a company formed and registered under this Act, be required to file in accordance with the provisions of this Act :

⁴[* * * * *]

(4) Every company to which this section applies and which uses the word “ Limited ” as part of its name, shall—

(a) in every prospectus inviting subscriptions for its shares or debentures in British India, state the country in which the company is incorporated; and

(b) conspicuously exhibit on every place where it carries on business in British India the name of the company and the country in which the company is incorporated in letters easily legible in English characters and also, if any place where it carries on business is beyond the local limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place ; and

(c) have the name of the company and of the country in which the company is incorporated mentioned in legible English characters in all bill heads and letter paper, and in all notices, advertisements and other official publications of the company.

⁵[(5) Every company to which this section applies shall if the liability of the members of the company is limited cause notice of that fact to be stated in legible characters in every prospectus inviting subscriptions for its shares, and in all bill-heads and letter paper notices, advertisements and other official publications of the company in British India, and to be affixed on every place where it carries on business.]

⁵[(6)] If any company to which this section applies fails to comply with any of the requirements of this section, the company, and every officer or agent of the company, shall be liable to a fine not exceeding five hundred rupees or, in the case of a continuing offence, fifty rupees for every day during which the default continues.

⁵[(7)] For the purposes of this section—

(a) the expression “ certified ” means certified in the prescribed manner to be a true copy or a correct translation ;

(b) the expression “ place of business ” includes a share transfer or share registration office ;

(c) the expression “ director ” includes any person occupying the position of director, by whatever name called ; and

(d) the expression “ prospectus ” means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of the company.

⁵[(8)] There shall be paid to the registrar for registering any document

LEG. REF.

¹ These words were substituted for the words “ a copy of that balance-sheet ” by S. 12 of Act II of 1938.

² These words were inserted by S. 117 of Act XXII of 1936.

³ These words were inserted by S. 12 of Act

II of 1938.

⁴ The proviso was omitted by S. 117 of Act XXII of 1936.

⁵ This sub-section was inserted and the original sub-Ss. (5), (6) and (7) were re-numbered (6), (7) and (8), *ibid.*

required by this section to be filed with him a fee of five rupees or such smaller fee as may be prescribed.

Restriction on sale and offer for sale of share.

¹[277-A. (1) It shall not be lawful for any person—

(a) to issue, circulate or distribute in British India any prospectus offering for subscription shares in or debentures of a company incorporated or to be incorporated outside British India whether the company has or has not established, or when formed will or will not establish, a place of business in British India, unless—

(i) before the issue, circulation or distribution of the prospectus in British India a copy thereof, certified by the chairman and two other directors of the company as having been approved by resolution of the managing body, has been delivered for registration to the registrar ;

(ii) the prospectus states on the face of it that the copy has been so delivered ;

(iii) the prospectus is dated ; and

(iv) the prospectus otherwise complies with this Part ; or

(b) to issue to any person in British India a form of application for shares in or debentures of such a company or intended company as aforesaid, unless the form is issued with a prospectus which complies with this Part :

Provided that this provision shall not apply if it is shown that the form of application was issued in connection with a *bona fide* invitation to a person to enter into an underwriting agreement with respect to the shares or debentures.

(2) This section shall not apply to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons, but, subject as aforesaid, this section shall apply to a prospectus or form of application whether issued on or with reference to the formation of a company or subsequently.

(3) Where any document by which any shares in or debentures of a company incorporated outside British India are offered for sale to the public would, if the company concerned had been a company within the meaning of this Act, have been deemed by virtue of section 98-A to be a prospectus issued by the company,

LEG. REF.

¹ This section was inserted by S. 118 of Act XXII of 1936.

NOTES.

Sec. 277-A: AMENDMENTS BY ACT XXII OF 1936.—This section and Ss. 277-B to 277-E have been inserted by the Amending Act XXII of 1936. Formerly, there was only one section (S. 277) dealing with companies incorporated outside British India, and it was found to be inadequate to deal effectively with and have control over such companies, and so Ss. 277-A to 277-E have been added in this Act. Section 277-A provides certain restrictions in the case of sale or offer for sale of shares of such companies in British India. A considerable trade is being carried on in this country in shares, bonds, etc., of foreign companies with the aid of unscrupulous agents and fraudulent advertisements, and ignorant investors get themselves often ruined. Many of the investors purchase these shares, bonds, debentures, etc., merely relying upon the very exaggerated and false accounts given by the canvassers as to their profitable nature, and without making any investigations as to the correctness or

truth of the same. Under these circumstances, it is the duty of the Government to make such provisions in the law so as to enable these persons to obtain all the information necessary to enable them to judge for themselves as to the profitable nature or otherwise of such investments. If, in spite of this the investors choose to invest their monies in them and get ruined, they will have to blame themselves. Similar circumstances were found to prevail, in England also, and Ss. 354 and 355 have been included in the English Act to regulate the issue of prospectuses on behalf of companies incorporated outside that country. This section and S. 277-B reproduce in this Act these Ss. 354 and 355 of the English Act. This S. 277-A requires that before any shares or debentures of a foreign company are issued, circulated or distributed in British India, a duly certified prospectus should be filed with the Registrar, and a copy of such prospectus should accompany every form of application for shares or debentures issued, etc., in British India. Certain exceptions are laid down, and penalty also is prescribed for violation of the provisions of this section.

that document shall be deemed to be, for the purposes of this section, a prospectus issued by the company.

(4) An offer of shares or debentures for subscription or sale to any person whose ordinary business or part of whose ordinary business it is to buy or sell shares or debentures, whether as principal or agent, shall not be deemed an offer to the public for the purposes of this section.

(5) Any person who is knowingly responsible for the issue, circulation or distribution of any prospectus, or for the issue of a form of application for shares or debentures, in contravention of the provisions of this section shall be liable to a fine not exceeding five thousand rupees.

(6) In this section and in section 277-B, the expressions 'prospectus,' 'shares' and 'debentures' have the same meanings as when used in relation to a company incorporated under this Act.]

¹[277-B. (1) In order to comply with this Part a prospectus, in addition to complying with the provisions of sub-clauses (ii) and (iii) of clause (a) of sub-section (1) of section 277-A, must—

- Requirements as to prospectus.
- (a) contain particulars with respect to the following matters :—
 - (i) the objects of the company ;
 - (ii) the instrument constituting or defining the constitution of the company ;
 - (iii) the enactments, or provisions having the force of an enactment, by or under which the incorporation of the company was effected ;
 - (iv) an address in British India where the said instrument, enactments or provisions, or copies thereof, and if the same are in a foreign language a translation thereof in the English language certified in the prescribed manner, can be inspected ;
 - (v) the date on which and the country in which the company was incorporated ;
 - (vi) whether the company has established a place of business in British India and, if so, the address of its principal office in British India :

Provided that the provisions of sub-clauses (i), (ii) and (iii) of this clause shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business ;

(b) subject to the provisions of this section, state the matters specified in sub-section (1-A) of section 93 and set out the reports specified in that section :

Provided that—

(i) where any prospectus is published as a newspaper advertisement, it shall be a sufficient compliance with the requirement that the prospectus must specify the objects of the company if the advertisement specifies the primary object with which the company was formed, and

(ii) in section 93 of this Act a reference to the articles of the company shall be deemed to be a reference to the constitution of the company.

(2) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

LEG. REF.

¹ This section was inserted by S. 118 of Act XXII of 1936.

NOTES.

Sec. 277-B: AMENDMENT BY ACT XXII OF 1936.—This section adopts S. 355 of the

English Act. As to the reason for the insertion of this section, see notes to the amendment under S. 277-A, *supra*. This section lays down the particulars which should be contained in the prospectus that has to be filed with the registrar under S. 277-A, *supra*.

(3) In the event of non-compliance with or contravention of any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention, if—

(a) as regards any matter not disclosed, he proves that he was not cognisant thereof; or

(b) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part, or

(c) the non-compliance or contravention was in respect of matters which, in the opinion of the Court dealing with the case, were immaterial or were otherwise such as ought, in the opinion of that Court, having regard to all the circumstances of the case, reasonably to be excused :

Provided that in the event of failure to include in a prospectus a statement with respect to the matters specified in clause (n) of sub-section (1) of section 93, no director or other person shall incur any liability in respect of the failure unless it be proved that he had knowledge of the matters not disclosed.

(4) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act, apart from this section.]

¹[277-C. (1) It shall not be lawful for any person to go from house to house offering shares of a company incorporated outside India for subscription or purchase to the public or any member of the public.

Restriction on canvassing for sale of shares.

(2) In this sub-section the expression 'house' shall not include an office used for business purposes.

(3) Any person acting in contravention of this section shall be liable to a fine not exceeding rupees one hundred.]

¹[277-D. ²[(1)] The provisions of sections 109 to 117, both inclusive, and 120 to 125, both inclusive, shall extend to charges on properties in British India which are created and to charges on property in British India which is acquired after the commencement of the Indian Companies (Amendment) Act, 1936, by a company incorporated outside British India which has an established place of business in British India:]

Registration of charges.

²[Provided that references in the said sections to the registrar shall be deemed to be references to the registrar of the province in which the principal place of business in British India of such company is situated, and references to the registered office of the company shall be deemed to be references to the principal place of business in British India of the company :

Provided further that, where a charge is created outside British India or the completion of the acquisition of property takes place outside British India, sub-

LEG. REF.

¹ This section was inserted by S. 118 of Act XXII of 1936.

² S. 277-D was re-numbered as sub-S. (1) of that section and the Provisos and sub-S. (2) were inserted by S. 13 of Act II of 1938.

NOTES.

Sec. 277-C: AMENDMENT BY ACT XXII OF 1936.—This section has been newly inserted and it reproduces the provisions contained in S. 356 (1) of the English Act. The object of this section is to prevent canvassers going from house to house hawking for shares, debentures, etc.

Sec. 277-D: AMENDMENT BY ACT XXII OF 1936.—This section enacts the provisions contained in S. 90 of the English Act. Pro-

visions as to the registration of charges and mortgages with the registrar, are intended to afford facility to those who have business dealings with the company and also to the members, to find out the exact financial position of the company. There is no justification at all for not insisting the registration of the same in the case of foreign companies, having an established place of business in this country. Moreover, it is more essential in the case of such companies than in the case of companies registered under this Act. Hence this section has been inserted; and it makes the provisions of the Act which relate to the registration of charges and mortgages applicable also to companies incorporated outside British India.

clause (i) of the proviso to sub-section (1) of section 109 and the proviso to sub-section (1) of section 109-A shall apply as if the property wherever situated were situated outside British India.

(2) This section shall be deemed not to have come into force until the commencement of the Indian Companies (Amendment) Act, 1938 :

Provided that where the provisions of section 109 and sections 117 to 120 have not been complied with in respect of any charge or mortgage created since the 15th day of January, 1937, as required by this Act, those provisions shall be complied with within four weeks from the commencement of the Indian Companies (Amendment) Act, 1938.]

¹[277-E. The provisions of sections 118 and 119 shall *mutatis mutandis* apply to the case of all companies incorporated outside British India but having an established place of business in British India and the provisions of section 130 shall apply to such companies to the extent of requiring them to keep at their principal place of business in British India the books of account required by that section with respect to money received and expended, sales and purchases made, and assets and liabilities in relation to its business in British India:]

²[Provided that references in the said section to the registrar shall be deemed to be references to the registrar of the province in which the principal place of business in British India of such company is situated, and references to the registered office of the company shall be deemed to be references to the principal place of business in British India of the company.]

³[PART X-A.]

BANKING COMPANIES.

¹[277-F. A 'banking company' means a company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order, notwithstanding that it engages in addition in any one or more of the following forms of business, namely :—

LEG. REF.

¹ This section was inserted by S. 118 of Act XXII of 1936.

² This proviso was added by S. 14 of Act II of 1938.

³ Part X-A consisting of the Ss. 277-F to 277-N was inserted by S. 119 of Act XXII of 1936.

NOTES.

Sec. 277-E: AMENDMENT BY ACT XXII OF 1936.—This section enacts the provisions contained in S. 90 of the English Act and requires the registration of the appointment of a receiver and other provisions contained in Ss. 118 and 119 applicable also to companies incorporated outside British India and having an established place of business in British India. This section further makes applicable the provisions of S. 130 of the Act as to the keeping of proper books of accounts by such companies, in relation to their transactions and business in this country. With reference to this matter the Select Committee has observed as follows:—“We consider that the provision of the New Zealand Companies Act of 1933 requiring these companies to keep books of account in relation to the business done in the country where they are trading should be incorporated in the Act, and we have provided

accordingly in this S. 277-E.

Sec. 277-F: AMENDMENT BY ACT XXII OF 1936.—This section and Ss. 277-G to 277-N have been inserted by the Amending Act XXII of 1936, and they lay down the special regulations to govern Banking Companies. It was felt necessary that the law relating to ordinary Banking Companies should be thoroughly overhauled in view of the various defects that have been found to exist in the matter of their regulation, conduct and control. At one time it was thought that a special enactment should be made with reference to these companies, but as there was no immediate prospect of any such legislation dealing solely with this subject some special provisions relating to banking companies have been included in this Act. Some of the defects that were clear and which caused the ruin of many banking companies were; (i) their launching into trading ventures; (ii) their management by persons having other interests and by ignorant people; (iii) their commencing business without sufficient capital; (iv) their charging the unpaid capital; (v) their failure to keep sufficient reserve fund; (vi) their failure to keep adequate cash reserve to meet time and demand liabilities; (vii) their forming, or taking shares in, subsidiary companies carrying

(1) the borrowing, raising or taking up of money ; the lending or advancing of money either upon or without security ; the drawing, making, accepting, discounting, buying, selling, collecting and dealing in bills of exchange, hoondees, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments, and securities whether transferable or negotiable or not ; the granting and issuing of letters of credit, travellers cheques and circular notes ; the buying, selling and dealing in bullion and specie ; the buying and selling of foreign exchange including foreign bank notes ; the acquiring, holding, issuing on commission, underwriting and dealing in stock, funds, shares, debentures debenture stock, bonds, obligations, securities and investments of all kinds ; the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others ; the negotiating of loans and advances ; the receiving of all kinds of bonds, scrips or valuables on deposit, or for safe custody or otherwise ; the collecting and transmitting of money and securities ;

(2) acting as agents for Governments or local authorities or for any other person or persons ; the carrying on of agency business of any description other than the business of a managing agent ¹[of a company not being a banking company] including the power to act as attorneys and to give discharges and receipts ;

(3) contracting for public and private loans and negotiating and issuing the same ;

(4) the promoting, effecting, insuring, guaranteeing, underwriting, participating in managing and carrying out of any issue, public or private, of State, Municipal or other loans or of shares, stock, debentures, or debenture stock of any company, corporation or association and the lending of money for the purpose of any such issue ;

(5) carrying on and transacting every kind of guarantee and indemnity business ;

(6) promoting or financing or assisting in promoting or financing any business undertaking or industry, either existing or new, and developing or forming the same either through the instrumentality of syndicates or otherwise ;

(7) acquisition by purchase, lease, exchange, hire or otherwise of any property immovable or movable and any rights or privileges which the company may think necessary or convenient to acquire or the acquisition of which in the opinion of the company is likely to facilitate the realisation of any securities held by the company or to prevent or diminish any apprehended loss or liability ;

(8) managing, selling and realising all property movable and immovable which may come into the possession of the company in satisfaction or part satisfaction of any of its claims ;

(9) acquiring and holding and generally dealing with any property and any right, title or interest in any property movable or immovable which may form

LEG. REF.

¹ These words were inserted by S. 15 of Act II of 1938.

NOTES.

on other kinds of business; and (viii) want of facilities in the nature of a moratorium to enable deserving companies to tide over temporary difficulties. With a view to get over the abovementioned defects, this and the following sections up to S. 277-N have been enacted. It is obviously undesirable that a banking company should enter into trading operations themselves or to come into any close contractual relationship with trading concerns except as bankers. With this object in view this (S. 277-F) defines "a banking company" and attempts to limit its action to banking business alone, and to

such other ordinary transactions as may emerge in the course of such business. It sets forth a fairly comprehensive list of 17 forms of business which may be undertaken by a banking company, in addition to its main business of accepting of deposits of money on current account or otherwise subject to withdrawal by cheque, draft or order. It would not be necessary for any banking company to go beyond the undertakings mentioned in this section; and if it does so, it will no longer be a banking company but some kind of trading company. As a further precaution, the Governor-General in Council has been empowered by notification in the Gazette to add to the 17 forms of business mentioned in this section other forms of business also, if they should be found to be necessary.

part of the security for any loans or advance or which may be connected with any such security ;

(10) undertaking and executing trusts ;

(11) undertaking the administration of estates as executor, trustee or otherwise ;

(12) taking or otherwise acquiring and holding shares in any other company having objects similar to those of the company ;

(13) establishing and supporting or aiding in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or *ex-employees* of the company or the dependents or connections of such persons ; granting pensions and allowances and making payments towards insurance ; subscribing to or guaranteeing moneys for charitable or benevolent objects or for any exhibition or for any public, general or useful object ;

(14) the acquisition, construction, maintenance and alteration of any building or works necessary or convenient for the purposes of the company ;

(15) selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company ;

(16) acquiring and undertaking the whole or any part of the business of any person or company, when such business is of a nature enumerated or described in this section ;

(17) doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company.]

¹[277-G. (1) No company formed after the commencement of the Indian Companies (Amendment) Act, 1936, for the purpose of carrying on business as a banking company or which uses as part of the name under which it proposes to carry on business the word 'bank,' 'banker' or 'banking' shall be registered under this Act, unless the memorandum limits the objects of the company to the carrying on of the business of accepting deposits of money on current account or otherwise subject to withdrawal by cheque, draft or otherwise along with some or all of the forms of business specified in section 277-F.

(2) No banking company whether incorporated in or outside British India shall after the expiry of two years from the commencement of the said Act carry on any form of business other than those specified in section 277-F :

Provided that the Central Government, may, by notification in the Official Gazette, specify in addition to the business set forth in clauses (1) to (17) of section 277-F other forms of business which it may be lawful under this section for a banking company to engage in.]

¹[277-H. No banking company shall after the expiry of two years from the commencement of the Indian Companies (Amendment) Act, 1936, employ or be managed by a managing agent other than a banking company for the management of the company.]

LEG. REF.

¹ Inserted by S. 119 of Act XXII of 1936.

NOTES.

Sec. 277-G: AMENDMENT BY ACT XXII OF 1936.—(See also notes under S. 277-F). This section has been newly inserted. It prohibits a banking company from undertaking or carrying on any business not included in S. 277-F; and it also prohibits the registrar from registering any company formed for the purpose of carrying a banking business or which uses as part of its

name the words "bank", "banker", or "banking" unless its memorandum limits the objects to some or all of the forms of business mentioned in that section. The provisions of this section have been made applicable even to companies incorporated outside British India, but the operation has been postponed in the cases of these companies to afford them time to make any necessary arrangements for compliance with this section.

Sec. 277-H: AMENDMENT BY ACT XXII OF 1936.—(See also notes under S. 277-F).

¹[277-I. Notwithstanding anything contained in section 103, no banking company incorporated under this Act after the commencement of the Indian Companies (Amendment) Act, 1936, shall commence business, unless shares have been allotted to an amount sufficient to yield a sum of at least fifty thousand rupees as working capital and unless a declaration duly verified by an affidavit signed by the directors and the manager that such a sum has been received by way of paid up capital has been filed with the registrar.]

Prohibition of charge on unpaid capital. ¹[277-J. No banking company shall create any charge upon any unpaid capital of the company, and any such charge shall be invalid.]

¹[277-K. (1) Every banking company shall, after the commencement of the Indian Companies (Amendment) Act, 1936, maintain a reserve fund.

LEG. REF.

¹ Inserted by S. 119 of Act XXII of 1936.

NOTES.

This section has been newly inserted with a view not to exempt even companies already incorporated from the provisions of this section. It has been provided that it shall apply to all companies after the expiry of two years from the commencement of this Act. This section prohibits for obvious reasons the employment of any managing agent other than a banking company for its management.

Sec. 277-I: AMENDMENT BY ACT XXII OF 1936.—(See also notes under S. 277-F.) This section prohibits the commencement of business by a banking company before shares have been allotted to an amount sufficient to yield a working capital of at least Rs. 50,000 and a duly signed affidavit to that effect has been filed with the registrar by the directors and manager. It requires a *definite* minimum amount which is not required in the case of other companies formed under this Act (*vide* S. 103). Although in the case of ordinary trading companies the matter of fixing the minimum required to commence the business may be left to the discretion of the directors with some necessary reservations, it is entirely different in the case of banking companies which, from the very nature of their business, would require a sufficient working capital in cash obtained from the sale of shares. Hence this section requires a minimum net sum of Rs. 50,000 as working capital after payment of all other outgoings such as preliminary expenses, commissions, discounts, etc., for the bank to commence its business.

Sec. 277-J: AMENDMENT BY ACT XXII OF 1936.—(See also notes under S. 277-F.) This section prohibits the creation of any charge on any unpaid capital of the bank, and declares the same to be invalid. This was one of the suggestions made by the Central Banking Enquiry Committee, and it reserves the uncalled capital for the business. This affords also some protection to

the creditors of the bank.

Sec. 277-K: AMENDMENT BY ACT XXII OF 1936.—(See also notes under S. 277-F.) This section provides for the keeping of a reserve fund by the bank. There are no provisions in the Act with reference to the maintenance of reserve fund or to the declaration of dividends; and these matters have been generally left over for the company itself to determine and provide for in the articles in the case of ordinary companies. But in the case of banking companies, a reserve fund is absolutely essential. Many companies carrying on banking business have been found to declare enormous dividends from the profits of each year going in some cases upto 50 per cent. without providing any reserve fund at all to meet unexpected emergencies or losses in the business; and many a company which adopted that course some day or other met with an inevitable crash; and the depositors were put to immense loss. It has been found necessary therefore that in the case of banking companies at least, some suitable provision should be made for the keeping of a sufficient amount by way of reserve out of the profits earned each year before the declaration and distribution of dividends. The Central Banking Enquiry Committee suggested the reservation from out of the profits of each year a sum equal to $2\frac{1}{2}$ per cent. of its paid up capital, but the legislature thought it better to express the amount which is to be transferred to the reserve fund as a fixed percentage of the profits rather than as a percentage of the capital, and has accordingly fixed in this section that a sum equivalent to not less than 20 per cent. of the profits of each year should be carried as reserve fund until the said fund becomes equal to the paid up capital. This section also deals with the investment of the reserve fund, and provides that the same should be invested in Government securities mentioned in S. 20 of the Trusts Act, or in a special account by the company with any scheduled bank as defined in clause (e) of S. 2 of the Reserve Bank of India

(2) Every banking company shall out of the declared profits of each year and before any dividend is declared transfer a sum equivalent to not less than twenty per cent. of such profits to the reserve fund until the amount of the said fund is equal to the paid up capital.

(3) A banking company shall invest the amount standing to the credit of its reserve fund in Government securities or in securities mentioned or referred to in section 20 of the Indian Trusts Act, 1882, or keep deposited in a special account to be opened by the company for the purpose in a scheduled bank as defined in clause (e) of section (2) of the Reserve Bank of India Act, 1934 :

Provided that the provision of the sub-section shall not apply to a banking company incorporated before the commencement of the Indian Companies (Amendment) Act, 1936, till after the expiry of two years from the commencement of the said Act.]

¹[277-L. (1) Every banking company shall maintain by way of cash reserve in cash a sum equivalent to at least one and a half per cent. of the time liabilities and five per cent. of the demand liabilities of such company and shall file with the registrar before the tenth day of every month ²[three copies of] a statement of the amount so held on the Friday of each week of the preceding month with particulars of the time and demand liabilities of each such day.

(2) For the purposes of sub-section (1) 'demand liabilities' means liabilities which must be met on demand, and 'time liabilities' means liabilities which are not demand liabilities.

(3) Nothing in this section or in section 277-K shall apply to a scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934.

(4) If default is made in complying with the requirements of section 277-G, section 277-H, section 277-J, section 277-K or section 277-M or with the require-

LEG. REF.

¹ Inserted by S. 119 of Act XXII of 1936.

² These words were inserted by S. 16 of Act XXII of 1936.

NOTES.

Act. This provision has been found necessary, because in the case of many companies although large amounts were kept in the accounts as reserve fund, still such amounts were being improperly utilised by the directors with the result that they could not be availed of for immediate use. This section is made applicable even to companies incorporated before the commencement of this Act; and provides a period of 2 years in the case of such companies for complying with the provisions of sub-section (2).

Sec. 277-L: AMENDMENT BY ACT XXII OF 1936.—(See also notes under S. 277-F.) This section provides for the maintenance by the bank of a cash reserve. Apart from the reserve fund which is to be maintained by the bank, it is also necessary that it should maintain a cash reserve, with reference to a percentage of the time and demand liabilities of the bank. In the circumstances peculiar to this country where banking business is more or less in its infancy, it is necessary that there should be a statutory provision for the compulsory maintenance of a minimum cash reserve, although it may involve the risk of the minimum limit being

turned into the maximum limit by the company in actual practice. The principle of having some fixed amount as cash reserve has been adopted in the case of scheduled banks as defined in the Reserve Bank of India Act. Hence this section makes it obligatory on all banking companies to maintain a cash reserve of a sum equivalent to at least 1½ per cent. of the time liabilities and 5 per cent. of the demand liabilities of the bank. To ensure the observance of this provision by the company it is required to file with the registrar before the 10th day of each month a statement regarding the daily cash balances as disclosed by the accounts of the previous month. Sub-section (3) excepts scheduled banks as defined in the Reserve Bank of India Act from the operation of this section and also of S. 277-K. The section further provides for heavy penalties being laid on every director or officer who is knowingly and wilfully a party to any default in complying with the provisions of this section as well as those of sections 277-G, 277-H, 277-J or 277-M. Where the evidence does not warrant the conclusion that an ordinary director of a company was knowingly and wilfully a party to the default to maintain the requisite cash reserve, he cannot be convicted under S. 277-L of the Act. 51 L.W. 434=(1940) 1 M.L.J. 478.

ments of this section as to the maintenance of a cash reserve, every director or other officer of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees for every day during which the default continues, and if default is made in complying with the requirements of this section as to the filing of the statement referred to in sub-section (1), to a fine not exceeding one hundred rupees for every day during which the default continues.]

¹[277-M. ²[(1)] ³[A banking company shall not form any subsidiary company except a subsidiary company] formed for the purpose of undertaking and executing trusts, undertaking the administration of estates as executor, trustee or otherwise and such other purposes set forth in section 277-F as are incidental to the business of accepting deposits of money on current account or otherwise.]

²[(2) Save as provided in sub-section (1), a banking company shall not hold shares in any company whether as pledgee, mortgagee or absolute owner of an amount exceeding forty per cent. of the issued share capital of that company :

Provided that nothing in this sub-section shall apply to shares held by a banking company before the commencement of the Indian Companies (Amendment) Act, 1936.]

¹[277-N. (1) The Court may on the application of a banking company which

Power of Court to stay proceedings.

is temporarily unable to meet its obligations make an order staying the commencement or continuance of all actions and proceedings against the company for a fixed

period of time on such terms and conditions as it shall think fit and proper and may from time to time extend the period.

LEG. REF.

¹ Inserted by S. 119 of Act XXII of 1936.

² S. 277-M was re-numbered as sub-S. (1) of that section and sub-S. (2) was inserted by S. 17 of Act II of 1938.

³ These words were substituted for the words "A banking company shall not form or hold shares, in any subsidiary company except a subsidiary company of its own," *ibid*.

NOTES.

Sec. 277-M: AMENDMENT BY ACT XXII OF 1936.—(See also notes under S. 277-F.) This section prohibits a banking company from forming or holding shares in any subsidiary company except a subsidiary company of its own formed for the purpose of carrying out some of the forms of business mentioned in S. 227-F (*supra*) incidental to banking operations.

Sec. 277-N: AMENDMENT BY ACT XXII OF 1936.—(See also notes under S. 277-F.) This section invests the Court with power in certain cases to stay the commencement or continuance of all actions and proceedings against a banking company for any fixed period with or without conditions attached. This is based on one of the recommendations of the Central Banking Enquiry Committee which suggested that some provision should be made for a moratorium to save from liquidation a banking company in temporary difficulties. The liquidation of a bank affects the public to a very great extent and if it could be avoided by any means, it should be resorted to. Prior to the enactment of this section it has no doubt been possible for banking companies to avoid liquidation by taking proceedings under S. 153

of the Act and proposing schemes of composition with the creditors. But this has been found in practice to be unsatisfactory, inadequate, and causing considerable difficulty. Further, under that section, no interim protection could be obtained. Hence this section has been enacted. The protection under this section would be purposeful only in the case of deserving companies which find themselves in temporary difficulties, and which could get over the same if some time and relief should be granted to them. So it has been provided that a banking company applying to the Court for protection under this section, should have first applied to the registrar and allowed him to have the books and documents of the company examined by a competent accountant in order to enable him to ascertain the exact financial position of the company and should have obtained a report from the registrar to the effect that it is a fit case for the grant of any relief under this section. Provision also is contained in the section for the grant of *interim* relief, in urgent cases, even before the investigation by the Registrar and the receipt of his report.

SCOPE AND OBJECT OF.—It was never the intention of the Legislature in enacting S. 277-N that a company in an insolvent position should be allowed to continue its operations under the protection of the Court and that those who had dealings with the company should be prevented from seeking legal remedies to which they would otherwise have been entitled. The Court could only undertake the responsibility of

(2) No such application shall be maintainable unless accompanied by a report of the registrar :

Provided, however, the Court may, for sufficient reasons, grant interim relief even if the application is not accompanied by such report.

(3) The registrar shall for the purposes of his report be entitled at the cost of the company to investigate the financial condition of the company and for such purpose to have the books and documents of the company examined by an accountant holding a certificate issued under section 144.]

PART XI.

SUPPLEMENTAL.

Legal proceedings, offences, etc.

Cognizance of offences.

278. (1) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence against this Act.

(2) If any offence which by this Act is declared to be punishable by fine only is committed by any person within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William, Madras and Bombay, such offence shall be punishable upon summary conviction by any Presidency Magistrate of the place at which such Court is held.

(3) Notwithstanding anything in the Code of Criminal Procedure, 1898, every offence against this Act shall, for the purposes of the said Code, be deemed to be non-cognizable.

279. The Court imposing any fine under this Act may direct that the whole or any part thereof be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding of the person on whose information the fine is recovered.

280. Where a limited company is plaintiff or petitioner in any suit or other legal proceeding, any Court having jurisdiction in the matter may, if it appears that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

¹[281. (1) If in any proceeding for negligence, default, breach of duty or breach of trust against a person to whom this section applies, it appears to the Court hearing the case that that person is or may be liable in respect of the negligence default, breach of duty or breach of trust, but that he has acted honestly and rea-

LEG. REF.

¹ This section was substituted by S. 120 of Act XXII of 1936.

NOTES.

barring these legal remedies to which the people would ordinarily be entitled if it was certain within reasonable limits that they would not suffer any real loss by being deprived of these remedies. Where the Court is not satisfied that the company is in a solvent condition essentially an order under S. 277-N cannot be passed. 1939 A.L.J. 1009=1939 All. 726=I.L.R. (1939) All. 938.

Sec. 280: APPLICATION OF SECTION.—A misfeasance proceeding under S. 235 is not a suit or legal proceeding within the meaning of this section. (On this ground and also

on grounds of public policy, the liquidator who files a misfeasance summons cannot be required to furnish security for costs. 55 A. 250=1930 A.L.J. 199=1933 A. 205. No appeal lies from an order refusing to direct a Company in liquidation to furnish security under S. 280 of the Act. 1941 Comp. Cas. 292.

Sec. 281: AMENDMENT BY ACT XXII OF 1936.—This section has been substituted for the old S. 281; and it follows S. 372 of the English Act, the provisions of which are more ample and detailed. "Default" and "breach of duty" have been added to "negligence" and "breach of trust" in sub-section (1); and provision has been made in sub-section (2) for any director, manager, etc.; who may apprehend that any claim may be made against him in respect of negligence,

sonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think fit.

(2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the Court for relief, and the Court on any such application shall have the same power to relieve him as under this section it would have had if it had been a Court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought.

(3) The persons to whom this section applies are the following :—

- (a) directors of a company ;
- (b) managers and managing agents of a company ;
- (c) officers of a company ;
- (d) persons employed by a company as auditors, whether they are or are not officers of the company.]

282. Whoever in any return, report, certificate, balance-sheet or other document, required by or for the purposes of any of the provisions of this Act, wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

NOTES.

default, etc., to apply to the Court *himself* in anticipation instead of waiting till the actual claim is made. In sub-section (3) the persons who are entitled to the grant of relief under this section are enumerated. The old section applied only to directors and this substituted section enumerates four classes of persons, including persons employed by the company as auditors.

SCOPE OF SECTION.—This section is not meant to cover any gross neglect of a director's ordinary duties over a long series of years. Even where managing agents have been appointed with very wide and all real powers, the directors have still their duties to perform or else the directors' names would have operated only as a mere trap for the unwary public. If the directors fail to perform their duties they must take the financial and other consequences of their negligence. 54 B. 227=32 Bom.L.R. 232=1930 B. 572; 47 A. 669=23 A.L.J. 473=1925 A. 519. It is wrong to think that S. 281 (2) is a section under which the Court is empowered to extend the time for holding meetings. The section does no such thing. It gives to the High Court a power to relieve certain classes of persons from the consequences of the default where they have an apprehension that they will be prosecuted and that apprehension can arise only after the Registrar of joint stock companies has done his duty and decided whether or not he proposes to prosecute. The duty of deciding whether there should be a prosecution or not, is not a function which is intended by S. 281 (2) of the Act to be cast

upon the High Court. The proper sequence of events is that the Registrar of joint stock companies should state whether he intends to launch prosecution or not. If he makes up his mind to prosecute and actually initiates the prosecution, then there can be an application under S. 281 (2) to the Court in which the prosecution is pending. If in such a case relief is sought before the prosecution is actually lodged, then that will be a proper case in which to apply to the High Court under S. 281 (2). But in such a case it would only be upon strong grounds and for special reasons, properly proved, that the High Court would interfere with a proposed prosecution. 1941 A. L. W. 1076. The power to relieve a director from the consequences of his wilful negligence is placed in the hands of the Court under S. 281 of the Act when the Court is convinced that the director has acted honestly and reasonably. Where it cannot be said that he has acted reasonably, though he may be said to have acted honestly, the Court has no power to grant any relief under the section. 46 L.W. 869=(1937) 2 M.L.J. 848. Company—Winding up—Directors entering into contract and making payments during—Liability of—They have no right to benefit of S. 281. See 1937 P. 293=168 I.C. 786.

Sec. 282: CONSTRUCTION OF BALANCE-SHEETS.—Balance-sheets and prospectuses are governed by the same principles of law with regard to the making of false statements. It is the effect upon the ordinary investor reading the statements in ordinarily careful manner in which an investor would do, which has to be considered when the

¹[282-A. Any director, managing agent, manager or other officer or employee of a company who wrongfully obtains possession of any property of a company, or having any such property in his possession wrongfully withholds it or wilfully applies it to purposes other than those expressed or directed in the articles and authorised by this Act, shall, on the complaint of the company or any creditor or contributory thereof, be punishable with fine not exceeding one thousand rupees and may be ordered by the Court trying the offence to deliver up or refund within a time to be fixed by the Court any such property improperly obtained or wrongfully withheld or wilfully misapplied or in default to suffer imprisonment for a period not exceeding two years.]

¹[282-B. (1) All moneys or securities deposited with a company by its

LEG. REF.

¹ This section was inserted by S. 121 of Act XXII of 1936.

NOTES.

Court has to find whether a breach of this section has been committed. 40 C.W.N. 1341=1936 C. 680. A balance sheet which does not disclose the true state of affairs of a company is not a properly drawn up balance sheet, and the opinion of an auditor that it has been properly drawn up is of no value whatever. 40 C.W.N. 1341. A banker in drawing up a balance sheet, must disclose both loans and overdrafts; and it does not make the slightest difference whether a particular advance made by him is a loan or an overdraft, when the question is as to the suppression of an advance from the balance sheet. (Per *Henderson, J.*) 40 C.W.N. 1341=1936 C. 680. There can never be an overdraft based on a deposit account. Overdrafts are the usual accompaniments of current accounts. (Per *Cunliffe, J.*, *ibid.*)

LOAN AND DEPOSIT.—A loan and a deposit are items differing from the balance sheet point of view. They ought to appear on different sides, one as an asset and the other as a liability. The act of consolidating the two and presenting them as one item in the balance sheet is a striking case of non-disclosure, amounting to suppression of truth; and the statement would be false in material particulars, and the managing directors would be guilty of an offence under this section. 40 C.W.N. 1341=1936 C. 680.

FALSE STATEMENT IN BALANCE SHEET.—If a balance sheet shows as profits a sum of money representing the interest on bad and doubtful debts due to the bank which was never paid and was never likely to be paid, it contains a false statement and a material one, for which the directors signing it are liable to be prosecuted under this section. 25 S.L.R. 297. A private complaint in respect of offence under S. 282 is not barred. 1942 Sind 9. See also 1937 M.W.N. 1122.

ACTS AMOUNTING TO OFFENCE.—A person who makes a declaration that all the directors had paid their dues as mentioned in the prospectus, while as a matter of fact they had not so paid, and obtains an order for the commencement of business, is guilty under this section. 46 A. 218=22 A.L.J.

83=1924 A. 314. Where the manager signs a balance sheet false in material particulars, he is liable; and it is no proper defence to the charge that he was not bound to sign it or that he had signed it merely because the directors wished him to do so. 25 S.L.R. 297=134 I.C. 993=1932 S. 4. Nor is it a proper defence to the directors who have signed it, to plead that they had no knowledge of banking accounts and that they did not often attend the meetings of the directors. 1932 S. 4.

"WILFULLY", MEANING OF.—The word "wilfully" in this section does not embody the idea of a criminal mentality. It means nothing more nor less than the spontaneous action of a person who is a free agent. It is not a term of art, but a legal expression to be fitted to the circumstances being considered by the Court and to be interpreted according to the facts of each case. 40 C.W.N. 1341=1936 C. 680. It is not necessary that the statement should be such as to deceive any one or that it should even be dishonestly made. 159 I.C. 523=1935 C. 731. So where, after the company has begun to earn revenue, current expenditure has been debited to organisation expenses when it ought to have been debited in the revenue accounts in the balance sheet, it must be held to contain a wilful false statement. 1935 C. 731.

Sec. 282-A: AMENDMENT BY ACT XXII OF 1936.—This section follows S. 87 of the Friendly Societies Act of 1896. Several cases of wrongful detention and misapplication of the company's properties by the directors, managers, and other employees of the company, have occurred and the provisions of the Act were found to be insufficient to afford adequate and speedy relief, and hence it was thought necessary to introduce this section providing for such cases and subjecting the delinquents to a heavy penalty.

Sec. 282-B: AMENDMENT BY ACT XXII OF 1936.—This section has been designed to prevent misuse of securities lodged with a company by its employees under their contracts of service and to safeguard provident funds. It provides for the investment of all future funds in trust securities, and as to the existing funds which are not so invested it requires the same to be so invested in not

Penalty for misapplication of securities by employers.

employees in pursuance of their contracts of service with the company shall be kept or deposited by the company in a special account to be opened by the company for the purpose in a scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934, and no portion thereof shall be utilised by the company except for the purposes agreed to in the contract of service.

(2) Where a provident fund has been constituted by a company for its employees or any class of its employees, all moneys contributed to such fund (whether by the company or by the employees) or accruing by way of interest or otherwise to such fund after the commencement of the Indian Companies (Amendment) Act, 1936, ¹[shall be either deposited in a Post Office Savings Bank Account or invested] in securities mentioned or referred to in clauses (a) to (e) of section 20 of the Indian Trusts Act, 1882, and all moneys belonging to such fund at the commencement of the said Act ¹[which are not so deposited or invested shall be so deposited or] invested in such securities by annual instalments not exceeding ten in number and not less in amount in any year than one tenth of the whole amount of such moneys.

LEG. REF.

¹ Substituted by Act XXII of 1941.

NOTES.

more than 10 annual instalments, and each instalment being not less than 1/10 of the amount of such monies. Sub-section (4) enables the employee to satisfy himself as to the safe investment of the funds. Further, to ensure the observance of the provisions of this section, a heavy penalty is provided for any contravention of the same.

TRUST—PROVIDENT FUND MONIES AND EMPLOYEES CASH SECURITY DEPOSITED IN BANK—IF CREATES A TRUST.—The fact that a Bank is given notice that money deposited is trust money does not make the Bank a trustee thereof. The legal consequence of such notice is only that the Bank should not participate in a breach of trust by the trustee. S. 282-B of the Companies Act imposes on a company a duty to invest all provident fund moneys in securities mentioned in S. 20 of the Trusts Act, and all such moneys belonging to the Fund at the commencement of the Companies Act which are not so invested shall be invested in such securities by annual instalments not exceeding ten in number and not less in amount than one-tenth of the whole amount of such moneys. On the coming into force of S. 282-B, if the said moneys are not invested in any such securities as are mentioned in S. 20 of the Trusts Act, the obligation of a company is to invest a tenth of the said moneys in that year and in every succeeding year in the authorised securities, and the balance of the moneys can be invested in any authorised Bank or Banks according to the rules of the institution. In so far as a company has not invested the said sum in any authorized security the company is guilty of a breach of trust, and a Bank holding the moneys in deposit must be held to participate in that breach of trust, and the bank can therefore be compelled to restore such trust fund, i.e., in respect of so much of the provident

fund as it is obligatory on the company to invest in authorised securities. 1940 Mad. 184=1939 M. W. N. 1068. See also 1938 M.W.N. 1332=1939 Mad. 352; 49 L.W. 181=1939 Mad. 337=(1939) 1 M.L.J. 209. Where a company has deposited its employees security fund and Provident Fund in a Bank prior to the coming into the operation of S. 282-B of the Companies Act, as amended in 1936, and the deposit is renewed after that section came into force it cannot be said that the renewal constitutes a breach of trust on the ground that the moneys are not invested in approved securities mentioned in S. 20 of the Trusts Act as required by S. 282-B of the Companies Act. So far as the amount of the security deposit is concerned, there can be no breach of trust, because the Bank is not a trustee in respect of the same, although the company may be a trustee and the money may be trust money in its hands. In regard to the provident fund deposit, there can be a breach of trust only in respect of so much of it as is required to be invested in authorised securities, namely, the annual instalments for the year or years in question, and there can be no breach of trust in respect of the balance. 1939 M.W.N. 1069=1939 Comp. Cas. 281. See also 1939 M. W. N. 1066; 1938 Mad. 651. As the result of the statutory obligation under S. 282-B (1) of the Companies Act imposed upon a Bank, the employees' cash security was deposited by the Bank in a scheduled Bank which subsequently went into liquidation. The depositor bank claimed priority in respect of the deposit on the ground that the amount had been deposited for a specific purpose. Held, that the depositor Bank held the moneys for a special purpose and was required by statute to deposit therein in a scheduled bank, and that the depositee bank was not a trustee, though the depositor was a trustee. The position of the depositee bank was still that of a banker keeping an account for a customer and therefore the depositor could not claim any priority. The relationship bet-

(3) Notwithstanding anything to the contrary in the rules of any fund to which sub-section (2) applies or in any contract between a company and its employees, no employee shall be entitled to receive in respect of such portion of the amount to his credit in such fund as is invested in accordance with the provisions of sub-section (2) interest at a rate exceeding the rate of interest yielded by such investment.

(4) An employee shall be entitled on request made in this behalf to the company to see the banks' receipt for any money or security such as is referred to in sub-section (1) and sub-section (2).

(5) Any director, managing agent, manager or other officer of the company who knowingly contravenes or permits or authorises the contravention of the provisions of this section shall be liable on conviction to a fine not exceeding five hundred rupees.]

283. If any person or persons trade or carry on business under any name or title of which "Limited" is the last word, that person or those persons shall, unless duly incorporated with limited liability, be liable to a fine not exceeding fifty rupees for every day upon which that name or title has been used.

¹[284. The provisions with respect to winding up contained in this Act as amended by the Indian Companies (Amendment) Act, 1936, shall not apply to any company of which the winding up has commenced before the commencement of the Indian Companies (Amendment) Act, 1936, but every such company shall be wound up in the same manner and with the same incidents as if the Indian Companies (Amendment) Act, 1936, had not been passed.]

285. Every instrument of transfer or other document made before the commencement of this Act in pursuance of any enactment hereby repealed, shall be of the same force as if this Act had not been passed, and for the purposes of that instrument or document the repealed enactment shall be deemed to remain in full force.

286. (1) The offices existing at the commencement of this Act for registration of joint-stock companies shall be continued as if they had been established under this Act.

(2) Registers of companies kept in any such existing offices shall respectively be deemed part of the registers of companies to be kept under this Act.

[* * * * *]²

287. Nothing in this Act shall affect the provisions of the Indian Life Assurance Companies Act, 1912, or of the Provident Insurance Societies Act, 1912.

LEG. REF.

¹ This section was substituted by S. 18 of Act II of 1938.

² Sub-s. (3) was omitted by A.O., 1937.

NOTES.

ween the depositor and depositor was only that of creditor and debtor though the depositor having notice of the trust could not be a party to a breach of trust by the trustee. 52 L.W. 512=(1940) 2 M.L.J. 559=I.L.R. (1941) Mad. 125. See also 1940 O.W.N. 1022=1941 Oudh 126; 1938 Mad. 651; (1939) 1 M.L.J. 209=1939 Mad. 337.

Sec. 287.—The effect of S. 287 of the Companies Act and S. 22 of the Life Assurance Companies Act is to incorporate into the Life Assurance Companies Act the relevant provisions about winding up contained in the Companies Act including S. 166 of the Companies Act. The right to wind up a company is, however, a statutory right and unless petitioner can bring his case within the terms of S. 166, he is not entitled to maintain the petition. A policy holder in a Life Assurance Company Limited by guarantee which has no share capital is not entitled to apply for winding up of that company either as contributory or as a creditor. 40 Bom.L.R. 52=174 I.C. 593=1938 Bom. 182.

288. In sections 1 and 18 of Act No. XXI of 1860 (for the registration of Literary, Scientific and Charitable Societies), the words "registrar of joint-stock companies" in Act XXI of 1860. shall be construed to mean the registrar under this Act.

Act not to apply to Banks of Bengal, Madras or Bombay.

289. Save as provided in sections 188, and 189 nothing in this Act shall be deemed to apply to the Bank of Bengal, the Bank of Madras and the Bank of Bombay.

¹[289A. The powers conferred by this Act on the Central Government shall, in relation to companies with objects confined to a single Province which are not trading corporations, be powers of the Provincial Government.]

290. (1) The enactments mentioned in the Fourth Schedule are hereby repealed to the extent specified in the fourth column thereof:

Provided that the repeal shall not affect—

(a) the incorporation of any company registered under any enactment hereby repealed; nor

(b) Table B² in the Schedule annexed to Act No. XIX of 1857, or any part thereof, so far as the same applies to any company existing at the commencement of this Act; nor.

(c) Table A³ in the First Schedule annexed to the Indian Companies Act, 1882, or any part thereof, so far as the same applies to any company existing at the commencement of this Act.

(2) All fees directed, resolutions passed and other things duly done under any enactment hereby repealed, shall be deemed to have been directed, passed or done under this Act.

(3) The mention of particular matters in this section or in any other section of this Act shall not prejudice the general application of section 6 of the General Clauses Act, 1897, with regard to the effect of repeals.

SCHEDULES.

THE FIRST SCHEDULE.

(See sections 2, 17, 18, 79, 266.)

TABLE A.

REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES.

Preliminary.

1. In these regulations, unless the context otherwise requires, expressions defined in the Indian Companies Act, 1913, or any statutory modification thereof in force at the date at which these regulations become binding on the company, shall have the meanings so defined; and words importing the singular shall include the plural, and *vice versa*, and words importing the masculine gender shall include females, and words importing persons shall include bodies corporate.

Business.

2. The directors shall have regard to the restrictions on the commencement of business imposed by section 103 of the Indian Companies Act, 1913, if, and so far as, those restrictions are binding upon the company.

LEG. REF.

¹ This section was inserted by A.O., 1937.

² See Appendix I to this Act.

³ See Appendix II to this Act.

NOTES.

Table A.—By sanctioning the adoption of Table A the Legislature has given a general sanction to the doing, by and in relation to a company limited by shares, of everything which the Table says may be done; and, therefore, any and every provision contained in such a company's articles of association which is to the same effect as some provision in Table A, is valid. *Lock*

v. Queensland, etc., Co., (1896) A.C. 461; (1896) 1 Ch. 397.

Art. 1.—See S. 2 of the Act for the definitions of words.

Art. 2.—The restrictions contained in S. 103 of the Act are by that section itself made inapplicable to private companies or to companies registered before the commencement of this Act which do not issue prospectuses inviting the public to subscribe for its shares, or to companies limited by guarantee without having a share capital in so far as the restrictions relating to shares are concerned.

Shares.

3. Subject to the provisions, if any, in that behalf of the memorandum of association of the company, and without prejudice to any special rights previously conferred on the holders of existing shares in the company, any share in the company may be issued with such preferred, deferred or other special rights, or such restrictions, whether in regard to dividend, voting, return of share capital, or otherwise, as the company may from time to time by special resolution determine ¹[and any preference share may with the sanction of a special resolution be issued on the terms that it is or at the option of the company is liable to be redeemed.]

4. If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may ¹[subject to the provisions of section 66A of the Indian Companies Act, 1913] be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meetings shall *mutatis mutandis* apply, but so that the necessary quorum shall be two persons at least holding or representing by proxy one-third of the issued shares of the class.

5. No share shall be offered to the public for subscription except upon the terms that the amount payable on application shall be at least five per cent. of the nominal amount of the share; and the directors shall, as regards any allotment of shares, duly comply with such of the provisions of sections 101 and 104 of the Indian Companies Act, 1913, as may be applicable thereto.

6. Every person whose name is entered as a member in the register of members shall, without payment, be entitled to a certificate under the common seal of the company specifying the share or shares held by him and the amount paid up thereon: Provided that, in respect of a share or, shares held jointly by several persons the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint-holders shall be sufficient delivery to all.

7. If a share certificate is defaced, lost or destroyed, it may be renewed on payment of such fee, if any, not exceeding eight annas, and on such terms, if any, as to evidence and indemnity as the directors think fit.

8. ¹[Except to the extent allowed by section 54A of the Indian Companies Act, 1913], no part of the funds of the Company shall be employed in the purchase of, or in loans upon the security of, the company's shares.

Lien.

9. The company shall have a lien on every share (not being a fully-paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a lien on all shares (other than fully-paid shares) standing registered in the name of a single person, for all moneys presently payable by him or his estate to the company; but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this clause. The company's lien, if any, on a share shall extend to all dividends payable thereon.

LEG. REF.

¹ These words were added by S. 122 of Act XXII of 1936.

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Art. 3.—As to the different shares and the rights attached to them, *see* notes under S. 2 (16) *supra*.

Art. 7.—Where the articles of association of a company provide for the issue of a duplicate share certificate on satisfaction of loss or destruction or on such indemnity as the directors might deem fit, the directors' discretion as to the indemnity to be furnished must be deemed to be absolute so that the Court would not interfere in the matter of the exercise of their discretion. 31 C. W.N. 155=1927 C. 947.

Art. 8.—This article is intended to prevent the unrestricted reduction of the share capital of the company. The Act itself provides for the reduction of the capital in certain cases, and lays down suitable safeguards so that the power may not be abused. *Vide* S. 54-A, and Ss. 55 to 66.

In the case of *British and America Trustee and Finance Corporation v. Couper*, [1894] A.C. 399, Lord Macnaghten says:—

"The exercise of the power is fenced round by safeguards, which are calculated to protect the interests of creditors, the interests of shareholders, and the interests of the public. Creditors are protected by express provisions. Their consent must be procured or their claims satisfied. The public, the shareholders and every class of shareholders, individually and collectively, are protected by the necessary publicity of the proceedings and by the discretion, which is entrusted to the Court. Until confirmed by the Court, the proposed reduction is not to take effect, though all the creditors have been satisfied. When it is confirmed, the memorandum is to be altered in the prescribed manner, and the company, as it were, makes a new start. With these safeguards, which certainly are not inconsiderable, the Act apparently leaves the company to determine the extent, the mode and the incidence of the reduction, and the application or disposition of any capital moneys, which the proposed reduction may set free."

Art. 9.—Where the article gives the company a lien in respect of the debts due by a shareholder to it, it is not necessary

10. The company may sell, in such manner as the director thinks fit, any shares on which the company has a lien, but no sale shall be made unless some sum in respect of which the lien exists is presently payable, nor until the expiration of fourteen days after a notice in writing, stating and demanding payment of such part of amount in respect of which the lien exists as is presently payable, has been given to the registered holder for the time being of the share, or the person entitled by reason of his death or insolvency to the share.

11. The proceeds of the sale shall be applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares prior to the sale) be paid to the person entitled to the shares at the date of the sale. The purchaser shall be registered as the holder of the shares, and he shall not be bound to see to the application of the purchase-money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

Calls on Shares.

12. The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payments) pay to the company at the time or times so specified the amount called on his shares.

13. The joint-holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

14. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of five per cent. per annum from the day appointed for the payment thereof to the time of the actual payment, but the directors shall be at liberty to waive payment of that interest wholly or in part.

15. The provisions of these regulations as to payment of interest shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium as if the same had become payable by virtue of a call duly made and notified.

16. The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.

17. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys uncalled and unpaid upon any shares held by him; and upon all or any of the moneys so advanced may (until the same would, but for such advance, become presently

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that the debt should have been contracted by the shareholder after his membership. The lien applies even in respect of his debts contracted with the company before he became a shareholder. *Chandoora v. Venugopal Rice Factory*, 43 I.C. 508.

Art. 12.—Three calls were made in pursuance of three resolutions of the directors which were passed without stipulating the amount, time and place for the payments. An allottee failed to pay the allotment and call money; and thereupon the directors passed a resolution forfeiting the shares. But later, they rescinded the resolution and made a fresh call which also was not paid by the allottee. Thereupon, the company brought a suit, and it was held that the first three calls were invalid and the forfeiture resolution *ultra vires*; that the new resolution was valid, and that the company was not precluded from showing the *ultra vires* acts of the directors. 54 B. 178=32 Bom. L.R. 87=1930 B. 267. Calls can be made only by a resolution of the board of directors indicating the amount of the call, the time and place at which, and the person to whom, it is to be paid; and the omission to include these directions cannot be cured by any subsequent notice regarding the directions. 50 B. 461=28 Bom. L.R. 411=1926 B. 341. But it was held in 35 Bom. L.R. 26=1933 B. 80, with reference to a

particular article of a company, that it was not necessary for the resolution of the directors making the call to specify the time and place at which or the person to whom the payment was to be made, that in the absence of any evidence the Court might assume that the notices were sent out by the agents of the company with the sanction of the directors, and also that, assuming a formal notice was necessary in such cases, it was open to the parties to waive the same.

Art. 14: INTEREST.—As to interest on calls in arrears after forfeiture of the shares, see 48 B. 715=27 Bom. L.R. 574=88 I.C. 96. See also 1932 A. 342=1932 A. L.J. 354, where on nonpayment of calls the share was forfeited and subsequently the liquidator sued to recover the amount due with interest, it was held that interest at 5 per cent. might be awarded up to the date of forfeiture but not thereafter.

Art. 16.—Any agreement with a company's agent entered into by a person that he should not be liable for payment of call money on shares is a fraud on creditors. It can only amount to a personal arrangement with agent and cannot be a defence to suit by company to recover the same. *Forget v. The Cement Products Co., of Canada, Ltd.*, 1916 W.N. 259=1917 P.C. 267 (P.C.).

Art. 17.—A company, by the issue to a member, of a share credited with a definite

payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting, six per cent.) as may be agreed upon between the member paying the sum in advance and the directors.

Transfer and transmission of shares.

18. The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain holder of the share until the name of the transferee is entered in the register of members in respect thereof.

19. Shares in the company shall be transferred in the following form, or in any usual or common form which the directors shall approve :

I, A. B. of _____, in consideration of the sum of rupees _____ paid to me by C. D. of _____ (hereinafter called "the said transferee"), do hereby transfer to the said transferee the share [or shares] numbered in the undertaking called the _____ Company, Limited, to hold unto the said transferee, his executors, administrators and assigns, subject to the several conditions on which I held the same at the time of the execution thereof, and I, the said transferee, do hereby agree to take the said share [or shares] subject to the conditions aforesaid. As witness our hands the _____ day of _____

Witness to the signatures of, etc.

20. The directors may decline to register any transfer of shares, not being fully paid shares, to a person of whom they do not approve, and may also decline to register any transfer of shares on

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sum as paid thereon, can in no sense become a debtor to its shareholder in respect of that full amount. 54 B. 437=57 I.A. 152=34 C.W.N. 709=1930 P.C. 151=59 M.L.J. 242 (P.C.).

Art. 18: APPLICATION OF ARTICLE.—Any provision regarding voluntary transfers in the Articles of Association will not apply to transfers by Court sale. 28 L.W. 932=1928 M. 571=111 I.C. 225.

ESSENTIALS FOR TRANSFER—EQUITABLE TITLE—AVAILABILITY AGAINST THIRD PARTIES.—Where the law prescribes a mode of transfer, any transfer otherwise than by the manner prescribed by law will not confer a valid title. This R. 18 requires that the deed of transfer has to be executed by the transferor and the transferee, and that the transferor shall be deemed to remain the holder of the share until the name of the transferee shall be entered in the register. Where the deed of transfer was signed only by the transferor, the right of the transferee was merely a right in equity to compel the vendor to execute a proper conveyance and the transaction evidenced by the transfer can be treated only as an agreement to convey capable of being perfected into an absolute conveyance by complying with the rules laid down in the Companies Act and the Articles of Association. This equitable title acquired against the transferor, will not avail against third parties. So, in the case of a conflict between a person who had obtained a deed of transfer signed by the transferor alone, and a person who had purchased the share subsequently in a Court auction sale, and of which due notice was given to the company it was held that the latter was entitled to priority as regards the transfer. 45 M. 537=42 M.L.J. 449=70 I.C. 659.

TRANSFER BY COURT SALE.—As regards the shares held in limited companies by judgment-debtors their attachment and sale are governed by the provisions of the Civil Procedure Code. O. 21, R. 46, C. P. Code enacts that in the case of a share in the capital of a Corporation, attachment

shall be made by a written order prohibiting the person in whose name the shares may be standing from transferring the same or receiving any dividend thereon and a copy of the order being sent to the proper officer of the Corporation. O. 21, R. 76 provides that the Court may instead of directing the sale to be made by public auction authorize the sale of such instrument or share through a broker. O. 21, R. 79 (3) provides that the delivery thereof shall be made by a written order of the Court prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser. O. 21, R. 80 provides that where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a Corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary and such execution or endorsement shall have the same effect as an execution or endorsement by the party. Where the sale is confirmed and the provisions of the Code have been complied with, the transfer becomes complete and there is nothing further to be done by the transferee or by the Court. 45 M. 537=70 I.C. 659=52 M.L.J. 449.

TRANSFER IN BLANK.—The delivery of share certificates with the transfer executed in blank passes a title both legal and equitable; but not the property in the shares. 46 B. 489=23 Bom.L.R. 1144=66 I.C. 726.

Art. 20: DISCRETION OF DIRECTORS TO RECOGNISE EXECUTION PURCHASERS.—The discretion given by the rule to the directors either to register or to decline to register any transfer of shares is to prevent undesirable persons or debtors of the company from getting transfers of the shares. This discretion can be exercised not only in the case

which the company has a lien. The directors may also suspend the registration of transfers during the fourteen days immediately preceding the ordinary general meeting in each year. The directors may decline to recognise any instrument of transfer unless—

(a) a fee not exceeding two rupees is paid to the company in respect thereof; and

(b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer.

¹[If the directors refuse to register a transfer of any share, they shall within two months after the date on which the transfer was lodged with the company send to the transferee and the transferor notice of the refusal.]

21. The executors or administrators of a deceased sole holder of a share shall be the only persons recognised by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the executors or administrators of the deceased survivor, shall be the only persons recognised by the company as having any title to the share.

22. Any person becoming entitled to a share in consequence of the death or insolvency of a member shall, upon such evidence being produced as may from time to time be required by the

LEG. REF.

¹ These words were added by S. 122 of Act XXII of 1936.

NOTES.

of private transfers but also in the case of purchase of shares in execution of decrees. 45 M. 537=42 M.L.J. 449; 41 B. 76.

COMPANY SELLING SHARES OF SHAREHOLDERS—POSITION OF.—Where a limited liability company undertakes to sell the shares belonging to one of its shareholders, the position of its Managing Director in negotiating and completing the sale is one of a fiduciary character. Utmost good faith should be expected and insisted upon in transactions of this description. If any advantage was obtained by the Managing Director as the fruit of the sale, whether the purchase was made in his name or in the name of his minor sons, the benefit must go to the owner of the shares. 1930 A.L.J. 1396=128 I.C. 229=1930 A. 615.

PURCHASER OF SHARE—RIGHT TO DIVIDEND.—In the absence of a contract to the contrary a purchaser of shares would ordinarily be entitled to all the dividends which may have been declared after the date of the purchase. But there is nothing in law against a shareholder reserving the dividends to himself selling only the shares. When there was a definite understanding that only the shares and not the dividends on the shares were the subject of bargain, whether under private or public sale, the original owner would be entitled to the dividend relating to the period anterior to the sale, even though the same may have been declared subsequent to the date of sale. 1930 A.L.J. 1396=128 I.C. 229=1930 A. 615.

Art. 21: APPLICABILITY OF RULE.—Arts. 21 and 22, while appropriate to a system such as that prevailing in England under which a legal title from a deceased person can only be traced either through probate or through letters of administration, are hardly so appropriate to a system under which a legal title by devolution may be obtained, apart altogether from and without either probate or letters of administration. 1936 R. 52. The provision contained in this

article causes great hardship to the heirs of small investors, who are put to the necessity of obtaining letters of administration at considerable expense. So also, where shares are held by a member of a Joint Hindu family some difficulty is felt. The shares held by such a member, generally belong to the joint Hindu family, and on his death the survivor becomes entitled to them by right of survivorship. In such a case, he would not be entitled according to law to obtain letters of administration in respect of such shares. The directors, therefore, cannot validly require such a person to produce letters of administration which he could not obtain under law, but oftentimes, it is being done and great hardship results therefrom. 1930 A. 82=126 I.C. 357. It is not within the legal competence of any company incorporated or otherwise to lay down any condition regulating the grant of letters of administration in contravention of any statutory enactment relating thereto. The Articles of Association of a company provided that the executors or administrators of a deceased shareholder are the only persons who are recognised by the company as having a title to the shares. The law is clear that when property (inclusive of shares in a company) belongs to a joint Hindu family, a person claiming by survivorship is not entitled to a grant of letters of administration to any portion of such property. Hence in such cases, the company cannot insist upon the surviving member of the joint Hindu family to obtain letters of administration regarding property which was not the separate estate of the deceased. It is no doubt open to the company to refuse to recognise the claim in the absence of satisfactory evidence to prove that the alleged right of survivorship, in fact, exists. But if the company disputes or denies the title of the claimant without any just cause, and merely on the ground that letters of administration has not been obtained, the company will expose itself to the risk, trouble and expense of a declaratory suit by the claimant. 1930 A. 82.

Art. 22.—As to the power to transfer shares of the legal representative of a de-

directors, have the right, either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or insolvent person could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or insolvent person, before the death or insolvency.

23. A person becoming entitled to a share by reason of the death or insolvency of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

Forfeiture of Shares.

24. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

NOTES.

ceased member, see S. 35. The legal representatives of a deceased member or the receiver in insolvency would in their representative capacity on behalf of the estate, be entitled to receive dividends, bonuses and other benefits attached to the shares, and would be bound to pay the calls as contributories. See Ss. 160 and 161 and also Art. 23.)

Art. 24.—The director of a company has no power to cancel or forfeit shares or release shareholders in the absence of such special power. 19 A.L.J. 351=62 I. C. 450. The articles of association are merely the terms of the contract which a member is supposed to know and to have agreed to. The company, therefore, cannot make a member liable for forfeiture otherwise than in accordance with the provisions of the articles of association. There is no valid forfeiture if notice as required to be given has not been given. (*Stanhope's case*, (1866) L.R. 1 Ch. 161.)

CONDITIONS OF VALID FORFEITURE.—A valid call and default are conditions precedent to and necessary for a valid forfeiture. The directors, for instance, must be properly appointed. The resolution of the directors making the call should mention the amount, the time and place of payment. Where these things are absent, the calls would be invalid as against the contributories, and on such invalid calls there can be no legal default and consequently no legal forfeiture. But mere laches on the part of directors or irregularities such as that the forfeiture is not formally registered or that there is no formal resolution of the directors do not affect the legality of the forfeiture. 54 B. 178=32 Bom.L.R. 87=1930 B. 267. A mere intention to forfeit and not carried into effect does not amount to forfeiture. A company's minutes-book only showed a resolution, notice calling for payment, and another notice demanding payment within six weeks "failing which shares held by them will be forfeited as provided in the Act". The shareholders did not comply with the notice and more than a year later the company was wound up. It was held that the notice by itself was sufficient to operate as a forfeiture, and that a resolution to that effect by the directors was required. Therefore, the contributories were held bound to

contribute. 10 P. 249=130 I.C. 534=1931 P. 44; 36 P.L.R. 282=155 I.C. 16=1934 L. 1015. But where there is a valid resolution of forfeiture, the fact that the member's name has not been removed from the register is immaterial. *Lyster's Case*, (1867) 4 Eq. 233; *Marshall v. Glamorgan Iron and Coal Co.*, (1868) 7 Eq. 129.

REVOCATION OF FORFEITURE.—Where the calls have been valid and there has been default, and the power of forfeiture has once been exercised by the directors, it is not open to the directors and to the company to rely upon the irregularity of their own procedure and without the consent of the contributory whose shares have been forfeited to revoke the forfeiture and replace him on the register as contributory. 54 B. 178=32 Bom.L.R. 87=1930 B. 267. But where the calls have been *invalid* as the directors making the calls did not stipulate the amount, time or place of payment, the allottee of the shares is not bound to pay these calls, and his failure to do so cannot constitute default entailing forfeiture. In such a case, even if the directors should pass a resolution of forfeiture, it would be *ultra vires* on their part. It is therefore open to them to rescind that resolution of forfeiture and to issue a fresh call on the shares held by the allottee. When the allottee fails to pay, it would be open to the company to maintain a suit both for the allotment and call money. 54 B. 178.

PRESUMPTION.—Where there is an entry as to forfeiture in the company's register, there is a presumption that the same has been properly made and that all the antecedent requirements have been complied with; but this presumption is not absolute and is rebuttable. 83 I.C. 94=1924 M. 703.

CANCELLATION OF SHARES.—A resolution authorising the money of those shareholders who have not paid their allotment money and are not willing to remain as members to be returned, is *ultra vires*. 19 A.L.J. 351=62 I.C. 450.

FORFEITURE AND SURRENDER, DISTINGUISHED.—Forfeiture denotes a proceeding taken by the company adversely to the shareholder; but surrender denotes consent on the part of the shareholder.

25. The notice shall name a further day (not earlier than the expiration of fourteen days, from the date of the notice) on or before which the payment required by the notice is to be made, and shall state that, in the event of non-payment at or before the time appointed, the shares in respect of which the call was made will be liable to be forfeited.

26. If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.

27. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.

28. A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company received payment in full of the nominal amount of the shares.

29. A duly verified declaration in writing that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share, and that declaration, and the receipt of the company for the consideration, if any, given, for the share on the sale or disposition thereof, shall constitute a good title to the share, and the person to whom the share is sold or disposed of shall be registered as the holder of the share and shall not be bound to see to the application of the purchase-money (if any) nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share.

30. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had been payable by virtue of a call duly made and notified.

Conversion of shares into stock.

31. The directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock and may with the like sanction re-convert any stock into paid-up share of any denomination.

32. The holders of stock may transfer the same, or any part thereof in the same manner, and subject to the same regulations, as, and subject to which, the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit; but the directors may from time to time fix the minimum amount of stock transferable and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the nominal amount of the shares from which the stock arose.

33. The holders of stock shall, according to the amount of the stock held by them have the same rights, privileges and advantages as regards dividends, voting at meetings of the company, and other matters, as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing in shares, have conferred that privilege or advantage.

34. Such of the regulations of the company (other than those relating to share-warrants), as are applicable to paid-up shares shall apply to stock, and the words "share" and "share-holder" therein shall include "stock" and "stockholder."

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Art. 26.—Where notices were issued to shareholders making calls, stating that in default of payment the shares will be forfeited, but no resolution was passed by the directors actually forfeiting the shares, and the company afterwards went into liquidation, it was held that there was no valid forfeiture and that the shareholders were liable to pay the amounts of their calls in the winding up. 155 I.C. 16=1934 L. 1015.

Art. 27.—There is no obligation on the part of the directors to sell or ascertain the value of a forfeited share the moment that it was forfeited. In a suit for the value of the shares, to fix the value as at the time of bringing the suit would not be incorrect or unreasonable. 158 I.C. 10=1935 L. 190.

Art. 28: LIMITATION.—This article imposes on forfeiture, a new obligation or a new debt, and as the shareholder thenceforth ceases to be a member of the com-

pany, his liability to pay future calls is gone, and all that is left is this new liability to pay the company "all monies which at the date of forfeiture were, presently payable by him to the company in respect of the shares". Such a person is liable with regard to unpaid calls, not as a contributory either as a present or a past member of the company, but as a debtor to the company. This gives the company a fresh cause of action. So a suit to enforce this obligation is governed by Art. 115 and time begins to run from the date on which shares are forfeited. 52 B. 477=30 Bom.L.R. 549=1928 B. 252. The fact that the calls are barred by time as against the company and that the company could not realise them by lapse of time is no answer to the liquidator's claim for contribution. 38 A. 357; 31 M. 66; 22 B. 654; 10 P. 249=12 Pat.L.T. 215. See also 54 A. 541=1932 A.L.J. 354=1932 A. 342.

Share-warrants.

35. The company may issue share-warrants, and accordingly the directors may in their discretion, with respect to any share which is fully paid up, on application in writing signed by the person registered as holder of the share, and authenticated by such evidence (if any) as the directors may from time to time require as to the identity of the person signing the request, and on receiving the certificate (if any) of the share, and the amount of the stamp duty on the warrant and such fee as the directors may from time to time require, issue under the company's seal a warrant, duly stamped, stating that the bearer of the warrant is entitled to the shares therein specified, and may provide by coupons or otherwise for the payment of dividends or other moneys on the shares included in the warrant.

36. A share-warrant shall entitle the bearer to the shares included in it and the shares shall be transferred by the delivery of the share-warrant, and the provisions of the regulations of the company with respect to transfer and transmission of shares shall not apply thereto.

37. The bearer of a share warrant shall, on surrender of the warrant to the company for cancellation, and on payment of such sum as the directors may from time to time prescribe, be entitled to have his name entered as a member in the register of members in respect of the shares included in the warrant.

38. The bearer of a share-warrant may at any time deposit the warrant at the office of the company, and so long as the warrant remains so deposited, the depositor shall have the same right of signing a requisition for calling a meeting of the company, and of attending and voting and exercising the other privileges of a member at any meeting held after the expiration of two clear days from the time of deposit, as if his name were inserted in the register of members as the holder of the shares included in the deposited warrant. Not more than one person shall be recognised as depositor of the share warrant. The company shall, on two days' written notice, return the deposited share-warrant to the depositor.

39. Subject as herein otherwise expressly provided, no person shall, as bearer of a share-warrant, sign a requisition for calling a meeting of the company, or attend, or vote or exercise any other privilege of a member at a meeting of the company, or be entitled to receive any notices from the company; but the bearer of a share-warrant shall be entitled in all other respects to the same privileges and advantages as if he were named in the register of members as the holder of the shares included in the warrant, and he shall be a member of the company.

40. The directors may from time to time make rules as to the terms on which (if they shall think fit) a new share-warrant or coupon may be issued by way of renewal in case of defacement, loss or destruction.

Alteration of Capital.

41. The directors may, with the sanction of ¹[the company in general meeting], increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

42. Subject to any direction to the contrary that may be given by the resolution sanctioning the increase of share capital, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this article.

43. The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture and otherwise as the shares in the original share capital.

44. The company may, by ²[ordinary resolution],

(a) consolidate and divide its share capital into shares of larger amount than its existing shares ;
(b) by sub-division of its existing shares or any of them, divide the whole or any part of its share capital, into shares of smaller amount than is fixed by the memorandum of association, subject, nevertheless, to the provisions of paragraph (d) of sub-section (1) of section 50 of the Indian Companies Act, 1913 ;

(c) cancel any shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person ;

³[* * * * *].

²[44-A. The company may, by special resolution, reduce its share capital in any manner and with, and subject to any incident authorised and consent required, by law.]

LEG. REF.

¹ These words were substituted for the words "an extraordinary resolution of the company" by S. 122 of Act XXII of 1936.

² These words were substituted for the words

"special resolution" by S. 122 of Act XXII of 1936.

³ Cl. (d) of regulation 44 was omitted and regulation 44-A was inserted, *ibid.*

General Meetings.

45. The statutory general meeting of the company shall be held within the period required by section 77 of the Indian Companies Act, 1913.

46. A general meeting shall be held ¹[within eighteen months from the date of its incorporation and thereafter once at least in every year] at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place as the directors shall appoint. In default of a general meeting, being so held, a general meeting shall be held in the month next following and may be called by any two members in the same manner as nearly as possible as that in which meetings are to be called by the directors.

47. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

48. The directors may, whenever they think fit, call an extraordinary general meeting, and extraordinary general meetings shall also be called on such requisition, or in default, may be called by such requisitionists, as provided by section 78 of the Indian Companies Act, 1913. If at any time there are not within British India sufficient directors capable of acting to form a quorum, any director or any two members of the company may call an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be called by the directors.

Proceedings at General Meeting.

49. ²[Subject to the provisions of sub-section (2) of section 81 of the Indian Companies Act, 1913, relating to special resolutions], fourteen days' notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given) specifying the place, the day and hour of meeting, and, in case of special business, the general nature of that business, shall be given in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under ³[the Indian Companies Act, 1913, or] the regulations of the company, entitled to receive such notices from the company; but the ³[the accidental omission to give notice to or the non-receipt of notice] by any member shall not invalidate the proceedings at any general meeting.

50. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting with the exception of sanctioning a dividend, the consideration of the accounts, balance-sheets and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors.

51. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, ⁴[two members in the case of a private company and five members in the case of any other company] personally present shall be a quorum.

52. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if called upon the requisition of members, shall be dissolved; in any other case, it shall stand adjourned to the same day in the next week at the same time and place, and, if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the members present shall be a quorum.

53. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company.

LEG. REF.

¹ These words were substituted for the words "once in every year" by S. 122 of Act XXII of 1936.

² These words were inserted, *ibid.*

³ These words were substituted for the words "non-receipt of the notice" by S. 122 of Act XXII of 1936.

⁴ These words were substituted for the words "three members," *ibid.*

NOTES.

Art. 49: ESSENTIALS OF VALID MEETING.—For a meeting to be a meeting of the company it must be a meeting convened strictly in accordance with the Articles of Association either by the directors or by the shareholders under requisition or by the direction of the Court to the liquidator in winding up proceedings. 52 C. 513=1925 C. 817.

Art. 53: MEMBER'S RIGHT TO BE HEARD.—

At a meeting, a shareholder has a right to be heard on reasonable terms for a reasonable time. But whether the denial of this right vitiates the resolution, depends upon the facts of each case. 26 Bom.L.R. 987=1925 B. 49.

AMENDMENTS.—Any proper amendment, moved by any member at a meeting, should be put to the meeting for consideration, and if the chairman rules out any such amendment, the resolution is liable to be set aside. But if an amendment is really a counter-proposal involving either adjournment of the consideration of the resolution or the rejection of the resolution proposed before the meeting, or goes beyond the scope of the subject-matter of the resolution, it should be ruled out. 26 Bom.L.R. 987=1925 B. 49. An amendment may be rejected if it is contrary to the terms of the order of the Court, under which the meeting takes place. 26 Bom.L.R. 907=1925 B. 105.

54. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman.

55. The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid, it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

56. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded ¹[in accordance with the provisions of clause (c) of sub-section (1) of section 79 of the Indian Companies Act, 1913], and unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried, or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book of the proceedings of the company shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against, that resolution.

57. If a poll is duly demanded, it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

58. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman, of the meeting at which the show of hands takes place, or at which the poll is demanded, shall be entitled to a second or casting vote.

59. A poll demanded on the election of a chairman or on a question of adjournment shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs.

Votes of Members.

60. On a show of hands every member present in person shall have one vote. ²[On a poll every member shall have one vote in respect of each share or each hundred rupees of stock held by him.]

61. In the case of joint-holders, the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint-holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members.

62. A member of unsound mind, or in respect of whom an order has been made by any Court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee or other legal guardian, and any such committee or guardian may, on a poll, vote by proxy.

63. No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid.

64. On a poll votes may be given either personally or by proxy: Provided that no company shall vote by proxy as long as a resolution of its directors in accordance with the provisions of section 80 of the Indian Companies Act, 1913, is in force.

LEG. REF.

¹ These words, and figures were substituted for the words "by at least three members" by S. 19 of Act II of 1938.

² These words were substituted for the words "On a poll every member shall have one vote for each share of which he is the holder" by S. 122 of Act XXII of 1936.

NOTES.

POINT OF ORDER.—A point of order assailing the competency of the meeting to consider a proposed resolution, which is long enough to form a speech against the resolution, can be ruled out. 26 Bom.L.R. 987=1925 B. 49. A point of order objecting to the validity of votes tendered for the resolution should be handed over to the chairman before he commences to take the poll, and it should also be directed to particular votes. 26 Bom.L.R. 987=1925 B. 49=90 I.C. 580.

Art. 55: CHAIRMAN'S POWER OF CLOSING MEETING.—The Chairman empowered by the

Articles of Association to adjourn a meeting has a discretion to adjourn with the consent of the meeting, but he is not necessarily bound to do so. 47 B. 915=25 Bom. L.R. 1083=80 I.C. 75.

RIGHT OF GENERAL MEETING TO ADJOURN.—In the absence of an express prohibition to the contrary, the law gives the right to every meeting to adjourn itself, provided the adjournment is for a *bona fide* purpose. 55 M.L.J. 385=1928 M. 1215.

PROXIES, USE OF, IN ADJOURNED MEETING.—An adjourned meeting is merely a continuation of the meeting and old proxies may be made use of at the adjourned meeting also. 55 M.L.J. 385=1928 M. 1215.

Art. 56.—The mere fact that an amendment to a resolution was first lost on a show of hands but on demand for a poll before the result was declared it was withdrawn in view of another amendment, does not invalidate the original resolution. 26 Bom. L.R. 987=1925 B. 49.

are not *ultra vires*, the money having been received by the company and applied for its purposes, the Official Liquidator of the company cannot during the winding up proceedings, reduce the balance outstanding at the date of liquidation by disputing the liability of the company to pay the whole sums advanced. I. L. R. (1938) Bom. 421 = 42 C. W. N. 733 = 40 Bom. L. R. 1109 = 1938 P. C. 159 (P. C.). Though the borrowings by the directors of a company may have at times exceeded the limits fixed by Art. 73, where the claim made by a creditor lending money is not in excess of the amount limited, the claim cannot be challenged on the ground that the incurring of the debt was *ultra vires*. The rule in *Clayton's case* has no application where the question is between moneys borrowed *intra vires* and moneys borrowed *ultra vires*. As soon as the amount due comes to below the limit, the borrowing is

74. The directors shall duly comply with the provisions of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, and in particular with the provisions in regard to the registration of the particulars of mortgages and charges affecting the property of the company or created by it, and to keeping a register of the directors, and to sending to the registrar, an annual list of members, and a summary of particulars relating thereto and notice of any consolidation or increase of share capital, or conversion of shares into stock, and copies of special resolutions and a copy of the register of directors and notifications of any changes therein.

75. The director shall cause minutes to be made in books provided for the purpose—

- (a) of all appointments of officers made by the directors ;
 - (b) of the names of the directors at each meeting of the directors and of any committee of the directors ;
 - (c) of all resolutions and proceedings at all meetings of the company, and, of the directors, and of committees of directors ;
- and every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose.

The seal.

76. The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for the purpose ; and those two directors and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

Disqualifications of Directors.

77. The office of director shall be vacated if the director—

¹[(a) fails to obtain within the time specified in sub-section (1) of section ²[85] of the Indian Companies Act, 1913, or at any time thereafter ceases to hold, the share qualification, if any, necessary for his appointment ; or]

¹[(b) is found to be of unsound mind by a Court of competent jurisdiction ; or]

¹[(c) is adjudged insolvent ; or]

¹[(d) fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made ; or]

¹[(e) without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of a managing director or manager or a legal or technical adviser or a banker ; or]

¹[(f) absents himself from three consecutive meetings of the directors or from all meetings of the directors for a continuous period of three months, whichever is longer, without leave of absence from the board of directors ; or]

¹[(g) accepts a loan from the company ; or]

LEG. REF.

¹ These clauses were substituted for the original Cls. (a) to (d) by S. 122 of Act XXII of 1936.

² This figure was substituted for the figure " 84 " by S. 19 of Act II of 1938.

NOTES.

authorised under Art. 73, and the presumption would be that the moneys already repaid represented the moneys borrowed *ultra vires* which never became the property of the company, but remained the property of the lender. In a case where the borrowing is *ultra vires* the directors, and not *ultra vires* the company, the money can be recovered in an action for money had and received. 37 Bom.L.R. 978=1936 B. 62.

Art. 75.—There is always a presumption in favour of the validity of the proceedings rather than in favour of their invalidity, if the fact which would go to invalidate the proceedings is not established beyond reasonable doubt. 26 Bom.L.R. 987=1925 B. 49. The minutes in the books are to be received, though not as conclusive, yet as *prima facie* evidence of resolution and proceedings at general meetings and a chairman's declaration of a poll as evidenced by entry in minutes will be presumed to be correct, and this presumption is rebuttable. But if the meeting be held under the orders

of the Court under the chairmanship of an officer of the Court the presumption is absolute. 26 Bom.L.R. 907=1925 B. 105.

Art. 76: IRREGULARITY IN AFFIXING SEAL.—Where a document is intended and required to be under seal, a mere defect or irregularity in affixing the seal, does not make the document bad for all purposes. If the Court is satisfied that the parties intended and had power to create a charge by the document, it will give effect to the intention notwithstanding any mistake in or a failure of the attempt to effect it. If, further, the document was acted upon by the company, the obligation it embodies will be enforced. 57 C. 1101=34 C.W.N. 570=1930 C. 782. An agreement between a company and a person as *banian* of the company that the latter will advance all the necessary funds up to a certain limit and in return will have the sole right to collect all sums due on bills to the company and re-pay himself the advances so made as also his remuneration, is an instrument which if otherwise binding creates an equitable charge on the company's outstandings for the amount due to the person. Such an agreement need not be under the company's seal. It is enough if it is in writing. Even if such agreement is required to be under seal by the Articles of Association, if it is fixed

¹[(h)] is concerned or participates in the profits of any contract with the company ; or

¹[(i)] is punished with imprisonment for a term exceeding six months :

Provided, however, that no director shall vacate his office by reason of his being a member of any company which has entered into contracts with, or done any work for, the company of which he is a director, but a director shall not vote in respect of any such contract or work, and if he does so vote, his vote shall not be counted.

Rotation of Directors.

78. At the first ordinary meeting of the company, the whole of the directors shall retire from office, and at the ordinary meeting in every subsequent year, one-third of the directors for the time being or, if their number is not three or a multiple of three, then the number nearest to one-third shall retire from office.

79. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

80. A retiring director shall be eligible for re-election.

81. The company at the general meeting at which a director retires in manner aforesaid may fill up the vacated office by electing a person thereto.

82. If at any meeting at which an election of directors ought to take place, the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place, and, if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors or such of them as have not had their places filled up shall be deemed to have been re-elected at the adjourned meeting.

83. ²[Subject to the provisions of sections 83-A and 83-B of the Indian Companies Act, 1913] the Company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

84. Any casual vacancy occurring on the board of directors may be filled up by the directors but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

85. The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting but shall be eligible for election by the company at that meeting as an additional director.

86. The Company may by extraordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead ; the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

Proceedings of Directors.

87. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time, summon a meeting of directors.

LEG. REF.

¹ The original cls. (e) and (f) were re-lettered (h) and (i) by S. 122 of Act XXII of 1936.

² These words were inserted by S. 122 of Act XXII of 1936.

NOTES.

with the seal irregularly, the irregularity does not affect the binding character of the agreement. 57 C. 1101=34 C.W.N. 570=1930 C. 782.

Art. 87: MEETING MUST BE DULY ASSEMBLED.—The mere accidental assembling of a majority of persons who are directors of a company does not constitute a legal board, and the acts of the directors at a meeting irregularly called, as where notice of meeting is not given to some of the directors, is not binding on the company, unless ratified. A majority must have been *duly assembled*, and then a majority of those who are assembled can act for the whole. But where there is a custom or by-law of the directors to hold meetings for the transaction of business at a certain time and place, special notice of such meetings is not

necessary in order to validate such business transacted thereat. So also, where a meeting is regularly assembled, but adjourns to a future time and place, special notice of the adjourned meeting is not necessary, since the fact and record of adjournment give such notice.

DIRECTOR CANNOT ACT BY PROXY.—A director cannot delegate the performance of his discretionary duties, which imply trust and confidence, to a proxy, but he must attend the meetings of the Board and act in person.

NOTICE OF MEETING.—The right of all the directors to notice is founded on the right of being present for the purpose of consultation of which right a minority cannot be arbitrarily deprived by the majority. But while all the members must be notified, in order to validate the transactions had at the meeting, it is not necessary that all should be present; but it will be sufficient if a quorum assemble. It follows that proceedings at a meeting of the majority of directors, without notice to the other members, are void, although all those present voted in favour of the action taken, and the result

88. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall (when the number of directors exceeds three) be three.

89. The continuing directors may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company but for no other purpose.

90. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting.

91. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so ¹[formed] shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors.

92. A committee may elect a chairman of their meetings: if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting.

93. A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in case of an equality of votes, the chairman shall have a second or casting vote.

94. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

Dividends and Reserve.

95. The company in general meeting may declare dividends, but no dividends shall exceed the amount recommended by the directors.

96. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

97. No dividends shall be paid otherwise than out of profits ¹[of the year or any other undistributed profits].

98. Subject to the rights of persons (if any) entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid upon any of the shares in the company, dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purposes of this article as paid on the share.

99. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose

LEG. REF.

¹ This word was substituted for the word "found" by Act X of 1914, Sch. I.

² These words were added by S. 122 of Act XXII of 1936.

NOTES.

would have been the same had the other members been present. It is not necessary that a notice convening a meeting of the directors should contain particulars as to the business which is to be done at the meeting. The meeting can take up any question it likes without previous notice so as to make it binding upon the whole committee. 54 M.L.J. 140=51 M. 68=1928 M. 372.

Art. 88.—The rules of a company as to the quorum for a meeting of the directors for enacting any business applies to the transaction of business by circulation where such transaction of business is allowed, but there is no restriction as to number. 20 L.W. 74; 51 C. 406=1924 C. 982=82 I.C. 405.

Art. 94.—Where a person who has ceased to be a director by efflux of time, entered into a contract as director on behalf of the company with a third party, and the shareholders agreed to ratify and carry out the same, it was held that the irregularity was cured by this article, and that the company was estopped from contending that the contract was not binding on it because the director who had entered into the contract was not a duly appointed one. 1935 R. 76=156 I.C. 196.

Art. 95.—Until the dividend is declared, no shareholder has any right of suit in respect of it. *Bond v. Barrow Haematite Steel Co.*, (1902) 1 Ch. 353. After its declaration it becomes a debt payable to the shareholder, and each shareholder becomes entitled to sue the company for the proportionate amount due to him. *Re Severn, etc.*, *Ry. Co.*, (1896) 1 Ch. 559. The company is not a trustee for the dividends held for the shareholders. 47 M.L.J. 563=1924 M. 721=79 I.C. 947.

to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit.

100. If several persons are registered as joint-holders of any share, any one of them may give effectual receipts for any dividend payable on the share.

101. Notice of any dividend that may have been declared shall be given in manner hereinafter mentioned to the persons entitled to share therein.

102. No dividend shall bear interest against the company.

Accounts.

¹[103. The directors shall cause to be kept proper books of account with respect to—
(a) all sums of money received and expended by the company and the matters in respect of which the receipts and expenditure take place :

(b) all sales and purchases of goods by the company :

(c) the assets and liabilities of the company.]

¹[104. The books of account shall be kept at the registered office of the company or at such other place as the directors shall think fit and shall be open to inspection by the directors during business hours.]

105. The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by law or authorised by the directors or by the company in general meeting.

¹[106. The directors shall as required by sections 131 and 131 A of the Indian Companies Act, 1913, cause to be prepared and to be laid before the company in general meeting such profit and loss accounts, ²[income and expenditure accounts], balance-sheets, and reports as are referred to in those sections.]

107. The profit and loss account shall ³[in addition to the matters referred to in sub-section (3) of section 132 of the Indian Companies Act, 1913] show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure distinguishing the expenses of the establishment, salaries and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting, and, in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

108. A balance-sheet shall be made out in every year and laid before the company in general meeting made up to a date not more than six months before such meeting. The balance sheet shall be accompanied by a report of the directors as to the state of the company's affairs, and the amount which they recommend to be paid by way of dividend, and the amount (if any) which they propose to carry to a reserve fund.

109. A copy of the balance-sheet and report shall, ⁴[fourteen] days previously to the meeting, be sent to the persons entitled to receive notices of general meetings in the manner in which notices are to be given hereunder.

110. The directors shall in all respects comply with the provisions of sections 130 to 135 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force.

Audit.

111. Auditors shall be appointed and their duties regulated in accordance with sections 144 and 145 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force.

Notices.

112. (1) A notice may be given by the company to any member either personally or by sending it by post to him to his registered address or (if he has no registered address in British India) to the address, if any, within British India supplied by him to the company for the giving of notices to him.

(2) Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

113. If a member has no registered address in British India, and has not supplied to the company an address within British India for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed to be duly given to him on the day on which the advertisement appears.

LEG. REF.

¹ This regulation was substituted by S. 122, Act XXII of 1936.

² These words were inserted by S. 19 of Act II of 1938.

³ These words were inserted by S. 122 of Act XXII of 1936.

⁴ This word was substituted for the word "seven" by S. 19 of Act II of 1938.

114. A notice may be given by the company to the joint-holders of a share by giving the notice to the joint-holder named first in the register in respect of the share.

115. A notice may be given by the company to the persons entitled to a share in consequence of the death or insolvency of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or assignee of the insolvent or by any like description, at the address (if any) in British India supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or insolvency had not occurred.

116. Notice of every general meeting shall be given in some manner hereinbefore authorised to (a) every member of the company (including bearers of share-warrants) except those members who (having no registered address within British India) have not supplied to the company an address within British India for the giving of notices to them, and also to (b) every person entitled to a share in consequence of the death or insolvency of a member, who but for his death or insolvency would be entitled to receive, notice of the meeting. ¹[* * * *]

TABLE B.

(See sections 249 and 262.)

TABLE OF FEES TO BE PAID TO THE REGISTRAR.

I.—By a company having a share capital.

	Rs.	A.	P.
1. For registration of a company whose nominal share capital does not exceed Rs. 20,000 a fee of ...	40	0	0
2. For registration of a company whose nominal share capital exceeds Rs. 20,000, the above fee of forty rupees, with the following additional fees regulated according to the amount of nominal capital (that is to say)—			
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 20,000 rupees up to 50,000 rupees ...	20	0	0
For every 10,000 rupees of nominal share capital or part of 10,000 rupees, after the first 50,000 rupees up to 1,00,000 rupees ...	5	0	0
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 1,00,000 rupees ...	1	0	0
3. For registration of any increase of share capital made after the first registration of the company, the same fees per 10,000 rupees or part of 10,000 rupees, as would have been payable if such increased share capital had formed part of the original share capital at the time of registration :			
Provided that no company shall be liable to pay in respect of nominal share capital on registration, or afterwards, any greater amount of fees than 1,000 rupees taking into account, in the case of fees payable on an increase of share capital after registration, the fees paid on registration.			
4. For registration of any existing company, except such companies as are by this Act, exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.			
5. For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the registrar by a receiver or the statement required to be filed with the registrar by the liquidator in a winding up ...	5	0	0
6. For making a record of any fact by this Act authorised or required to be recorded by the registrar, a fee of ...	5	0	0

II.—By a company not having a share capital.

1. For registration of a company whose number of members, as stated in the articles of association, does not exceed 20 ...	40	0	0
2. For registration of a company whose number of members, as stated in the articles of association, exceeds 20, but does not exceed 100 ...	100	0	0
3. For registration of a company whose number of members, as stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of Rs. 100 with an additional Rs. 5 for every 50 members, or less number than 50 members, after the first 100.			
4. For registration of a company in which the number of members is stated in the articles of association to be unlimited, a fee of ...	400	0	0
5. For registration of any increase on the number of members made after the registration of the company, the same fees as would have been payable ² [in respect of such increase] if such increase had been stated in the articles of association at the time of registration ...			

... ³[* * *]

LEG. REF.

¹ The words "No other persons shall be entitled to receive notices of general meetings" were omitted by S. 19 of Act II of 1938.

² These words were inserted by Notification No. 1-D dated 3rd November, 1917, see Gazette of India, 1917, Pt. I, p. 1787.

³ The figure "5" was omitted, *ibid.*

Provided that no one company shall be liable to pay on the whole a greater fee than Rs. 400 in respect of its number of members, taking into account the fee paid on the first registration of the company.

6. For registration of any existing company except such companies as are by this Act exempted from payment of fees in respect of registration under this Act the same fee as is charged for registering a new company.
7. For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the registrar by a receiver or the statement required to be filed with the registrar by the liquidator in a winding up ...
8. For making a record of any fact by this Act authorised or required to be recorded by the registrar a fee of ...

Rs. A. P.

5 0 0

5 0 0

¹[THE SECOND SCHEDULE.

(See sections 98 and 154.)

FORM I.

THE INDIAN COMPANIES ACT, 1913. STATEMENT IN LIEU OF PROSPECTUS filed by

.....LIMITED,
pursuant to section 98 of the Indian Companies Act, 1913.

Presented for filing by

The nominal share capital of the company.	Rs.
Divided into	Shares of Rs. each. " Rs. each. " Rs. each.
Amount (if any) of above capital which consists of redeemable preference shares	Shares of Rs. each.
The date on or before which these shares are, or are liable, to be redeemed.	
Names, descriptions and addresses of directors or proposed directors and managers or proposed managers, and any provision in the articles, or in any contract, as to appointment of and remuneration payable to directors or managers.	
If the share capital of the company is divided into different classes of shares, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively.	
Number and amount of shares and debentures agreed to be issued as fully or partly paid up otherwise than in cash.	1. —shares of Rs. fully paid. 2. —shares upon which Rs. . . . per share credited as paid. 3. Debenture Rs. 4. Consideration.
Names and addresses of vendors of property purchased or acquired, or proposed to be purchased or acquired by the company. Amount (in cash, shares or debentures) payable to each separate vendor.	
Amount (if any) paid or payable (in cash or shares or debentures) for any such property specifying amount (if any) paid or payable for goodwill.	Total purchase price Rs..... Cash Rs..... Shares Rs..... Debentures Rs..... Goodwill Rs.....
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company; or, Rate of the commission.. ..	Amount paid. Amount payable. Rate per cent.

LEG. REF.

Act XXII of 1936.

¹ This schedule was substituted by S. 123 of

The number of shares, if any, which persons have agreed for a commission to subscribe absolutely.	
Estimated amount of preliminary expenses.	Rs.....
Amount paid or intended to be paid to any promoter.	Name of promoter..... Amount Rs.....
Consideration for the payment.	Consideration :—
Dates of, and parties to every material contract (except contracts entered into in the ordinary course of the business intended to be carried on by the company or contracts, other than contracts appointing or fixing the remuneration of a managing ¹ director or managing agent, entered into more than two years before the delivery of this statement).	
Time and place at which the contracts or copies thereof may be inspected.	
Names and addresses of the auditors of the company (if any).	
Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.	
If it is proposed to acquire any business, the amount, as certified by the persons by whom the ¹ [accounts] of the business have been audited, of the net profits of the business in respect of each of the three financial years immediately preceding the date of this statement provided that in the case of a business which has been carried on for less than three years and the amounts of which have only been made up in respect of two years or one year the above requirement shall have effect as if references to two years or one year as the case may be, were substituted for references to three years, and in any such case the statement shall say how long the business to be acquired has been carried on.	
(Signatures of the persons above-named as Directors or proposed Directors or of their agents authorised in writing.)	
Date	

FORM II.

THE INDIAN COMPANIES ACT, 1913.
STATEMENT IN LIEU OF PROSPECTUS
filed by

.....LIMITED,
pursuant to sub-section (1) of section 154 of the Indian Companies Act, 1913.
Presented for filing by

The nominal share capital of the company.	Rs.
Divided into	Shares of Rs..... each. Shares of Rs..... each. Shares of Rs..... each.

LEG. REF.

¹ This word was substituted for the word

" amounts " by S. 20 of Act II of 1938.

Amount (if any) of above capital which consists of redeemable preference shares.	Shares of Rs.....each.	
The date on or before which these shares are or are liable to be redeemed.		
Names, descriptions and addresses of Directors or proposed Directors and Managers or proposed Managers and any provision in the Articles, or in any contract, as to appointment of and remuneration payable to Directors or Managers.		
If the share capital of the Company is divided into different classes of shares, the right of voting at meetings of the Company conferred by and the rights in respect of capital and dividends attached to, the several classes of shares respectively.		
Number and amount of shares and debentures issued within the two years preceding the date of this statement as fully or partly paid up otherwise than for cash or agreed to be so issued at the date of this statement.	1. Shares of Rs.....fully paid. 2. Shares upon which Rs. ...per share credited as paid. 3. Debenture Rs. 4. Consideration.	
Names and addresses of vendors of property (1) purchased or acquired by the Company within the two years preceding the date of this Statement or (2) agreed or proposed to be purchased or acquired by the Company.		
Amount (in cash, shares or debentures) payable to each separate vendor.		
Amount (if any) paid or payable (in cash or shares or debentures) for any such property specifying amount (if any) paid or payable for goodwill.	Total purchase price Cash Shares Debentures Goodwill	Rs..... Rs..... Rs..... Rs..... Rs.....
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the Company ; or rate of the Commission.	Amount paid. Amount payable. Rate per cent.	
The number of shares, if any, which persons have agreed for a commission to subscribe absolutely.		
Unless more than two years have elapsed since the date on which the Company was entitled to commence business :—		
Estimated amount of preliminary expenses ..	Rs.	
Amount paid or intended to be paid to any promoter.	Name of promoter.	
Consideration for the payment. ..	Amount Rs.	
	Consideration.	
Dates of, and parties to every material contract (except contracts entered into in the ordinary course of the business intended to be carried on by the Company or contracts, other than contracts appointing or fixing the remuneration of a Managing Director or Managing Agent, entered into more than two years before the delivery of this statement.		
Times and place at which the contracts or copies thereof may be inspected.		
Names and addresses of the auditors of the Company.		
Full particulars of the nature and extent of the interest of every Director in the promotion of or in the property purchased or acquired by the Company within the two years preceding the date of this statement or proposed to be acquired by the Company or where		

the interest of such a Director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a Director, or otherwise for services rendered by him or by the firm in connection with the promotion or the formation of the Company.

If it is proposed to acquire any business, the amount, as certified by the persons by whom the accounts of the business have been audited, of the net profits of the business in respect of each of the three financial years immediately preceding the date of this statement provided that in the case of a business which has been carried on for less than three years and the accounts of which have only been made up in respect of two years or one year the above requirements shall have effect as if references to two years or one year, as the case may be, were substituted for references to three years, and in any such case the statement shall say how long the business to be acquired has been carried on.

(Signatures of the persons above named as Directors or proposed Directors or of their agents authorised in writing.)

Dated the

day of

]

THE THIRD SCHEDULE.

FORM A.

(See sections 6 and 151.)

MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY SHARES.

1st.—The name of the company is "The Eastern Stream Packet Company, Limited."

2nd.—The registered office of the company will be situate in the province of Bombay.

3rd.—The objects for which the company is established are "the conveyance of passengers, and goods in ships or boats between such places as the company may from time to time determine, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th.—The liability of the members is limited.

5th.—The share capital of the company is two hundred thousand rupees, divided into one thousand shares of two hundred rupees each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, addresses and descriptions of subscribers.	Number of shares taken by each subscriber.
1. A.B. of , merchant	200
2. C.D. " " " " " " " " " "	25
3. E.F. " " " " " " " " " "	30
4. G.H. " " " " " " " " " "	40
5. I.J. " " " " " " " " " "	15
6. K.L. " " " " " " " " " "	5
7. M.N. " " " " " " " " " "	10
TOTAL SHARES TAKEN.	325

Dated the

day of

19

Witness to the above signatures.

X. Y., of

(See sections 7 and 151.)

Memorandum of Association.

2nd.—The registered office of the company will be situate in Calcutta.

4th.—The liability of the members is limited.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

Names, Addresses and Descriptions of Subscribers.

Dated the

Witness to the above signatures.

X. Y. of

ARTICLES OF ASSOCIATION TO ACCOMPANY PRECEDING MEMORANDUM OF ASSOCIATION.

Number of Members.

1. The company for the purpose of registration is declared to consist of five hundred members.
2. The directors hereinafter mentioned may, whenever the business or the association requires it, register an increase of members.

Definition of Members.

3. Every person shall be deemed to have agreed to become a member of the company who insures any ship or share in a ship in pursuance of the regulations hereinafter contained.

General Meetings.

4. The first general meeting shall be held at such time not being less than one month nor more than three months after the incorporation of the company, and at such place, as the directors may determine.

5. A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place, as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be called by any two members in the same manner as nearly as possible as that in which meetings are to be called by the Directors.

6. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

7. The directors may, whenever they think fit, and shall, on a requisition made in writing by any five or more members, call an extraordinary general meeting.

8. Any requisition made by the members must state the object of the meeting proposed to be called, and must be signed by the requisitionists and deposited at the registered office of the company.

9. On receipt of the requisition the directors shall forthwith proceed to call a general meeting: if they do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited, the requisitionists or any other five members may themselves call a meeting.

Proceedings at General Meetings.

10. Fourteen days' notice at the least, specifying the place, the day and the hour of meeting, and in case of special business the general nature of the business, shall be given to the members in manner hereinafter mentioned or in such other manner (if any) as may be prescribed by the company in general meeting; but the non-receipt of such a notice by any member shall not invalidate the proceedings at any general meeting.

11. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of the consideration of the accounts balance-sheets and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of remuneration of the auditors.

12. No business shall be transacted at any meeting except the declaration of a dividend, unless a quorum of members is present at the commencement of the business. The quorum shall be ascertained as follows (that is to say) :—if the members of the company at the time of the meeting do not exceed ten in number, the quorum shall be five if they exceed ten, there shall be added to the above quorum one for every five additional members with this limitation, that no quorum shall in any case exceed ten.

13. If within one hour from the time appointed for the meeting a quorum of members is not present, the meeting, if called on the requisition of the members, shall be dissolved; in any other case it shall stand adjourned to the same day in the following week at the same time and place; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned *sine die*.

14. The chairman (if any) of the directors shall preside as chairman at every general meeting of the company.

15. If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the members present shall choose some one of their number to be chairman of that meeting.

16. The chairman may, with the consent of the meeting adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

17. At any general meeting, unless a poll is demanded by at least three members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

18. If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

Votes of Members.

19. Every member shall have one vote and no more.

20. If any member is a lunatic or idiot, he may vote by his committee or other legal guardian.

21. No member shall be entitled to vote at any meeting unless all moneys due from him to the company have been paid.

22. On a poll votes may be given either personally or by proxy: Provided that no company shall vote by proxy as long as a resolution of its directors in accordance with the provisions of section 80 of the Indian Companies Act, 1913, is in force. A proxy shall be appointed in writing under the hand of the appointer, or if such appointer is a corporation, under its common seal.

23. (1) No person shall act as a proxy unless he is a member, or unless he is appointed to act at the meeting as proxy for a corporation.

(2) The instrument appointing him shall be deposited at the registered office of the company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.

24. Any instrument appointing a proxy shall be in the following form :—

Company, Limited.

I, _____, of _____, being a Member of the _____ Company, Limited, hereby appoint _____ of _____ as my proxy, to vote for me and on my behalf at the [ordinary or extraordinary, as the case may be] general meeting of the company to be held on the _____ day of _____ and at any adjournment thereof.

Signed this _____ day of _____.

Directors.

25. The number of the directors and the names of the first directors shall be determined by the subscribers of the memorandum of association.

26. Until directors are appointed, the subscribers of the memorandum of association, shall, for all the purposes of the Indian Companies Act, 1913, be deemed to be directors.

Powers of Directors.

27. The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not by the Indian Companies Act, 1913, or by any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

Elections of Directors.

28. The directors shall be elected annually by the company in general meeting.

Business of Company.

(Here insert rules as to mode in which business of insurance is to be conducted.)

Audit.

29. Auditors shall be appointed and their duties regulated in accordance with sections 144 and 145 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being

in force, and for this purpose the said sections shall have effect as if the word "members" were substituted for "shareholders," and as if "first general meeting" were substituted for "statutory meeting."

Notices.

30. A notice may be given by the company to any member either personally or by sending it by post to him to his registered address.

31. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Names, Addresses and Descriptions of Subscribers.

" 1. A. B. of
" 2. C. D. of
" 3. E. F. of
" 4. G. H. of
" 5. I. J. of
" 6. K. L. of
" 7. M. N. of
day of

19 .

Dated the

Witness to the above signatures.

X. Y., of

FORM C.

(See sections 7 and 151.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE, AND HAVING A SHARE CAPITAL.

Memorandum of Association.

1st.—The name of the company is "The Snowy Range Hotel Company, Limited."

2nd.—The registered office of the company will be situate in the province of Bengal.

3rd.—The objects for which the company is established are "the facilitating travelling in the Snowy Range, by providing hotels and conveyances by sea and by land for the accommodation of travellers and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th.—The liability of the members is limited.

5th.—Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company, contracted before he ceases to be a member, and the costs, charges and expenses of winding up the same and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding fifty rupees.

6th.—The share capital of the company shall consist of five hundred thousand rupees, divided into five thousand shares of one hundred rupees each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, addresses and descriptions of subscribers.	Number of shares taken by each subscriber
" 1. A. B. of	200
" 2. C. D. of	25
" 3. E. F. of	30
" 4. G. H. of	40
" 5. I. J. of	15
" 6. K. L. of	5
" 7. M. N. of	10
TOTAL SHARES TAKEN	325

Dated the

day of

19 .

Witness to the above signatures.

X. Y., of

Articles of Association to accompany preceding Memorandum of Association.

1. The share capital of the company is five hundred thousand rupees, divided into five thousand shares of one hundred rupees each.
2. The directors may, with the sanction of the company in general meeting, reduce the amount of shares in the company.
3. The directors may, with the sanction of the company in general meeting, cancel any shares belonging to the company.
4. All the articles of Table A of the Indian Companies Act, 1913, shall be deemed to be incorporated with these articles and to apply to the company.

Names, Addresses and Descriptions of Subscribers.

- " 1. A. B. of
 " 2. C. D. of
 " 3. E. F. of
 " 4. G. H. of
 " 5. I. J. of
 " 6. K. L. of
 " 7. M. N. of

, merchant.

Dated the

day of

19 .

Witness to the above signatures.

X. Y., of

FORM D.

(See Sections 8 and 151.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF AN UNLIMITED COMPANY HAVING A SHARE CAPITAL.

Memorandum of Association.

- 1st.—The name of the company is "The Patent Stereotype Company."
 2nd.—The registered office of the company will be situate in the province of Bomaby.
 3rd.—The objects for which the company is established are "the working of a patent method of founding and casting stereotype plates of which method P. Q., of Bombay, is the sole patentee."

We, the several persons whose names are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, addresses and descriptions of subscribers.						Number of shares taken by each subscriber.
" 1.	A. B. of	...	...	...	...	3
" 2.	C. D. of	...	...	...	...	2
" 3.	E. F. of	...	...	...	...	1
" 4.	G. H. of	...	...	...	...	2
" 5.	I. J. of	...	...	...	...	2
" 6.	K. L. of	...	...	...	...	1
" 7.	M. N. of	...	...	...	...	1
TOTAL SHARES TAKEN						12

Dated the

day of

19 .

Witness to the above signatures.

X. Y., of

Articles of Association to accompany the preceding Memorandum of Association.

1. The share capital of the company is twenty thousand rupees, divided into twenty shares of one thousand rupees each.
2. All the articles of Table A of the Indian Companies Act, 1913, shall be deemed to be incorporated with these articles and to apply to the company.

Names, Addresses and Descriptions of Subscribers.

- " 1. A. B. of _____, merchant.
 " 2. C. D. of _____
 " 3. E. F. of _____
 " 4. G. H. of _____
 " 5. I. J. of _____
 " 6. K. L. of _____
 " 7. M. N. of _____

Dated the

day of

19 .

Witness to the above signatures.

X. Y., of

FORM E.

AS REQUIRED BY PART II OF THE ACT.

(See Section 32.)

Summary of Share Capital and Shares of the	day of	19	Company, Limited, made up
to the	ordinary general meeting in 19	.)	(being the day of the first
Nominal share capital Rs.	divided into*	} shares of Rs. each. shares of Rs. each.	
Total number of shares taken up* to the	day of	19	} existing
which number must agree with the total shown in the list as held by	members.		
Number of shares issued subject to payment wholly in cash			...
Number of shares issued as fully paid up otherwise than in cash			...
Number of shares issued as partly paid up to the extent of per share otherwise than in cash			... }
† There has been called up on each—of shares			...Rs.
There has been called up on each—of shares			...Rs.
There has been called up on each—on shares			...Rs.
‡ Total amount of calls received, including payments on application and allotment			... } Rs.
Total amount (if any) agreed to be considered as paid on shares which have been issued as fully paid up otherwise than in cash			... } Rs.
Total amount (if any) agreed to be considered as paid on shares which have been issued as partly paid up to the extent of per share			... } Rs.
Total amount of calls unpaid			Rs.
Total amount (if any) of sums paid by way of commission in respect of shares or debentures or allowed by way of discount since date of last summary...			... } Rs.
Total amount (if any) paid on § shares forfeited			...Rs.
Total amount of shares and stock for which share-warrants are outstanding			...Rs.
Total amount of share-warrant issued and surrendered respectively since date of last summary.			... } Rs.
Number of shares or amount of stock comprised in each share-warrant			Rs.
Total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act			... } Rs.

* When there are shares of different kinds or amounts (e.g., Preference and Ordinary of Rs. 200 or Rs. 100) state the numbers and nominal values separately.

† Where various amounts have been called

or there are shares of different kinds, state them separately.

‡ Include what has been received on forfeited as well as on existing shares.

§ State the aggregate number of shares forfeited.

List of persons holding shares in the _____ Company, Limited, on the _____ day of _____ 19_____, and of persons who have held shares therein at any time since the date of the last return, showing their names and addresses and an account of the shares so held.

Folio in register containing particulars.		Names, Addresses and Occupations.	
		Name in full.	
		Father's name.	
		Address.	
		Occupation or caste.	
*Number of shares held by existing Members at date of return.		Account of Shares.	
Number.†	§ Particulars of Shares transferred since the date of the last Return by persons who are still Members.		
	Date of Registration of Transfer.		
Number.‡	§ Particulars of Shares transferred since the date of the last Return by persons who have ceased to be Members.		
	Date of Registration of Transfer.		
		Remarks.	

Names and addresses of the persons who are the Directors of the _____, Limited,
on the _____ day of _____ 19 _____.

Names.	Addresses.

Names and addresses of the persons who are the managers of the _____, Limited,
on the _____ day of _____ 19 _____.

[illegible]

NOTE.—Banking companies must add a list of all their places of business.

I, _____, do hereby certify that the above list and summary truly and correctly states the facts as they stood on _____ day of _____ 19____.

(State whether director, manager or secretary).

* State the aggregate number of shares forfeited (if any).

† The aggregate number of shares held, and not the distinctive numbers, must be stated and the column must be added up throughout so as to make one total to agree with that stated in the summary to have been taken up.

‡ When the shares are of different classes, these columns may be sub-divided so that the number of each class held or transferred may be

shown separately.

§ The date of registration of each transfer should be given as well as the number of shares transferred on each date. The particulars should be placed opposite the name of the transferor and not opposite that of the transferee, but the name of the transferee may be inserted in the remarks column immediately opposite the particulars of each transfer.

FORM F.

(See Section 132.)

.....LIMITED.

Balance-sheet as at.....19

CAPITAL AND LIABILITIES.	PROPERTY AND ASSETS.
CAPITAL—	FIXED CAPITAL EXPENDITURE—
Authorised Capital shares of Rs. each	(Distinguishing as far as possible between expenditure upon goodwill, land, buildings, lease-holds, railway sidings, plant, machinery, furniture, development of property patents, trade marks, and designs, interest paid out of capital during construction, etc., and stating in every case the original cost and the additions thereto and deductions therefrom during the year, and the total Depreciation written off under each head. Where sums have been written off on a reduction of capital or a revaluation of assets every balance sheet after the first balance-sheet subsequent to the reduction or revaluation shall show the reduced figures, with the date of and the amount of the reduction made).
(Distinguishing between the various classes of Capital.)	PRELIMINARY EXPENSES
Issued capital. shares of Rs. . . . each	COMMISSION OR BROKERAGE
(i) Shares issued as fully paid up pursuant to any contract without payments being received in cash shares of Rs. . . . each...	(Commission or Brokerage paid for underwriting or placing or subscribing shares or debentures of the until written off.)
(ii) Shares issued for payments in cash shares of Rs. . . . each.	DISCOUNT ALLOWED on the issue of shares or so much as has not been written off at the date balance sheet
Subscribed Capital. . . shares of Rs. . each.	STORES AND SPARE PARTS
Amount called up at Rs. per share	LOOSE TOOLS
Less—Calls unpaid—	LIVE-STOCK AND VEHICLES
(i) due from Managing Agents	STOCK-IN-TRADE
(ii) due from others	(Stating mode of valuation, e.g., cost or market value).
Add—Forfeited shares (amount paid up).	BILLS OF EXCHANGE
Note.—Where circumstances permit issued and subscribed capital and amount called up may be shown as one item, e.g.,	[Book Debts]
Issued and Subscribed Capital. shares of Rs. . . . each Rs. . . . paid up.	
RESERVES	
DEBENTURES stating the nature of security	
ANY SINKING FUND	
ANY OTHER FUND CREATED OUT OF NET PROFITS, including any development fund	
ANY PENSION OR INSURANCE FUND	
PROVISION FOR BAD AND DOUBTFUL DEBTS	

LEG. REF.

¹ This Form was substituted by S. 124 of Act XXII of 1936.² These words were substituted for the words "Book Debts" by S. 21 of Act II of 1938.

CAPITA AND LIABILITIES.	PROPERTY AND ASSETS.												
LOANS—	(Distinguishing between those considered good and in respect of which the company is fully secured and those considered good for which the company holds no security other than the debtor's personal security, and distinguishing between debts considered good and debts considered doubtful or bad. Debts due by directors or other officers of the company or any of them either severally or jointly with any other persons to be separately stated.)	...	...	...	...	...	...	...	...	...	...	...	...
(a) Secured—		...	...	...	...	...	...	...	...	...	...	...	...
(i) loans on mortgages or fixed assets		...	...	...	...	...	...	...	...	...	...	...	...
(ii) loans on debentures		...	...	...	...	...	...	...	...	...	...	...	...
(iii) Loans from banks, stating the nature of security		...	...	...	...	...	...	...	...	...	...	...	...
(iv) liabilities to subsidiary companies		...	...	...	...	...	...	...	...	...	...	...	...
(v) other secured loans, stating the nature of security		...	...	...	...	...	...	...	...	...	...	...	...
(vi) interest accrued on mortgages, debentures or other secured loans		...	...	...	...	...	...	...	...	...	...	...	...
(b) Unsecured—		...	...	...	...	...	...	...	...	...	...	...	...
(i) loans from banks		...	...	...	...	...	...	...	...	...	...	...	...
(ii) fixed deposits		...	...	...	...	...	...	...	...	...	...	...	...
(iii) short term loans		...	...	...	...	...	...	...	...	...	...	...	...
(iv) advances by directors or managers and managing agents		...	...	...	...	...	...	...	...	...	...	...	...
(v) interest accruing but not due and interest accrued and due		...	...	...	...	...	...	...	...	...	...	...	...
(vi) liabilities to subsidiary companies		...	...	...	...	...	...	...	...	...	...	...	...
UNCLAIMED DIVIDENDS		...	...	...	...	...	...	...	...	...	...	...	...
LIABILITIES—		...	...	...	...	...	...	...	...	...	...	...	...
For Goods supplied		...	...	...	...	...	...	...	...	...	...	...	...
For Expenses		...	...	...	...	...	...	...	...	...	...	...	...
For Acceptances		...	...	...	...	...	...	...	...	...	...	...	...
For Other Finance		...	...	...	...	...	...	...	...	...	...	...	...
ADVANCE PAYMENTS AND UNEXPIRED DISCOUNTS		...	...	...	...	...	...	...	...	...	...	...	...
(For the portion for which value has still to be given, e.g., in the case of the following classes of companies—		...	...	...	...	...	...	...	...	...	...	...	...
Newspaper, Fire Insurance, Theatre, Club, Banking Steamship Companies, etc.)		...	...	...	...	...	...	...	...	...	...	...	...
PROFIT AND LOSS		...	...	...	...	...	...	...	...	...	...	...	...
CONTINGENT LIABILITIES—		...	...	...	...	...	...	...	...	...	...	...	...
Claims against the company not acknowledged as		...	...	...	...	...	...	...	...	...	...	...	...

CAPITAL AND LIABILITIES.			PROPERTY AND ASSETS.				
debts
Money for which the company is contingently liable
(Showing separately the amount of any guarantees given by the company on behalf of directors or officers of the company.)
Arrears of Cumulative Preference Dividends

[The information required to be given under any of the items or sub-items in this Form if not included in the Balance-sheet itself shall be furnished in a separate Schedule or Schedule s to be attached to and to form part of the Balance Sheet.]

FORM G.

(See Section 136.)

FORM OF STATEMENT TO BE PUBLISHED BY BANKING AND INSURANCE COMPANIES AND DEPOSIT, PROVIDENT, OR BENEFIT SOCIETIES.

*The share capital of the company is Rs. _____ divided into _____ shares of Rs. _____ each.

The number of shares issued is _____ Calls to the amount of Rs. _____ per share have been made, under which the sum of Rs. _____ has been received.

The liabilities of the company on the thirty-first day of December (or thirtieth of June) were—
Debts owing to sundry persons by the company :

- Under decree, Rs.
- On mortgages or bonds, Rs.
- On notes, bills or hundis, Rs.
- On other contracts, Rs.
- On estimated liabilities, Rs.

The assets of the company on that day were :
Government securities [stating them], Rs.
Bill of exchange, hundis and promissory notes, Rs.
Cash at the Bankers, Rs.
Other securities, Rs.

[FORM H.

(See Section 277.)

INFORMATION TO BE SUPPLIED IN OR IN ADDITION TO THE INFORMATION CONTAINED IN THE BALANCE-SHEET OF A COMPANY REFERRED TO IN PART X.

Liabilities.

1. *Summary of Authorised Share Capital and Issued Share Capital.*
2. *Redeemable Preference Shares, stating date on or before which the shares are or are liable to be redeemed.*
3. *Debentures stating the nature of the security.*
4. *Redeemed debentures which the Company has power to re-issue.*
5. *Loans (a) secured, stating the nature of the security (b) unsecured.*
6. *Loans from Banks :—*
 - (a) *Secured, stating the nature of the security ;*
 - (b) *Unsecured.*
7. *Profit and Loss Account, showing (unless disclosed in a separate account) :—*
Balance as per previous Balance-Sheet.
Appropriation thereof.
Profit since last Balance-Sheet.
8. *Contingent Liabilities.*
9. *Arrears of Cumulative Preference Dividend.*

Assets.

1. *Fixed Assets, with sufficient particulars to disclose their general nature, and stating how their values are arrived at.*
2. *Preliminary expenses, so far as not written off.*
3. *Any expenses incurred in connection with any issue of Share Capital or Debentures, so far as not written off.*
4. *If it is shown as a separate item in or is otherwise ascertainable from the books of the Company, or from any contract for the sale or purchase of any property to be acquired by the Company, or from any documents in the possession of the Company relating to the stamp duty payable in respect of any such contract or the conveyance of any such property the amount of the goodwill and of any patents and trade marks as so shown or ascertained.*
5. *Interest paid on Capital, so far as not written off, showing the Share Capital on which and the rate at which interest has been paid out of Capital during the period to which the accounts relate.*
6. *Discount allowed on shares issued, so far as not written off.*
7. *Commission paid or allowed in respect of any shares or debentures, so far as not written off.*
8. *Loans outstanding to enable employees or trustees on their behalf to purchase shares in the Company.*
9. *Particulars showing :—*
 - (a) *the amount of any loans which during the period to which the accounts relate have been made either by the Company or by any other person under a guarantee from or on a security provided by the Company to any director or officer of the Company, including any such loans which were repaid during the said period ;*

* If the company has no capital divided into shares, the portion of the statement relating to capital and share must be omitted.

and
(b) the amount of any loans made in manner aforesaid to any director or officer at any time before the period aforesaid and outstanding at the expiration thereof;

and
(c) the total of the amount paid to the Directors as remuneration for their services, inclusive of all fees, percentages, or other emoluments, paid to or receivable by them by or from the Company or by or from any subsidiary Company.

Note (1).—There shall not be required to be shown:—

(a) In the case of a Company the ordinary business of which includes the lending of money, loans made by the Company in the ordinary course of its business;

or
(b) loans made by the Company to any employee of the Company if the loan does not exceed twenty thousand rupees and is certified by the directors of the Company to have been made in accordance with any practice adopted or about to be adopted by the Company with respect to loans to its employees.

Note (2).—The foregoing shall not apply in relation to a Managing Director of the Company, and in the case of any other director who holds any salaried employment or office in the Company there shall not be required to be included in the said total amount any sums paid to him except sums paid by way of directors' fees.

(Where a company is a holding company then the Balance-Sheet shall disclose the particulars required by section 132-A.)]

THE FOURTH SCHEDULE.

(See Section 290.)

ENACTMENTS REPEALED.

1	2	3	4
Year.	No.	Subject or short title.	Extent of repeal.
1882 ...	VI	The Indian Companies Act, 1882.	So much as has not been repealed.
1887 ...	VI	The Indian Companies Act (1882) Amendment Act, 1887.	The whole.
1891 ...	XII	The Amending Act, 1891.	So much of the Second Schedule as relates to the Indian Companies Act, 1882.
1895 ...	XII	The Indian Companies (Memorandum of Association) Act, 1895.	The whole.
1899 ...	IX	The Indian Arbitration Act, 1899.	The second proviso to section 3 relating to the Indian Companies Act, 1882.
1900 ...	IV	The Indian Companies (Branch Registers) Act, 1900.	The whole.
1910 ...	IV	The Indian Companies (Amendment) Act, 1910.	The whole.

APPENDIX I.

(Table B in schedule to Act XIX of 1857.)¹

REGULATIONS FOR MANAGEMENT OF THE COMPANY.

Shares.

1. No person shall be deemed to have accepted any share in the Company unless he has testified his acceptance thereof by writing under his hand in such form as the Company from time to time directs.

2. The Company may from time to time make such calls upon the shareholders, in respect of all moneys unpaid on their shares, as they think fit, provided that twenty-one days' notice at least is given of each call; and each shareholder shall be liable to pay the amount of calls so made to the persons and at the times and places appointed by the Company.

3. A call shall be deemed to have been made at the time when the resolution authorizing such call was passed.

LEG. REF.

¹ See S. 290 (1) (b) of the Indian Companies Act VII of 1913.

The Table is reproduced here as an Appendix for convenience of reference.

4. If, before or on the day appointed for payment, any shareholder does not pay the amount of any call to which he is liable, then such shareholder shall be liable to pay interest for the same at the rate of 5 per cent. per annum from the day appointed for the payment thereof to the time of the actual payment.

5. The company may, if they think fit, receive, from any of the shareholders willing to advance the same, all or any part of the moneys due upon their respective shares beyond the sums actually called for, and upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the Company may pay interest at such rate as the shareholder paying such sum in advance and the Company agree upon.

6. If several persons are registered as joint holders of any share, any one of such persons may give effectual receipts for any dividend payable in respect of such share.

7. The Company may decline to register any transfer of shares made by a shareholder who is indebted to them.

8. Every shareholder shall, on payment of such sum not exceeding eight annas as the Company may prescribe, be entitled to a certificate, under the common seal of the Company, specifying the share or shares held by him, and the amount paid up thereon.

9. If such certificate is worn out or lost, it may be renewed on payment of such sum, not exceeding eight annas, as the Company may prescribe.

10. The transfer books shall be closed during the fourteen days immediately preceding the ordinary general meeting in each year.

Transmission of Shares.

11. The executors or administrators or representatives of a deceased shareholder shall be the only persons recognized by the Company as having any title to his share.

12. Any person becoming entitled to a share in consequence of the death, bankruptcy or insolvency of any shareholder, or in consequence of the marriage of any female shareholder or in any way other than by transfer, may be registered as a shareholder upon such evidence being produced as may from time to time be required by the Company.

13. Any person who has become entitled to a share in any way other than by transfer may, instead of being registered himself, elect to have some person to be named by him registered as a holder of such share.

14. The person so becoming entitled shall testify such election by executing to his nominee a transfer of such share.

15. The instrument of transfer shall be presented to the Company accompanied with such evidence as they may require to prove the title of the transferor, and thereupon the Company shall register the transferee as a shareholder.

Forfeiture of shares.

16. If any shareholder fails to pay any call due on the appointed day, the Company may, at any time thereafter, during such time as the call remains unpaid, serve a notice on him, requiring him to pay such call, together with any interest that may have accrued by reason of such non-payment.

17. The notice shall name a further date, and a place or places, being a place or places at which calls of the Company are usually made payable, on and at which such call is to be paid; it shall also state that, in the event of non-payment at the time and place appointed, the shares in respect of which such call was made will be liable to be forfeited.

18. If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may be forfeited by a resolution of the directors to that effect.

19. Any shares so forfeited shall be deemed to be the property of the Company, and may be disposed of in such manner as the Company thinks fit.

20. Any shareholder whose shares have been forfeited shall notwithstanding be liable to pay to the Company all calls owing upon such shares at the time of the forfeiture.

Increase in Capital.

21. The Company may, with the sanction of the Company previously given in general meeting, increase its capital.

22. Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions in all respects, whether with reference to the payment of calls, or the forfeiture of shares on non-payment of calls or otherwise, as if it had been part of the original capital.

General Meetings.

23. The first general meeting shall be held at such time, not being more than twelve months after the incorporation of the Company, and at such place as the directors may determine.

24. Subsequent general meetings shall be held at such time and place as may be prescribed by the Company in general meeting; and if no other time or place is prescribed, a general meeting shall be held on the ¹[first Monday in February] in every year, at such place as may be determined by the directors.

LEG. REF.

¹ The bracketted portion read originally as

follows: ". . . day of"

25. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

26. The directors may, whenever they think fit, and they shall, upon a requisition made in writing by any number of shareholders holding in the aggregate not less than one-fifth part of the shares of the Company, convene an extraordinary general meeting.

27. Any requisition so made by the shareholders shall express the object of the meeting proposed to be called, and shall be left at the registered office of the Company.

28. Upon the receipt of such requisition, the directors shall forthwith proceed to convene a general meeting; if they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other shareholders holding the required number of shares, may themselves convene a meeting.

29. Seven days' notice at the least, specifying the place, the time, the hour of meeting, and the purpose for which any general meeting is to be held, shall be given by advertisement, or in such other manner (if any) as may be prescribed by the Company.

30. Any shareholder may, on giving not less than three days' previous notice, submit any resolution to a meeting beyond the matters contained in the notice given of such meeting.

31. The notice required of a shareholder shall be given by leaving a copy of the resolution at the registered office of the Company.

32. No business shall be transacted at any meeting, except the declaration of a dividend, unless a quorum of shareholders is present at the commencement of such business: and such quorum shall be ascertained as follows (that is to say); if the shareholders belonging to the Company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten, there shall be added to the above quorum one for every five additional shareholders up to fifty, and one for every ten additional shareholders after fifty, with this limitation, that it shall not be necessary for any quorum in any case to exceed forty.

33. If within one hour from the time appointed for the meeting the required number of shareholders is not present, the meeting, if convened upon the requisition of the shareholders, shall be dissolved; in any other case it shall stand adjourned to the following day at the same time and place; and if at such adjourned meeting the required number of shareholders is not present, it shall be adjourned *sine die*.

34. The chairman (if any) of the Board of Directors shall preside as Chairman at every meeting of the Company.

35. If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the shareholders present shall choose some one of their number to be chairman of such meeting.

36. The chairman may, with the consent of the meeting, adjourn any meeting from time to time and from place to place; but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

37. At any general meeting, unless a poll is demanded by at least five shareholders, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the Company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

38. If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs; and the result of such poll shall be deemed to be the resolution of the Company in general meeting.

Votes of Shareholders.

39. Every shareholder shall have one vote for every share up to ten; he shall have an additional vote for every five shares beyond the first ten shares up to one hundred, and an additional vote for every ten shares held by him beyond the first hundred shares.

40. If any shareholder is a lunatic or idiot, he may vote by his committee; and if any shareholder is a minor, he may vote by his guardian, or any one of his guardians if more than one.

41. If more persons than one are jointly entitled to a share or shares, the person whose name stands first in the register of shareholders as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same.

42. No shareholder shall be entitled to vote at any meeting unless all calls due from him have been paid, nor until he shall have been possessed of his shares three calendar months, unless such shares shall have been acquired or shall have come by bequest, or by marriage, or by succession to an intestate's estate, or by any deed of settlement after the death of any person who shall have been entitled for life to the dividends of such shares.

43. Votes may be given either personally or by proxies; a proxy shall be appointed in writing under the hand of the appointer, or, if such appointer is a corporation, under their common seal.

44. No person shall be appointed a proxy who is not a shareholder, and the instrument appointing him shall be deposited at the registered office of the Company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote; but no instrument appointing a proxy shall be valid after the expiration of one month from the date of its execution.

Directors.

45. The number of the directors, and the names of the first directors shall be determined by the subscribers of the memorandum of association.

46. Until directors are appointed, the subscribers of the memorandum of association shall for all the purposes of this Act be deemed to be directors.

Powers of Directors.

47. The business of the Company shall be managed by the directors, who may exercise all such powers of the Company as are not by this Act or by the articles of association (if any) declared to be exercisable by the Company in general meeting, subject nevertheless to any regulations of the articles of association, to the provisions of this Act, and to such regulations, not being inconsistent with the aforesaid regulations or provisions, as may be prescribed by the Company in general meeting, but no regulation made by the Company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

Disqualification of Directors.

48. The office of director shall be vacated—

if he holds any other office or place of profit under the Company ;

if he becomes bankrupt or insolvent ;

if he is concerned in or participates in the profits of any contract with the Company ;

if he participates in the profits of any work done for the Company.

But the above rules shall be subject to the following exceptions :—that no director shall vacate his office by reason of his being a shareholder in any incorporated Company which has entered into contracts with or done any work for the Company of which he is director ; nevertheless he shall not vote in respect of such contract or work ; and, if he does so vote, his vote shall not be counted, and he shall incur a penalty, not exceeding five hundred rupees.

Rotation of Directors.

49. At the first ordinary meeting after the incorporation of the Company the whole of the directors shall retire from office ; and at the first ordinary meeting in every subsequent year, one-third of the directors for the time being, or, if their number is not a multiple of three, then the number nearest to one-third, shall retire from office.

50. The one-third or other nearest number to retire during the first and second years ensuing the incorporation of the Company shall, unless the directors agree among themselves, be determined by ballot ; in every subsequent year the one-third or other nearest number who have been longest in office shall retire.

51. A retiring director shall be re-eligible.

52. The Company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons.

53. If at any meeting at which an election of directors ought to take place no such election is made, the meeting shall stand adjourned till the next day, at the same time and place, and, if at such adjourned meeting no election takes place, the former directors shall continue to act until new directors are appointed at the first ordinary meeting of the following year.

54. The Company may from time to time, in general meeting, increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to go out of office.

55. Any casual vacancy occurring in the Board of Directors may be filled up by the Directors ; but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.

Proceedings of Directors.

56. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings, as they think fit, and determine the quorum necessary for the transaction of business ; questions arising at any meeting shall be decided by a majority of votes ; in case of an equality of votes, the chairman, in addition to his original vote, shall have a casting vote ; a director may at any time summon a meeting of the directors.

57. The directors may elect a chairman of their meetings and determine the period for which he is to hold office ; but if no such chairman is elected or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting.

58. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit : any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors.

59. A committee may elect a chairman of their meetings : if no such chairman is elected, or if he is not present at the time appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting.

60. A committee may meet and adjourn as they think proper : questions at any meeting shall be determined by a majority of votes of the members present ; and in case of an equal division of votes, the chairman shall have a casting vote.

61. All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of

them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

62. The director shall cause minutes to be made in books provided for the purpose—

- (1) of all appointments of officers made by the directors ;
- (2) of the names of directors present at each meeting of directors and committees of directors ;
- (3) of all orders made by the directors and committees of directors ; and
- (4) of all resolutions and proceedings of meetings of the Company, and of the directors and committees of directors.

And any such minute as aforesaid if signed by any person purporting to be the chairman of any meeting of directors, or committee of directors, shall be receivable in evidence without any further proof.

63. The Company, in general meeting, may, by a special resolution, remove any director before the expiration of his period of office, and appoint another qualified person in his stead ; the person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed.

Dividends.

64. The directors may, with the sanction of the Company in general meeting, declare a dividend to be paid to the shareholders in proportion to their shares.

65. The directors may, before recommending any dividend, set aside out of the profits of the Company such sum as they think proper as a reserved fund to meet contingencies, or for equalizing dividends or for repairing or maintaining the works connected with the business of the Company, or any part thereof ; and the directors may invest the sum so set apart as a reserved fund upon such securities as they, with the sanction of the Company, may select.

66. The directors may deduct from the dividends payable to any shareholder all such sums of money as may be due from him to the Company on account of calls or otherwise.

67. Notice of any dividend that may have been declared shall be given to each shareholder or sent by post or otherwise to his registered place of abode ; and all dividends unclaimed for three years, after having been declared, may be forfeited by the directors for the benefit of the Company.

68. No dividend shall bear interest as against the Company.

Accounts.

69. Once at the least in every year the directors shall lay before the Company in general meeting a statement of the income and expenditure for the past year made up to a date not more than three months before such meeting.

70. The statement so made shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expense of the establishment, salaries, and other like matters ; every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting ; and in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

71. A balance-sheet shall be made out in every year, and laid before the general meeting of the Company ; and such balance-sheet shall contain a summary of the property and liabilities of the Company arranged under the heads appearing in the form annexed to this table, or as near thereto as circumstances admit.

72. A printed copy of such balance-sheet shall, seven days previously to such meeting, be delivered at or sent by post to the registered address of every shareholder.

Audit.

73. The accounts of the Company shall be examined, and the correctness of the balance-sheet ascertained by one or more auditor or auditors to be elected by the Company in general meeting.

74. If not more than one auditor is appointed, all the provisions herein contained relating to auditors shall apply to him.

75. The auditors need not be shareholders in the Company ; no person is eligible as an auditor who is interested otherwise than as a shareholder in any transaction of the Company ; and no director or other officer of the Company is eligible during his continuance in office.

76. The election of auditors shall be made by the Company at their ordinary meeting, or, if there are more than one, at their first ordinary meeting in each year.

77. The remuneration of the auditors shall be fixed by the Company at the time of their election.

78. Any auditor shall be re-eligible on his quitting office.

79. If any casual vacancy occurs in the office of auditor, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the same.

80. If no election of auditors is made in manner aforesaid, the Local Government may, on the application of one-fifth in number of the shareholders of the Company, appoint an auditor for the current year, and fix the remuneration to be paid to him by the Company for his services.

81. Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same with the accounts and vouchers relating thereto.

82. Every auditor shall have a list delivered to him of all books kept by the Company, and he shall at all reasonable times have access to the books and accounts of the Company; he may, at the expense of the Company, employ accountants or other persons to assist him in investigating such accounts, and he may in relation to such accounts examine the directors or any other officer of the Company.

83. The auditors shall make a report to the shareholders upon the balance-sheet and accounts; and in every such report they shall state whether in their opinion the balance-sheet is a full and fair balance-sheet, containing the particulars required by these regulations, and properly drawn up so as to exhibit a true and correct view of the state of the Company's affairs; and in case they have called for explanations or information from the directors, whether such explanations or information have been given by the directors, and whether they have been satisfactory; and such report shall be read, together with the report of the directors, at the ordinary meeting.

Notices.

84. Notices requiring to be served by the Company upon the shareholders may be served either personally, or by leaving the same, or sending them through the post in a letter addressed to the shareholders, at their registered places of abode.

85. All notices directed to be given to the shareholders shall, with respect to any share to which persons are jointly entitled, be given to whichever of the said persons is named first in the register of shareholders; and notice so given shall be sufficient notice to all the proprietors of such share.

FORM OF BALANCE-SHEET REFERRED TO IN TABLE B.

Balance-Sheet* of the

Company made upto 18 . . . Cr.

CAPITAL AND LIABILITIES.

PROPERTY AND ASSETS.

Dr.	I.—CAPITAL	...	SHOWING— The total amount received from the shareholders; showing also— (a) The number of shares ... (c) The amount paid per share. (c) If any arrears of calls, the nature of the arrear, and the names of the defaulters. (Any arrears due from any director or officer of the Company to be separately stated). (d) The particulars of any forfeited shares.	Rs.a.p.	Rs.a.p.	II.—PROPERTY HELD BY THE COMPANY.	4	SHOWING— Immovable property, distinguishing— (a) Land (describing tenure) ... (b) Buildings ... Movable property, distinguishing— (c) Stock-in-trade .. (d) Plant .. (The cost to be stated with deduction for deterioration in value as charged to the Reserve Fund or Profit and Loss.)	Rs.a.p.	R s.a.p
II.—DEBTS AND LIABILITIES OF THE COMPANY.		1	The amount of loans on mortgage or debenture bonds.			IV.—DEBTS OWING TO THE COMPANY.	6	Debts considered good for which the Company hold bills or other securities.		
		2	The amount of debts owing by the company distinguishing— (a) Debts for which acceptances have been given.				8	Debts considered good for which the Company hold no security. Debts considered doubtful and bad. (Any debt due from a director or other officer of the Company to be separately stated.)		
		3	Debts to tradesmen for supplies of stock-in-trade or other articles. (c) Debts of law expenses ... (d) Debts for interest on debentures or other loans. (e) Unclaimed dividends ... (f) Debts not enumerated above.				9	SHOWING— The nature of investment and rate of interest.		
VI.—RESERVE FUND.			The amount set aside from profits to meet contingencies.			V.—CASH AND INVESTMENT.	10	The amount of cash, where lodged, and if bearing interest.		
VII.—PROFIT AND LOSS.			The disposable balance for payment of dividend, etc.							
CONTINGENT LIABILITIES.			Claims against the Company not acknowledged as debts.							
			Moneys for which the Company is contingently liable.							

* See clauses 71 and 72 of the foregoing Table B.

APPENDIX II.

(Table A in the first Schedule to Act VI of 1882.)¹

REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES.

Shares.

1. If several persons are registered as joint holders of any share, any one of such persons may give effectual receipts for any dividend payable in respect of such share.
2. Every member shall, on payment of eight annas or such less sum as the Company in general meeting may prescribe, be entitled to a certificate under the common seal of the Company, specifying the share or shares held by him, and the amount paid up thereon.
3. If such certificate is worn out or lost, it may be renewed on payment of eight annas or such less sum as the Company in general meeting may prescribe.

Calls on Shares.

4. The directors may from time to time make such calls upon the members in respect of all moneys unpaid on their shares as they think fit, provided that twenty-one days' notice at least is given of each call; and each member shall be liable to pay the amount of calls so made to the persons and at the times and places appointed by the directors.
5. A call shall be deemed to have been made at the time when the resolution of the directors authorising such call was passed.
6. If the call payable in respect of any share is not paid before or on the day appointed for payment thereof, the holder for the time being of such share shall be liable to pay interest for the same at the rate of five per cent. per annum from the day appointed for the payment thereof to the time of the actual payment.
7. The directors may, if they think fit, receive, from any member willing to advance the same, all or any part of the moneys due upon the shares held by him beyond the sums actually called for; and, upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the Company may pay interest at such rate as the member paying such sum in advance and the directors agree upon.

Transfers of Shares.

8. The instrument of transfer of any share in the Company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof.
9. Shares in the Company shall be transferred in the following form :

I, A. B., of	do hereby transfer to the said C. D., the share (or shares)	paid
to me by C. D. of	standing in my name in the books of the	Company,
numbered	on which I held the same at the time of the execution thereof; and I, the said C. D., do hereby agree	
to hold unto the said C. D., his executors, administrators and assigns, subject to the several conditions	to take the said share (or shares) subject to the same conditions. As witness our hands the	
		day
10. The Company may decline to register any transfer of shares made by a member who is indebted to them.
11. The transfer books shall be closed during the fourteen days immediately preceding the ordinary general meeting in each year.

Transmission of Shares.

12. The executors or administrators of a deceased member shall be the only persons recognised by the Company as having any title to his share.
13. Any person becoming entitled to a share in consequence of the death, bankruptcy or insolvency of any member, or in consequence of the marriage of any female member, may be registered as a member upon such evidence being produced as may, from time to time, be required by the Company.
14. Any person who has become entitled to a share in consequence of the death, bankruptcy or insolvency of any member or in consequence of the marriage of any female member, may, instead of being registered himself, elect to have some person to be named by him registered as a transferee of such share.
15. The person so becoming entitled shall testify such election by executing to his nominee an instrument of transfer of such share.
16. The instrument of transfer shall be presented to the Company, together with such evidence as the directors may require to prove the title of the transferee, and thereupon the Company shall register the transferee as a member.

Forfeiture of Shares.

17. If any member fails to pay any call on the day appointed for payment thereof, the directors may, at any time thereafter, during such time as the call remains unpaid, serve a notice

LEG. REF.

¹ See S. 290 (1) of the Indian Companies Act (VII of 1913).

The Table is reproduced here as an Appendix for convenience of reference.

on him requiring him to pay such call together with interest and any expenses that may have accrued by reason of such non-payment.

18. The notice shall name a further day on or before which such call and all interest and expenses that have accrued by reason of such non-payment are to be paid. It shall also name the place where payment is to be made, the place so named being either the registered office of the Company or some other place at which calls of the Company are usually made payable. The notice shall also state that, in the event of non-payment at or before the time and at the place appointed, the shares in respect of which such call was made will be liable to be forfeited.

19. If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may at any time thereafter, before payment of all calls, interest and expenses due in respect thereof has been made, be forfeited by a resolution of the directors to that effect.

20. Any share so forfeited shall be deemed to be the property of the Company and may be disposed of in such manner as the Company in general meeting thinks fit.

21. Any member whose shares have been forfeited shall notwithstanding be liable to pay to the Company all calls owing upon such shares at the time of the forfeiture.

22. A solemn declaration in writing, made before a Magistrate, that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated as against all persons entitled to such share and such declaration and the receipt of the Company for the price of such share shall constitute a good title to such share, and a certificate of proprietorship shall be delivered to the purchaser, and thereupon he shall be deemed the holder of such share discharged from all calls due prior to such purchase, and he shall not be bound to see to the application of the purchase money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale.

Conversion of Shares into Stock.

23. The directors may, with the sanction of the Company previously given in general meeting, convert any paid up shares into stock.

24. When any shares have been converted into stock, the several holders of such stock may thenceforth transfer their respective interests therein, or any part of such interest, in the same manner and subject to the same regulations as and subject to which any shares in the capital of the Company may be transferred, or as near thereto as circumstances admit.

25. The several holders of stock shall be entitled to participate in the dividends and profits of the Company according to the amount of their respective interests in such stock; and such interests shall, in proportion to the amount thereof, confer on the holders thereof, respectively, the same privileges and advantages for the purpose of voting at meetings of the Company and for other purposes as would have been conferred by shares of equal amount in the capital of the Company; but so that none of such privileges or advantages, except the participation in the dividends and profits of the Company, shall be conferred by any such aliquot part of the consolidated stock as would not, if existing in shares have conferred such privileges or advantages.

Increase in Capital.

26. The directors may, with the sanction of a special resolution of the Company previously given in general meeting, increase its capital by the issue of new shares; such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, as the Company in general meeting directs, or, if no direction is given, as the directors think expedient.

27. Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, and such offer shall be made by notice specifying the number of shares to which the member is entitled and limiting a time within which the offer, if not accepted, will be deemed to be declined; and after the expiration of such time, or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the Company.

28. Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions, with reference to the payment of calls, and the forfeiture of shares on non-payment of calls, or otherwise, as if it had been part of the original capital.

General Meetings.

29. The first general meeting shall be held at such time, not being more than six months after the registration of the Company, and at such place as the directors may determine.

30. Subsequent general meetings shall be held, once at the least in every year, at such time and place as may be prescribed by the Company in general meeting; and if no other time or place is prescribed, a general meeting shall be held on the first Monday in February in every year, at such place as may be determined by the directors.

31. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

32. The directors may, whenever they think fit, and they shall, upon a requisition made in writing by not less than one-fifth in number of the members of the Company, convene an extraordinary general meeting.

33. Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the Company.

34. Upon the receipt of such requisition the directors shall forthwith proceed to convene an extraordinary general meeting. If they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other members amounting to the required number, may themselves convene an extraordinary general meeting.

Proceedings at General Meeting.

35. Seven days' notice at the least, specifying the place, the day and the hour of meeting, and, in case of special business, the general nature of such business, shall be given to the members in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the Company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.

36. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend, and the consideration of the accounts, balance-sheets, and the ordinary report of the directors.

37. No business shall be transacted at any general meeting except the declaration of a dividend, unless a quorum of members is present at the time when the meeting proceeds to business. Such quorum shall be ascertained as follows, that is to say:—If the persons who have taken shares in the Company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten, there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation that no quorum shall in any case exceed twenty.

38. If, within one hour from the time appointed for the meeting, a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved. In any other case, it shall stand adjourned to the same day in the next week, at the same time and place; and if, at such adjourned meeting, a quorum is not present, it shall be adjourned *sine die*.

39. The chairman (if any) of the board of directors shall preside as chairman at every general meeting of the Company.

40. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, the members present shall choose some one of their number to be chairman.

41. The chairman may, with the consent of the meeting, adjourn any meeting from time to time and from place to place but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

42. At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the Company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

43. If a poll is demanded by five or more members, it shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the Company in general meeting. In the case of an equality of votes at any general meeting, the chairman shall be entitled to a second or casting vote.

Votes of Members.

44. Every member shall have one vote for every share up to ten. He shall have an additional vote for every five shares beyond, the first ten shares up to one hundred, and an additional vote for every ten shares beyond the first hundred shares.

45. If any member is a lunatic or idiot, he may vote by his committee or other legal curator; and, if any member is a minor, he may vote by his guardian or any one of his guardians if more than one.

46. If one or more persons are jointly entitled to a share or shares, the member whose name stands first in the register of members as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same.

47. No member shall be entitled to vote at any general meeting unless all calls due from him have been paid, and no member shall be entitled to vote in respect of any share that he has acquired by transfer, at any meeting held after the expiration of three months from the registration of the Company, unless he has been possessed of the share in respect of which he claims to vote for at least three months previously to the time of holding the meeting at which he proposes to vote.

48. Votes may be given either personally or by proxy.

49. The instrument appointing a proxy shall be in writing, under the hand of the appointer, or, if such appointer is a corporation, under their common seal, and shall be attested by one or more witness or witnesses. No person shall be appointed a proxy who is not a member of the Company.

50. The instrument appointing a proxy shall be deposited at the registered office of the Company not less than seventy-two hours before the time for holding the meeting at which the person named in such instrument proposes to vote; but no instrument appointing a proxy shall be valid after the expiration of twelve months from the date of its execution.

51. Any instrument appointing a proxy shall be in the following form:—

Company, Limite.

I, _____, of _____, being a member of the _____ Company, Limited, and entitled to _____ vote or _____ votes, hereby appoint _____, of _____, as my proxy to vote for me and on my behalf at the [ordinary or extraordinary *as the case may be*] general meeting of the Company to be held on the _____ day of _____ and at any adjournment thereof (or at any meeting of the Company that may be held in the year _____).
 As witness my hand, this _____ day of _____, Signed by the said _____ in the presence of _____
Directors.

52. The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association.

53. Until directors are appointed, the subscribers of the memorandum of association shall be deemed to be directors.

54. The future remuneration of the directors, and their remuneration for services performed previously to the first general meeting, shall be determined by the Company in general meeting.

Powers of Directors.

55. The business of the Company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the Company and may exercise all such powers of the Company as are not by the foregoing Act, or by these articles, required to be exercised by the Company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act and to such regulations, being not inconsistent with the aforesaid regulations, or provisions, as may be prescribed by the Company in general meeting; but no regulation made by the Company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

56. The continuing directors may act notwithstanding any vacancy in their body.

Disqualification of Directors.

57. The office of director shall be vacated—

if he, or any partner of his, or the firm of which he is a member, holds any other office or place of profit under the Company;

if he becomes bankrupt or insolvent;

if he is punished under any of the penal provisions of the foregoing Act;

if he is concerned in or participates in the profits of any contract with the Company.

But the above rules shall be subject to the following exceptions:—that no director shall vacate his office by reason of his being a member of any Company which has entered into contracts with, or done any work for, the Company of which he is director; nevertheless, he shall not vote in respect of such contract or work, and, if he does so vote, his vote shall not be counted.

Rotation of Directors.

58. At the first ordinary meeting after the registration of the Company the whole of the directors shall retire from office; and at the first ordinary meeting in every subsequent year one-third of the directors for the time being, or, if their number is not a multiple of three, then the number nearest to one-third, shall retire from office.

59. The one-third or other nearest number to retire during the first and second years ensuing the first ordinary meeting of the Company shall, unless the directors agree among themselves, be determined by ballot. In every subsequent year, the one-third or other nearest number who have been longest in office shall retire.

60. A retiring director shall be re-eligible.

61. The Company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons.

62. If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week, at the same time and place; and if at such adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall continue in office until the ordinary meeting in the next year, and so on from time to time until their places are filled up.

63. The Company may from time to time, in general meeting, increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to go out of office.

64. Any casual vacancy occurring in the board of directors may be filled up by the directors, but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.

65. The Company in general meeting may by a special resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead. The person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed.

Proceedings of Directors.

66. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction

of business. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairman shall have a second or casting vote. A director may at any time summon a meeting of the directors.

67. The directors may elect a chairman of their meetings, and determine the period for which he is to hold office ; but, if no such chairman is elected or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting.

68. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit. Any committees so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on it by the directors.

69. A committee may elect a chairman of its meetings. If no such chairman is elected, or if he is not present at the time appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting.

70. A committee may meet and adjourn as it thinks proper. Questions arising at any meeting shall be determined by a majority of votes of the members present ; and, in case of an equality of votes, the chairman shall have a second or casting vote.

71. All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

Dividends.

72. The directors may, with the sanction of the Company in general meeting, declare a dividend to be paid to the members in proportion to their shares.

73. No dividend shall be payable except out of the profits arising from the business of the Company.

74. The directors may, before recommending any dividend, set aside out of the profits of the Company such sum as they think proper as a reserve fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the Company or any part thereof ; and the directors may invest the sum so set apart as a reserve fund upon such securities as they may select.

75. The directors may deduct from the dividends payable to any member all such sums of money as may be due from him to the Company on account of calls or otherwise.

76. Notice of any dividend that may have been declared shall be given to each member in manner hereinafter mentioned ; and all dividends unclaimed for three years after having been declared may be forfeited by the directors for the benefit of the Company.

77. No dividend shall bear interest as against the Company.

Accounts.

78. The directors shall cause true accounts to be kept—

of the stock in trade of the Company ;

of the sums of money received and expended by the Company, and the matters in respect of which such receipt and expenditure take place ; and

of the credits and liabilities of the Company.

The books of account shall be kept at the registered office of the Company, and, subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed by the Company in general meetings, shall be open to the inspection of the members during the hours of business.

79. Once at the least in every year the directors shall lay before the Company in general meeting a statement of the income and expenditure for the past year, made up to a date not more than three months before such meeting.

80. The statement so made shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expenses of the establishment, salaries and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting, and, in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

81. A balance-sheet shall be made out in every year and laid before the Company in general meeting, and such balance-sheet shall contain a summary of the property and liabilities of the Company arranged under the heads appearing in the form annexed to this table, or as near thereto as circumstances admit.

82. A printed copy of such balance-sheet shall, seven days previously to such meeting, be served on every member in the manner in which notices are hereinafter directed to be served.

Audit.

83. Once at the least in every year the accounts of the Company shall be examined, and the correctness of the balance-sheet ascertained by one or more auditor or auditors.

84. The first auditors shall be appointed by the directors ; subsequent auditors shall be appointed by the Company in general meeting.

85. If one auditor only is appointed, all the provisions herein contained relating to auditors shall apply to him.

86. The auditors may be members of the Company, but no person is eligible as an auditor who is interested otherwise than as a member in any transaction of the Company, and no director or other officer of the Company is eligible during his continuance in office.

87. The election of auditors shall be made by the Company at their ordinary meeting in each year.

88. The remuneration of the first auditors shall be fixed by the directors ; that of the subsequent auditors shall be fixed by the Company in general meeting.

89. Any auditor shall be re-eligible on his quitting office.

90. If any casual vacancy occurs in the office of any auditor appointed by the Company, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the same.

91. If no election of auditors is made in manner aforesaid the Local Government may, on the application of not less than five members of the Company, appoint an auditor for the current year and fix the remuneration to be paid to him by the Company for his services.

92. Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same with the accounts and vouchers relating thereto.

93. Every auditor shall have a list delivered to him of all books kept by the Company, and shall at all reasonable times have access to the books and accounts of the Company. He may, at the expense of the Company, employ accountants or other persons to assist him in investigating such accounts, and he may, in relation to such accounts, examine the directors or any other officer of the Company.

94. The auditors shall make a report to the members upon the balance-sheet and accounts, and in such report they shall state whether, in their opinion, the balance-sheet is a full and fair balance-sheet, containing the particulars required by these regulations and properly drawn up so as to exhibit a true and correct view of the state of the Company's affairs, and, in case they have called for explanations or information from the directors, whether such explanations or information have or has been given by the directors, and whether they or it have or has been satisfactory. Such report shall be read, together with the report of the directors, at the ordinary meeting.

Notices.

95. A notice may be served by the Company upon any member either personally or by sending it through the post in a letter addressed to such member at his registered place of abode.

96. All notices directed to be given to the members shall, with respect to any share to which persons are jointly entitled, be given to whichever of such persons is named first in the register of members ; and notice so given shall be sufficient notice to all the holders of such share.

97. Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post ; and, in proving such service, it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post office.

Dr. Cr.

FORM OF BALANCE-SHEET REFERRED TO IN TABLE A.
Balance-sheet* of the 18
Company made up to

CAPITAL AND LIABILITIES.

PROPERTY AND ASSETS.

		Rs.	As			Rs.	As
I.—CAPITAL.	1	SHOWING— The number of shares	...	III.—PROPERTY HELD BY THE COMPANY.	7	SHOWING— Immovable property—distinguishing— (a) Freehold land	...
	2	The amount paid per share	...			(b) " buildings	...
	3	If any arrears of calls, the nature of the arrear and the names of the defaulters.	...			(c) Leasehold	...
	4	The particulars of any forfeited shares	...		8	Movable property—distinguishing— (d) Stock-in-trade	...
II.—DEBTS AND LIABILITIES OF THE COMPANY.	5	SHOWING— The amount of loans or mortgages or debenture bonds.	...			(e) Plant	...
	6	The amount of debts owing by the Company—distinguishing— (a) Debts for which acceptances have been given.	...	The cost to be stated with deductions for deterioration in value as charged to the reserve fund or profit and loss			
		(b) Debts to tradesmen for supplies of stock-in-trade or other articles.	...	IV.—DEBTS OWING TO THE COMPANY.	9	SHOWING— Debts considered good for which the Company hold bills or other securities.	...
		(c) Debts for law expenses	...		10	Debts considered good for which the Company hold no security.	...
		(d) Debts for interest on debentures or other loans.	...		11	Debts considered doubtful and bad Any debt due from a director or other officer of the company to be separately stated.	...
		(e) Unclaimed dividends	...	V.—CASH AND INVESTMENTS.		SHOWING—	
VI.—RESERVE FUND.		(f) Debts not enumerated above	...		12	The nature of investment and rate of interest.	
VII.—PROFIT AND LOSS.		SHOWING— The amount set aside from profits to meet contingencies.			13	The amount of cash, where lodged and if bearing interest.	
		The disposable balance for payment of dividends, etc.					
CONTINGENT LIABILITIES.		Claims against the Company not acknowledged as debts.					
		Moneys for which the Company is contingently liable.					

* See cls. 81 and 82 of the foregoing Table A.

THE COMPANIES (FOREIGN INTEREST) ACT (XX OF 1918).

PREFATORY NOTE.—The following is the Statement of Objects and Reasons appended to the Bill (see *Fort St. George Gazette*, Part III, 15th October, 1918, p. 589).

"It is considered desirable that companies which, during the war, have been reconstituted in India on lines approved by the Government of India and that new companies, whose business is of importance to the security of India and of the British Empire as a whole, should be restrained from altering their articles of association, in such a way as to bring them under the control of foreign interests. It is therefore proposed that the provisions in the articles of association of such companies, which are designed to restrict the shares or interests to be held or the powers to be exercised by persons other than British subjects, should not be altered without the consent of the Governor-General in Council. Similar legislation in the United Kingdom has resulted in the Companies (Foreign Interests) Act (7 and 8 Geo. 5, Ch. 18) which prohibits the alteration of restrictive articles of this nature without the permission of the Board of Trade. Clauses 3 and 4 (1) of the Bill are designed to give effect to this proposal, and the remaining sub-clauses of clause 4 have been inserted to prevent evasion of this provision by voluntary liquidation on the part of the companies concerned.

[26th September, 1918.

An Act to take power to prohibit the alteration, except with the sanction of the Governor-General in Council, of articles of association which restrict foreign interests in certain Companies, and to provide for other purposes connected therewith.

WHEREAS it is expedient to take power to prohibit the alteration, except with the sanction of the Governor-General in Council, of articles of association which restrict foreign interests in certain companies, and to provide for other purposes connected therewith; it is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN COMPANIES (FOREIGN INTERESTS) ACT, 1918.

Definitions.

2. (1) In this Act—

(a) the expression "British subject" has the same meaning as in section 27 of the British Nationality and Status of Aliens Act, 1914, but shall include any person who holds a certificate of naturalization as a British subject granted under any ¹[Act of the Central Legislature] for the time being in force, and any association incorporated in any part of His Majesty's Dominions: Provided that the said expression shall, for the purposes of this Act, be deemed to apply to any subject of a State in India;

(b) the expression "restrictive provision" means any provision in the articles of association of a company which, in the opinion of the Central Government is designed to restrict or limit or has the effect of restricting or limiting the share or shares or interests which may be held, or the rights, powers or authority which may be conferred upon or exercised by or on behalf of persons other than British subjects in the company, or in respect of the control, management or direction of the affairs thereof.

(2) All words and expressions used in this Act and defined in the Indian Companies Act, 1913, shall be deemed to have the meanings respectively attributed to them by that Act.

3. This Act shall apply to such companies as the Central Government may, by notification in the Official Gazette, declare to be companies with restrictive provisions, and any such notification shall specify the restrictive provisions.

4. So long as a notification issued under section 3 is in force in respect of any company, notwithstanding anything to the contrary in any other Act—

(1) no alteration of the articles of association of the company affecting either directly or indirectly any restrictive provision shall be of any effect until it has received the consent in writing of the Central Government;

(2) a resolution for the voluntary winding up of the company shall be of no effect unless the Central Government authorizes or ratifies it by a written consent ;

(3) any Court which has jurisdiction to wind up the company may in its discretion refuse to make a winding up order. In the exercise of its discretion, the Court shall be guided by the consideration whether the winding up is *bona fide* with a view to the discontinuance of the undertaking, or is with a view to continuing the undertaking freed either wholly or in part from any restrictive provision ;

(4) The Central Government in giving consent, or the Court in making a winding up order, as the case may be, may impose such terms or conditions for giving effect to the purposes of this Act as ¹[it] thinks fit.

THE CONTEMPT OF COURTS ACT (XII OF 1926).² EFFECT OF LEGISLATION.

Year.	No.	Short title.	Repealed or otherwise how affected by legislation.
1926	XII	The Contempt of Courts Act, 1926.	Am., Act XII of 1937.

PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Bill:—

"The several High Courts of Judicature established by Letters Patent are superior Courts of record, and as such they have power to attach and commit for acts amounting to contempt of their own proceedings as contempt of Court and without reference to whether the acts alleged constitute an offence under the Indian Penal Code. Different views have, however, been held by the various High Courts in regard to their power to punish for such contempts committed in regard to proceedings in Courts which are subordinate to them. The Madras High Court in the case of *In re Venkata Rao* (21 M.L.J. 832) and the Bombay High Court in the case of *King-Emperor v. P. G. Kulkarni* (24 Bom.L.R. 16), have held that they possess this power to protect their subordinate courts against such contempts. The Calcutta High Court, on the other hand, in the case of *King-Emperor v. Girindra Mohan Das and others* (17 C.W.N. 1285) and *The Legal Remembrancer v. Moti Lal Ghose* (I.L.R. 4 Cal. 173) has taken a contrary view. In cases in which it is held that the power to attach and commit exists the powers of the courts are as unrestricted as are the powers of superior courts of record in England. It has not been decided whether the Court of Judicial Commissioners of the Central Provinces, Oudh and Sindh have these general powers either in regard to contempt of their own proceedings, or of the proceedings of courts subordinate to them. In England, in addition to the powers of the superior Courts of record to attach and commit for contempt of court, contempts of courts are also indictable misdemeanours at common law. In India, on the other hand, though the Indian Penal Code makes certain acts which would be punishable as contempts of court in England specific offences, it does not provide generally for the punishment of contempts of the authority of judicial officers not committed in their presence.

2. The condition of the law in India as summarised above has long been regarded as unsatisfactory, and in 1914, a Bill was introduced in the Indian Legislative Council which would have increased the classes of cases of contempts of court punishable as offences under the Indian Penal Code, but it was not proceeded with owing to the war. The present Bill proposes to declare and amend the law on other lines. Instead of increasing the classes of cases punishable as contempts of court after trial by Magistrates, the Bill restricts the power to protect subordinate courts against contempts which are not already provided for in the Indian Penal Code to the High Courts themselves. The Bill resolves any doubts as to the powers of the High Courts of Judicature in regard to the protection of their subordinate courts from such contempts. It will show clearly that the Courts of the Judicial Commissioners of the Central Provinces, Oudh and Sindh will have the same powers of punishing for contempts committed in regard to their own proceedings or of the proceedings of courts subordinate to them. In lieu of the existing unrestricted powers of the High Courts of Judicature, it will define the nature of the offence or contempt of court and the extent of the punishment which may be awarded. Finally it bars the inherent powers of the High Courts to deal with such offences." *Fort St. George Gazette*, 1925, Part III, March 3rd, 1925, pp. 52, 53.

[8th March, 1926.]

An Act to define and limit the powers of certain Courts in punishing contempts of Courts.

WHEREAS doubts have arisen as to the powers of a High Court of Judicature to punish contempts of ³[*] Courts ;

LEG. REF.

¹ Substituted for "he or it" by A.O., 1937.

² For Statement of Objects and Reasons, see *Gazette of India*, 1925, Pt. V, p. 42 ; for Report

of Sel. Com., see *ibid.*, p. 249.

³ Word "subordinate" omitted by Act XII of 1937.

AND WHEREAS it is expedient to resolve these doubts and to define and limit the powers exercisable by High Courts and Chief Courts in punishing contempts of Court ; It is hereby enacted as follows :—

Short title, extent and commencement.

1. (1) This Act may be called THE CONTEMPT OF COURTS ACT, 1926.

NOTES.

Sec. 1: SCOPE OF ACT.—(Per *Yorke, J.*) Far from the enactment implying a recognition that no such powers had in fact previously existed, the Contempt of Courts Act is an Act which creates no fresh power at all but merely recognises the fact that such powers already do exist but seeks to define and limit them. 14 Luck. 492=1939 O. 131 (F.B.). The jurisdiction to deal with people for contempt of Court is quasi-criminal and the Court has no right to punish people merely because it might disapprove of what they do, if their conduct does not clearly bring them within the four walls of some offence known to law. 1941 Rang. L.R. 747. The proceedings for contempt of the High Court are in the exercise of the inherent jurisdiction of the Court and are of a criminal nature. *When the matter is of a criminal nature, the Civil Procedure Code, does not apply.* 1941 O.W.N. 455=1941 All. 211.

CONTEMPT, WHAT IS.—Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is another class of contempt. The former class belongs to the category which is characterised as 'scandalising a Court or a Judge.' That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt. 40 C.W.N. 801=38 Bom.L.R. 681=1936 P.C. 141=71 M.L.J. 665 (P.C.). Where the writer had written an article on the inequality of sentence under text, "The Human Element," held, that he was perfectly justified in pointing out what is obvious, that sentences do vary in apparently similar circumstances with the habit of mind of the particular Judge. It is quite inevitable. Some very conscientious Judges have thought it their duty to visit particular crimes with exemplary sentences ; others equally conscientious have thought it their duty to view the same crimes with leniency. Hence, to say that the human element enters into the awarding of punishment is not contempt of Court. 71 M.L.J. 665 (P.C.). Letter by manager of estate to Collector referring to decision of latter as District Magistrate dismissing a complaint and stating that opposite party had been emboldened by the view taken by the District Magistrate—Not contempt of Court. 38 Cr.L.J. 412=18 Pat.L.T. 113=1937 Pat. 124. The publication of comments on a pending case amounts to contempt, if the comments are such as are likely to prejudice

the administration of justice in the case. In the absence of an express provision allowing him to do so, no person can contract out of a responsibility imposed upon him by law in the case of a contempt of Court for publication of *prejudicial comments on case pending trial* and a *printer as well as a publisher cannot escape responsibility for matter printed and published.* 6 R. 39=1928 R. 115. A printer and publisher of an article amounting to contempt of Court is liable for contempt of Court even if the article is written by another and he has dissociated from it and disapproved it. 1940 Sind 239 (F.B.)=I.L.R. (1941) Kar. 3. See also 16 Luck. 506=1941 O.W.N. 683=1941 O. 399. The question in all cases of comment on pending proceedings is not whether the publication does interfere, but whether it tends to interfere with the due course of justice, and on the same principle it is a contempt of Court to make a *speech tending to influence the result of a pending trial* whether civil or criminal, or to deliver a speech at a meeting. 188 I.C. 408=41 Cr.L.J. 584. See also 16 Luck. 61=1941 O. 14 ; 1941 O.W.N. 683=1941 O. 399. Where during the pendency of a suit instituted for a declaration that certain land claimed by the defendant is a public path way, a resolution is passed at a public meeting protesting against the attempts of the defendant to close the land in question which is being used by the general public from time immemorial, the effect and tendency of the resolution is to embarrass, if indeed not to imperil the defendant's cause and that being so, the passing of that resolution amounts to contempt. To the resolution itself, there is not so much objection in so far as it is, or purports to be, merely a resolution of the residents of the locality to support the cause of establishing the right of the public over the land in suit. But it is objectionable to put forward in the resolution of a public meeting a positive assertion of a public right of way, as it would predispose people to a belief, right or wrong, that the defendant is an invader of the public right. It undoubtedly conveys the impression of a public denunciation of the defendant's conduct which might well deter inhabitants of the locality from bearing testimony in support of his case. I.L.R. (1938) 2 Cal. 447=42 C.W.N. 952=1938 Cal. 772. Where the publication of a plaint is the publication of a document reflecting severally on the conduct of the defendant, a contempt of scandalous and serious nature is committed. 165 I.C. 813=1936 Lah. 917. Where the editors of newspapers publish copies or *summary of pleadings* and other similar documents in pending cases, they do so at considerable risk. Where however the abstract of the plaint published in the newspaper only represented the defendant as the victim of the wickedness of others, it contained no attack upon her personal character and there was no attempt to prejudice the issue or prejudice her

(2) It shall extend to the whole of British India.

NOTES.

defence. *Held*, that the publication did not amount to contempt of Court. 152 I.C. 900 = 38 C.W.N. 330 = 1934 C. 606. Where the gravamen of an article published in a newspaper is that *judgment after judgment is being given in the High Court arbitrarily* and that neither law nor facts are discussed before judgment is delivered, and it further says that it is necessary "to restore the confidence of the public that law is discussed and facts are digested before cases are disposed of," there can be no doubt that the article is as gross a contempt of Court and misrepresentation of proceedings in Court as it is possible to imagine and nothing could be more calculated to bring the High Court into contempt and to lower its authority with the general public. 16 L. 266 = 155 I.C. 695 = 1935 Lah. 212 (S.B.). Where an editorial comment based upon a news item contained a clear insinuation that the Chief Justice had issued a circular to all Judicial officers to raise contributions from litigants and others to the war fund, it was *held* that the implication was that the Chief Justice had done something which was unworthy of a person holding that High Office, and that as the head and representative of the High Court he had committed the gross impropriety of forcing the Judicial officers subordinate to the High Court to ask for war contributions from litigants and that the probable effect of the news item would be to impair the authority of the High Court to lower its dignity and prestige and seriously to shake public confidence in the administration of justice. It was *held*, further that the publication of an editorial comment calculated to have the above effect was a clear contempt of Court. 1942 O.W.N. 6. In cases of contempt the question of motive is irrelevant; what the Court has to consider is the effect—the probable effect of the publication. Motive of the contemner cannot be considered in determining his guilt; it may, however, be a proper criterion for awarding punishment. 1942 O.W.N. 6. It is not possible to lay down an exhaustive catalogue of cases which would amount to contempt of Court, but interference with the administration of justice is one of the well recognised heads of contempt of Court. A notice was issued to the defendant in a pending suit by the plaintiff's counsel after the plaintiff's evidence closed and the defendant's evidence begun, threatening him with drastic action in case he did not withdraw a plea which he had taken in the suit, and offering to desist from taking any action in case the plea was withdrawn within a certain time. It was intended to put pressure on the defendant and to compel him to withdraw the plea. *Held*, that the action amounted to a direct interference with administration of justice and constituted contempt of Court. 57 A. 573 = 1935 A. 117 = 1935 A.L.J. 29. It must not be supposed that a Court of Justice has not the power to remove an Attorney if he is unfit to be entrusted with a professional status and character. If an Attorney be found guilty of moral delinquency in his private character, there is no doubt that he may be struck off the roll. Contempt of Court when committed by an

Attorney in a private capacity can be of such a nature as to show professional unfitness. There can be no grosser contempt on the part of an Attorney than to *allege that a Judge has acted with prejudice, bias and malice in the course of his judicial duties*, that he decided a case not according to his own convictions but to please somebody else and that he abused his powers as a Judge and acted dishonestly and in bad faith. The fact that such *allegations are contained in a notice sent by the Attorney under S. 80, C. P. Code*, to a Judge in respect of certain remarks made by the Judge in a judgment in a case in which the Attorney was a witness is no ground for holding that no offence is committed. No one by merely filing or threatening to file a suit and calling his communication a notice under S. 80, C. P. Code, can insult and vilify a Judge in that manner. The fact that the scandalous allegations are contained in a notice under S. 80, C. P. Code, and not therefore prevent them from being contempt of Court, and the Attorney who makes such allegations renders himself liable to be dealt with under the disciplinary powers of the High Court. 43 Bom. L.R. 250. It is not uncommon to attack abuses and to attack persons in an *election manifesto* whether the abuses exist or not and whether the persons deserve the attack. But to *slander the whole judiciary* of a province in an attempt to secure votes at a Bar Council election is not only contemptible but almost criminal. An Advocate indulging in such attacks is guilty of contempt of Court. 57 A. 573 = 1935 A.L.J. 46 = 1935 A. 38. An article in a newspaper contained a passage as follows: "In this connection it is amusing to note that when a *comparatively undeserving lawyer is raised to the Bench*, which is a fairly frequent occurrence in our judicial history, it is generally claimed, etc." *Held*, the words "a comparatively undeserving lawyer" were particularly offensive, connoting as they did lack of capacity or character or of both, and that the passage in question amounted to an unwarranted defamation of the High Court likely to injure and lower its prestige in the eyes of the public and to shake their confidence in its capacity to administer justice, and that it constituted a contempt of Court of which the High Court is bound to take cognisance. 57 A. 573 = 1935 A.L.J. 125 = 1935 A. 1. To constitute contempt it is not necessary that the Act or writing should be in respect of a case which has been heard or is pending. Judges and Courts are no doubt open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court would treat that as contempt of Court. A publication out of Court of a libel on one or more Judges of the Court will constitute contempt. 36 Cr.L.J. 1053 = 39 C.W.N. 770 = 1935 Cal. 419 (S.B.). An article published in a newspaper stated as follows: "It is so unfortunate and regrettable that at the present day the Chief Justice and the Judges find a peculiar delight in hobnobbing with the executive with the result the judiciary is robbed of its independence which at one time attracted the admiration of the whole country. The old order of things ha

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.¹

LEG. REF.

¹ This Act was brought into force on the 1st May, 1926, Gazette of India, 1926, Pt. I, p. 442.

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vanished away. We wish the Chief Justice and the Judges appreciate the sentiments of the public. The generation that has gone by should be an ideal to them." *Held*, that it constituted contempt of the High Court; and that it was the duty of the High Court in the administration of justice to deal with it in summary manner and not by way of indictment or criminal information, which was too dilatory and inconvenient to afford any satisfactory remedy. 39 C.W.N. 770. Where the effect of certain newspaper articles was likely to be to deter witness from giving evidence in a pending case, it amounts to contempt of Court though not of a serious nature. 1941 O.A. 429 = 1941 O. W.N. 683 = 1941 O. 399. Where a complainant in a defamation case writes an article a couple of days after the complaint is filed asserting the truth of the statements contained in his paper and challenges the accused to prove their falsity, the article does not amount to contempt of Court. 1941 O.A. 429 = 1941 O.W.N. 683 = 1941 O. 399.

HEADLINES AMOUNTING TO COMMENT on a pending case are not permissible. Where a newspaper in publishing the proceedings of a pending case inserted headlines which in fact amounted to a criticism of the prosecution case under the guise of a summary of the day's proceedings and some of the headlines were mere arguments of the defence and it appeared that their publication might have an effect on the minds of witnesses to be examined or cross-examined and amounted to conduct calculated to produce an atmosphere of prejudice *held*, that the publication of the headlines amounted to contempt. (Limits to press comment on pending criminal cases pointed out.) 37 C.W.N. 276 = 60 C. 603 = 1933 C. 118. Where a newspaper published with scare headlines portions of a complaint against the respondent in which gross allegations were made against him four months after the complaint had been filed, while proceedings were actually pending in the trial Court and also in the High Court for quashing the complaint, and further the paper published above the complaint its own comments. *Held*, that nothing could be more in the nature of contempt than action of that character. 40 P.L.R. 791 = 1938 Lah. 815. Although the danger or absence of danger of actual prejudice is an important consideration it is not the only consideration. The jurisdiction of the Court exists not only to prevent mischief in the particular case but to prevent similar mischief arising in other cases. 37 C.W.N. 276 = 1933 C. 118 = 60 C. 603. *The misuse of the process of the Court* for obtaining a warrant against a person against whom the complainant has no intention of proceeding, merely to use it as a lever for black-mailing him, amounts to contempt of Court. 41 P.L.R. 130 = 1939 Lah. 143.

JURISDICTION TO PUNISH FOR CONTEMPT.—
The jurisdiction to punish for contempt of

itself is inherently vested in every High Court in India including the non-Presidency High Court, which is also a superior Court of record. This inherent power of the High Courts has not been taken away or in anywise limited by Act XII of 1926. Consequently the High Courts in India continue to have power to deal with contempt of themselves in the same manner as a court of record has under the common law of England. There is no limitation imposed on the High Courts in the matter of punishment of offenders for contempt. A sentence passed on an offender committing him to custody in jail until such time as he apologised to the Court and further purged his contempt by paying into the Court the sums of money received in defiance of the Court's injunction, is in accordance with law. 18 Lah. 69 = 1937 Lah. 497 (S.B.); 40 C.W.N. 1285; 156 I.C. 1055 = 39 C.W.N. 770. Apart from the inherent jurisdiction of the High Court, such jurisdiction has been expressly conferred on the High Court by the Contempt of Courts Act (1926), in all cases of contempt except those which amount to offences under the Indian Penal Code. 57 A. 573 = 1935 A. 117 = 1935 A.L.J. 29. The Judicial Commissioner's Court although it is the highest Court of Judicature in the Provinces and has general superintendence over other Subordinate Courts in the Province, cannot be held to derive its authority from the Court of King's Bench, nor has it been established by Royal Charter. The Judicial Commissioner's Court, hence, is not a Court of record and has no power either by statute or otherwise to punish contempt of Subordinate Courts either in civil or criminal cases. 1935 N. 46 = 31 N.L.R. 154 = 156 I.C. 666. But *see also* 18 Lah. 69 = 1937 Lah. 497; 40 C.W.N. 1285; 1940 Sind 239; 1939 O. 131 (F.B.); I.L.R. (1941) Kar. 3 = 42 Cr.L.J. 1. If the Official Receiver considers that members of his staff have been obstructed to an extent which amounts to a contempt of Court, it is entirely within his discretion either to take proceedings for contempt or to initiate criminal proceedings. It is, however, a salutary principle that where the contempt is some form of physical violence or obstruction and is as such punishable by a Criminal Court, it should be dealt with there. 41 C.W.N. 1325. The High Court in insolvency has jurisdiction to commit to prison for contempt not only the insolvent, but other persons who deliberately aid the insolvent in defying an order of the Court deliberately passed in the exercise of insolvency jurisdiction. The Court's powers are not limited by S. 58 of the Presidency Towns Insolvency Act. The wife and son of the insolvent, though they are not parties to the proceedings, can be proceeded against, if they at the instigation of the insolvent refuse to vacate possession of the properties of the insolvent as ordered by the Court. 48 L.W. 462 = (1938) 2 M.L.J. 609. The power to commit for contempt is not to be lightly used and should be reserved for cases where the contempt is deliberate and of such a nature that committal is called for. I.L.R. (1939) Mad. 466 = 1939 Mad. 257 = (1939) 2 M.L.J.

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843 (F.B.). The Court's jurisdiction in contempt is not to be invoked unless there is real prejudice which can be regarded as a substantial interference with the course of justice. It is not every theoretical tendency that will attract the attention of the Court to its very special jurisdiction. Where in the course of a newspaper article it was suggested that a political party was in sympathy with a terrorist gang against whom criminal proceeding was pending, *held*, that the comments were improper but did not amount to contempt. (Essentials for prosecution for contempt stated). 58 C. 884=35 C.W.N. 189=1931 C. 257. *The Chief Court of Sind* has a right to punish in a summary way contempt of itself. 1940 Sind 239 (F.B.). See also I.L.R. (1941) Kar. 3=42 Cr.L.J. 1. It is a duty of a Court not so much to itself but to the public in whose interest it administers justice, that it should preserve its proceedings from misrepresentation. There is no distinction between a misrepresentation of the action of a Chief Court when it exercises its undoubted powers of superintendence of Magisterial Courts under S. 224, Government of India Act, 1935, and S. 17, Sind Courts Act, 1926, and the misrepresentation of the action of the Court or a Judge in a judicial as distinct from an administrative capacity, provided always that that action relates to the administration of justice. 1940 Sind 239 (F.B.). See also 1939 Oudh 131 (F.B.).

JURISDICTION OF COURT—RESIDENCE OF ACCUSED IF MATERIAL.—Contempt of Court is not an offence within the ambit of the Penal Code, but yet it conforms to the ordinary rule that the jurisdiction of the Court is determined by the place where the offence is committed and not by the place where the offender may happen to reside. If the offender removes himself beyond the territorial jurisdiction there might be difficulty in securing his appearance and executing the sentence but that would not deprive the Court of jurisdiction over the offence. This is especially so where the accused has appeared and has submitted to the Court's jurisdiction. 57 M. 831=1934 M. 423=66 M.L.J. 650. The High Court has jurisdiction to hear a notice of motion for contempt of Court against a party who, though not resident within the limits of its ordinary original jurisdiction, is yet a resident of British India, because as a subject of British India, he is governed by and bound to obey the laws of British India and to recognise the authority of Courts established by laws prevailing in British India. 36 Bom.L.R. 992=1934 B. 452=59 B. 10. *Persons who are not parties to the proceedings can be proceeded against in contempt* if they at the investigation of the insolvent refuses to vacate possession of the properties as ordered by the Court. 48 L.W. 462=(1938) 2 M.L.J. 609. [Reversing 46 L.W. 900=1937 M.W.N. 125.] Where a person is restrained by a judicial order of one High Court from proceeding with certain action and the person commits contempt of that High Court by defying the order in the jurisdiction of other High Court, the former High Court has jurisdiction to commit the person for contempt [I.L.R. (1937) 1 Cal. 345, Foll.] 1937 Cal. 601. See also 40 C.W.N. 1285. As to jurisdiction of Oudh Chief Court in respect of contempt

of subordinate Courts, see 1939 O.W.N. 296=1939 O. 131 (F.B.).

INHERENT POWER TO PUNISH—CRIMINAL PROCEEDINGS UNDER S. 194, CR. P. CODE, IF A BAR.—The fact that criminal proceedings under S. 194, Cr. P. Code, may be directed against a person who has defamed the Court generally is no bar to his being proceeded against for contempt of Court as well. The inherent power of a Court to punish for contempt of Courts is essential in the interests of the administration of justice and that power is not restricted in any degree by the provisions of the Cr. P. Code, relating to proceedings which may be instituted with the sanction of the Government in case of defamation of the Courts or His Majesty's Judges. 1935 A. 1=154 I.C. 955.

SOME ILLUSTRATIVE CASES—COMMENT ON PENDING CASES.—All proceedings in suits pending in a Court of Justice are privileged, and any comment on the subject-matter of the suits and any abuse of the parties or holding them up to ridicule and contempt in the eyes of the public, whilst the suit is pending are not allowed. The object of proceedings in contempt in such cases is not so much to vindicate the dignity of the Court or of the person of the Judge, as to ensure that every litigant in a Court of Justice has a fair and unprejudiced hearing at the trial on the merits of his case. Whether an article in a newspaper will *in fact* prejudice a party or not, or scare away his witnesses, or lead him to compromise the suit, is not the real and proper test in such a case. The Court has to read the article and see whether the article *may have that effect*, and thereby tend to interfere with the proper course of justice. If it has that tendency, it constitutes contempt of Court justifying the Court in taking action. 39 Bom.L.R. 471=38 Cr.L.J. 942=1937 Bom. 305. A libel on the parties to a suit which does not amount of an interference with the course of administration of justice is not a matter in respect of which contempt proceedings can be taken. The aggrieved party has his remedies elsewhere, namely, he can either prosecute the offender in a Criminal Court or sue him for damages in a Civil Court, (*Ibid.*) It is well settled that any act done or writing published which is calculated to interfere with or obstruct the due course of justice or the legal process of the Court is contempt of Court, although the Court will not take action for contempt unless it thinks that the conduct of the party in question is calculated seriously to interfere with the course of justice. Proceedings in contempt are not taken merely in respect of technical offences. To suggest in a newspaper article that evidence intended to be used in a prosecution which is either proceeding or is plainly contemplated, has been obtained by improper means and is unreliable or to suggest that admissions by the accused have been improperly obtained is such as is calculated to interfere with the due course of justice, and amounts to contempt of Court, as such allegations introduce at once into the trial an element of prejudice against the prosecution evidence. 40 Bom.L.R. 73. It is of the *very essence* of contempt of Court that proceedings should be pending, when the article alleged to constitute contempt is published. It is not necessary that the

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accused in a criminal case which is the subject of comment should have been committed for trial or even for him to have been brought before a committing Magistrate provided he has been arrested and is in custody when the article is published. 21 Pat.L.T. 980.

Dhauve, J.—It is contempt of Court to publish a newspaper article containing comments on the facts of a case which is pending before a Court or is about to come before a Court, if the comments are calculated to obstruct or interfere with the course of justice. In such cases the contempt takes the form of prejudicing mankind against persons who are on their trial raising an atmosphere of prejudice against them by comment which is addressed to the public at large. 21 Pat.L.T. 980=1940 P.W.N. 902. See also 20 Pat. 306=1941 Pat. 185. As to what are *pending proceedings*, see 185 I.C. 86=41 Cr.L.J. 148. Any publication which tends to excite prejudice against the parties to a pending litigation or their litigation while it is pending constitutes contempt of Court. Attacks on or abuse of a party, his witnesses or solicitor constitute contempt, but a mere libel on a party, not amounting to an interference with the course of justice, does not, the party being left to his remedy by action. To publish injurious misrepresentations directed against a party to the action, especially when they are holding that party to hatred or contempt is liable to affect the course of justice, because it may, in the case of a plaintiff, cause him to discontinue the action from fear of public dislike, or it may cause the defendant to come to a compromise which he otherwise would not come to, for a like reason. The fact that the trial Judge would not be affected by the article has no bearing on the matter. I.L.R. (1938) Mad. 545=1938 Mad. 248=(1938) 2 M.L.J. 81. To comment on a case which is *subjudice* or to suggest that the Court should take a certain course in respect of a matter before it undoubtedly constitutes contempt and honesty of motive cannot remove it from this category. If this were to be allowed persons in a position to assist the Court by their evidence might be prevented from coming forward, and persons appearing as witnesses might be influenced in their testimony. The criterion is not whether the Court will be influenced, but whether the action complained of is calculated to prejudice the course of justice. Good intention is not the deciding factor in a matter of contempt, though the intention and *bona fide* nature of the action constituting contempt have an important bearing on the question whether the Court should take action. To comment on a case which is about to come before the Court with knowledge of that fact is just as much contempt as comment on a case actually launched. A discussion in a newspaper of the rights and wrongs of a case when pending before a Court is improper and constitutes contempt of Court. This does not mean that reference cannot be made to pending cases or that items of news which are concerned with pending cases should not be published. What cannot be permitted is a discussion of the attitude which the Court should adopt when considering the case. I.L.R. (1939) Mad. 466

=1939 Mad. 257=(1939) 2 M.L.J. 843 (F.B.). A pamphlet which assumes the truth of certain facts which are connected directly or indirectly with the matters under consideration and awaiting decision in a pending litigation, amounts to contempt of Court. So also a document containing reflections of the gravest possible nature upon the conduct and the character of certain of the persons concerned in a pending proceeding and predicting that a certain party will win and thereby justice will be defeated. 43 C.W.N. 333=I.L.R. (1939) 1 Cal. 394. Where a member of the Legislative Assembly wrote a letter to a Magistrate making certain suggestions with reference to proceedings under S. 107, Cr. P. Code, pending before him, it was held that it grossly offended against the law of contempt of Court and that no member of the Legislative Assembly had any right to interfere in such a manner in the course of administration of criminal justice. 185 I.C. 754=1940 Oudh 178. A pamphlet published during the pendency of proceeding comes within the definition of "contempt of Court," if (1) it assumes the truth of certain facts which are connected directly or indirectly with the matters under consideration and awaiting decision in the proceeding itself, (2) if the document contains reflections of the gravest possible nature upon the conduct and the character of certain of the persons in the proceeding, and (3) if the pamphlet purports to predict that certain party will be or is likely to be successful in the proceeding and adds the comment in effect that if he is successful, law and justice will be defeated. 43 C.W.N. 333=1939 Cal. 672=I.L.R. (1939) 1 Cal. 399. *Writing of letters to a Magistrate in respect of a matter pending before him* grossly offends against the law of contempt. It is in the clearest terms an attempt to prejudice the mind of the Magistrate in regard to the trial of the case before him. 181 I.C. 714=1939 O.W.N. 525=1939 Oudh 180. See also 14 Luck. 649; 14 Luck. 653. Every *private communication to a Judge for the purpose of influencing his decision* upon a pending matter, is contempt of Court as tending to interfere with the course of justice. On the facts of the case it was held that a letter addressed to a Magistrate at a time when no proceedings were pending before him did not amount to contempt, as it was not the intention of the writer to influence the Magistrate by means of that letter. 181 I.C. 466=1939 O.W.N. 522=1939 Oudh 182. Where a party to a pending case wrote a letter to the Judge *seised of the case* containing the following statement "you have on your responsibility caused all these proceedings against law to be taken with a view to cause loss to me. In case I succeed in appeal, you yourself shall be responsible for the property or the value thereof due to the above mentioned unlawful acts," it was held that it amounted to contempt of a serious nature and that it contained a *threat and an imputation against the Judges impartially* and that it was a serious matter which could not be treated lightly. 1940 N.L.J. 425=1940 Nag. 407. Interference with the administration of justice is one of the well-recognized heads of contempt. Courts while they have to be jealous to guard against any interference with their functions should not be too sensitive where no harm

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has been caused or was intended to be caused. Where the accused in a case under the Copyright Act made certain defamatory statements about a certain third person and the latter wrote and demanded an apology and compensation under threat of legal action it was *held*, that the latter's action did not amount to contempt and though he might have waited for the termination of criminal proceedings, was not bound to do so. 1941 N.L.J. 368=1941 Nag. 241. Where a member of the Legislative Assembly writes letters to a District Magistrate about certain pending criminal cases he is attempting to interfere with the administration of criminal justice which nobody is entitled to. 1939 A.L.J. 99=1939 A. 247. Though a printed article may not have any effect on the mind of the Magistrate or Judge, the essence of contempt of Court being conduct calculated to produce an atmosphere of prejudice in the midst of which the proceedings must go on, publications with such a tendency will be punished as contempts. Where the respondent, the editor of a newspaper, after reproducing an accurate statement of a criminal complaint lodged against the accused, added in big headlines that "thousands 'of rupees were missing," as a fact, instead of "as alleged," *held*, the respondent was guilty of contempt. 1931 M.W.N. 1058=34 L.W. 727=61 M.L.J. 848. Where during the pendency of a suit relating to the genuineness of a will the editor of a newspaper published a copy of the will in the paid advertisement column and it appeared that the publication was likely to prejudice the mind of the public, *held*, that the act of the persons responsible for the paper amounted to contempt of Court. 1931 A.L.J. 647=1931 A. 420. The *special privilege of the press is a time-worn fallacy*, and the sooner the misconception that the press is not accountable to the law is removed the better it will be. No editor has a right to assume the role of investigator or try to prejudice the Court against any person. Writing and publishing an article in a newspaper likely to prejudice the course of justice relating to a pending case amounts to a contempt of Court. 15 Luck. 268=41 Cr.L.J. 169=1940 O. 137. See also 1940 Rang. 70=41 Cr.L.J. 445. Far from there being any special privilege of the press, there is on the other hand a special responsibility affecting the editor of a newspaper, namely that he is in duty bound always to bear in mind the danger of prejudicing the course of justice by the publication of articles in his newspaper which though innocent in appearance may easily be so read by members of the public as to prejudice the course of litigation. 1940 O.W.N. 1197. It is not possible to say that criticism of Court is protected and can be justified where there is no good faith, where there are *misstatements and misrepresentations* and where necessarily the Court is brought into contempt and disrepute. The writer cannot claim to act in good faith when he ignores the sources of the truth which were open to him. I.L.R. 1941 Kar. 3=42 Cr. L. J. 1=1940 Sind 239 (F. B.). Guardian celebrating marriage of ward in breach of undertaking given to Court—Offence—Persons assisting guardian whether liable. 31 Bom.L.R. 1120. See also 1938 Cal. 38; 1933 Pat. 142=12 Pat. 1. Where a person is

restrained by a judicial order from proceeding with certain action, the person so ordered is not justified in disobeying the order merely because he is advised or thinks that the order is wrong in law. 1937 Cal. 601. Where in the course of a series of newspaper articles the editor alleged that the Judges had convicted a person after having expressed a doubt of his guilt, that the conduct of cases before the Chief Justice was such that arguments and authorities were ignored and that the life and liberty of the subject brought before him was in peril, and further that the Chief Justice passed monstrous sentences and unjustifiably convicted persons on the uncorroborated testimony of an approver and accused the people of the province as habitual liars thus prostituting the position of a Judge. *Held*, that the articles were intended to lower the prestige of the High Court and the dignity of the Judge and that the editor could be punished for contempt. 8 Pat. 323=117 I.C. 180 (2)=30 Cr.L.J. 741 (F.B.). It is indeed difficult and well nigh impossible to frame a comprehensive and complete definition of 'contempt of Court.' Anything that tends to curtail or impair the freedom of the limits of the judicial proceeding must of necessity result in hampering the due administration of law and in interfering with the course of justice. It must therefore be held to constitute contempt of Court. Where a party sends *threatening letters to the opposite party and his advocate* demanding the withdrawal of certain allegations in the pleadings it is calculated to interfere with and obstruct or divert the course of justice and hence the party sending such communications is therefore clearly guilty of a contempt of Court. I.L.R. (1940) Nag. 69=1939 N.L.J. 461. Where a person accused of an offence under Ss. 420 and 406, I. P. Code, files a *complaint for defamation against a witness* in that case and during its pendency, in respect of certain statements made by that witness it was *held*, that inasmuch as the complaint was made more than 6 months after the examination of all the witnesses and not straightway as soon as the particular witness was examined, it was a *bona fide* act intended for the protection of the complainant's own good name and not an act aimed at putting pressure to bear on witnesses and as such there was not even a technical offence of contempt committed. 181 I.C. 575=40 Cr.L.J. 569=1939 Oudh 225. The essence of an offence of contempt of Court lies in the fact that the person complained against has done something which might have the effect of prejudicing the fair trial of a pending case, inasmuch as it is of great importance to the administration of justice that it should be allowed to take an unfettered course and not be sullied and besmirched in any manner. Where a person files a *complaint for defamation in respect of various allegations against him contained in a petition to adjudicate him an insolvent* and also says that he had told the other party that if insolvency proceedings are started, he would take counter proceedings, there is nothing done from which an inference could be drawn that if the allegations in the insolvency proceedings are withdrawn, the criminal proceedings for defamation would also be dropped. There is a *distinction between a threat before proceedings are instituted and a threat after proceedings have been instituted*. If

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when the earlier proceedings have been taken a threat is held out then to the person who institutes the proceedings by the opposite party to the effect that unless the proceedings are withdrawn drastic action would be taken, the holder of the threat would be guilty of contempt of Court; but where the threat is held out before the institution of the proceedings it amounts only to a warning so that an unguarded action may not be taken. There may well be action in the nature of a blackmail and it would be dangerous to hold that if the person attempted to be blackmailed were to hold out a counter threat, he would be guilty of contempt of Court. 1940 A.L.J. 798=1941 A. 95. Where during the course of a guardianship proceedings, one of the parties files an affidavit containing aspersions on the other party and he thereupon files an application under S. 476, Cr. P. Code, for enquiry into the falsity of the allegations in the affidavit and for necessary action and also files a complaint against the other under S. 500, I. P. Code, neither the application under S. 476, Cr. P. Code, nor the complaint under S. 500, I. P. Code, constitutes contempt of Court. 1940 A.L.J. 579=1940 A. 497. Where a person not a party to the suit sends a registered notice to the defendant, demanding the withdrawal of an abusive epithet used in the written statement with reference to him, and threatening to file a suit for damages, if it was not withdrawn, it is merely the formal preliminary notice for a suit for damages for libel and does not constitute contempt of Court. This is quite different from putting pressure on a party to withdraw a plea in a civil suit, which may amount to contempt of Court. 187 I.C. 65=1939 A.L.J. 1157=1940 All. 114. Where A aids and abets B in his disobedience of an injunction it is a wrong remedy to petition the Court to issue notice upon A to show cause why he should not be committed for contempt for disobedience of the injunction. The petition should ask the Court that A be committed for aiding and abetting B in his disobedience. In the first case the Court might dismiss the application and ask the petitioner to apply again in proper form. 1938 P.W.N. 895=19 P.L.T. 867=1938 P.C. 295. The Government granted certain lease of quarrying rights to A. A took possession of the quarries. In a dispute concerning lease the Government and its servants were restrained by an injunction from disturbing possession of A, B, who was not a party to the injunction proceedings, but who derived his supposed interest from the Government, continued to work the quarries. A brought an action for contempt proceedings against the Government for disobedience of the injunction, and against B, for aiding and abetting the disobedience. Held, that Government could not be said to have disobeyed the injunction. It was for A, who had the immediate right to possession or was in possession under the order of the Court and not for the Government, who was not in actual possession to eject B. The duty of the Government was to leave those who claimed entitled to the possession of the soil to take the appropriate measures. Held, further, as Government was not liable, B, who derived his interest through it, could also not be held liable for disobedience. [16 Pat. 159=1937 Pat. 65=

166 I.C. 966 (S.B.), reversed]. 19 Pat.L.T. 867=178 I.C. 490. See also 41 C.W.N. 821=1938 P.C. 295 (P.C.). Any act done or writing published which is calculated to bring a Court or a Judge into contempt or to lower his authority is contempt of Court. It is a class of contempt usually known as "*scandalising the Court*"; the principle on which the Court proceeds in taking notice of this class of contempt is based on the interest of the public and not on the interest of the particular Court or Judge, who is attacked. Where attacks are made on the personal character of a Judge, or where base or improper motives in the decision of a case are attributed to a Judge, the process of the Court should be used; but the process of contempt for scandalising the Court is one which should be sparingly used. A general expression of opinion hostile to the utility of Courts of Justice, without any attack on any particular judge or comment on any particular case, is not likely to affect the public and need not disturb the equanimity of Judges, and does not amount to such a contempt of Court as should be dealt with by the process of contempt. I.L.R. (1938) Bom. 179=40 Bom.L.R. 75=1938 Bom. 197. *Scandalising the Court* amounts to contempt of Court. It is immaterial whether the attack on the Judge is with reference to a case about to be tried or actually under trial or recently adjudged. And the offence is in no way mitigated when the attack is not upon a particular Judge but upon the Court as a whole, indeed, upon all the Judges. Contempt is not only committed when there is a detailed discussion of the facts and merits, but when, for instance, some presumptuous person states that the case of the party is sound in law and fact before such case is heard and decided. An article suggesting abuse by Chief Court of its powers, a desire on the part of that Court to enter into a conflict with the executive Government and containing a plain invitation to Magistrates to disregard the authority of that Court and to subordinate themselves to the alleged wishes of the executive Government, is an article tending to embarrass the administration of Justice and calculated to create in the minds of the general public grave apprehension that the Chief Court is not entitled to public confidence in its discharge of its duties. Such article amounts to contempt of Court. 1940 Sind 229 (F.B.). Where a suit was concluded by a decree of Court embodying the terms of settlement between the parties one of which was an undertaking given by the defendant not to dispose of his properties until the decree was fully satisfied, and the defendant mortgaged the properties before the satisfaction of the decree. Held, that the breach of the undertaking given to the Court amounted to contempt of Court and that the breach was not so trivial a matter as to be beneath the dignity of the Court to as to be beneath the dignity of the Court to notice or punish it. 42 C.W.N. 203. Newspaper article—Imputations against jail authorities likely to prejudice fair trial—Offence—Sentence. 26 A.L.J. 1307=113 I.C. 754=1929 A. 81 (F.B.). Proceedings for contempt—Nature of—Evidence—Receiver's report based on hearsay evidence as the basis of sentence—Legality. 118 I.C. 565=1929 C. 115.

PRACTICE AND PROCEDURE.—Summary proceedings taken by the High Court for con-

2. (1) Subject to the provisions of sub-section (3), the High Courts of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of courts subordinate to them as they have and exercise in respect of contempts of themselves.

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tempt of itself are proceedings derived from the Common Law of England. There is inherent right to take such proceedings in the High Court by virtue of its position as a superior Court of record. The power to punish for contempt is a power *sui generis* and not a power which is or can be exercised under the ordinary criminal jurisdiction of the Court. 39 C.W.N. 823. A rule for contempt can be issued by any single Judge or any number of Judges of a Court of record. It is not necessary that the rule should be issued by the High Court as an entire body after consultation with all its members 8 Pat. 323=117 I.C. 180 (2)=30 Cr.L.J. 741 (F.B.). See also 7 R. 844=122 I.C. 282=31 Cr.L.J. 397. Where an application is made to the High Court on behalf of the *Legal Remembrancer* for taking proceedings against a person for contempt of Court, it is not proper that the affidavit in support of the application should be that of a clerk. It should be the affidavit of some responsible officer. 21 P.L.T. 980=20 Pat. 306=1941 Pat. 185. The *Legal Remembrancer of Bihar* is competent to represent the Government or the Governor in proceedings for contempt in Bihar and can move the Court to take proceedings. His functions and duties are wide enough to empower him to move on behalf of the Government or the Governor and to instruct the Advocate-General to carry on proceedings for contempt in the High Court. 1940 P.W.N. 902=21 P.L.T. 980=1941 Pat. 185. Summary jurisdiction in contempt is a powerful weapon in the hands of the Court and is to be used sparingly. But its use must in large part depend upon those who by their misconduct invite its application. 1940 Sind 239 (F.B.)=I.L.R. (1941) Kar. 3=42 Cr.L.J. 1. There can be no doubt that a Court need not and should not interfere in all cases of contempt. It is a very arbitrary method of dealing with an offence and contempt proceedings should be sparingly instituted, and a person should not be convicted unless it is essential in the interests of justice that he should be. Where the matter complained of tends to prejudice and tends to cause substantial prejudice, it does call for action, as it cannot be said to be a mere technical contempt. A mere technical contempt of Court is not sufficient to warrant the High Court interfering and convicting the offender. There must be a substantial contempt, that is, something which tends in a substantial manner to interfere with the due course of justice or tends substantially to prejudice the public against the accused in a pending criminal case. If the Court is satisfied that there is a danger of grave prejudice and a danger of substantial and real interference with the due course of justice, the Court will take action and commit the offender for contempt. 21 P.L.T. 980=20 Pat. 306=1941 Pat. 185.

INTENTION.—Any act done or writing published, which is calculated to interfere with

the due course of justice is a contempt of Court and writings prejudicing the public for or against a party are similarly contempts. No intent to interfere with the due course of justice or to prejudice the public need be proved if the effect of the article or matter alleged to constitute contempt is to create prejudice or to interfere with the due course of justice. The writer of an article can be guilty of contempt without intending to interfere with the due course of justice. The test is not what the writer intends but what effect the words would have. An article written with the deliberate intention of interfering with the due course of justice would be an extremely serious matter meriting very severe punishment. Once it is held that the words are likely to cause substantial interference with the due course of justice or likely substantially to prejudice the hearing of a case or the trial of an accused person, then the writer is guilty of contempt whether or not he intended such results. The question of intention is irrelevant in considering whether the offence has been committed, though of course, it is a most important matter in considering the appropriate punishment to be awarded. 20 Pat. 306=21 P.L.T. 980=1941 Pat. 185. See also 49 L.W. 29. In contempt proceedings before the High Court it cannot be said that in every case the party if represented must appear though an advocate instructed by an attorney. Nature of High Court's jurisdiction in matters of contempt indicated. 34 C.W.N. 928. (See also notes under S. 2, *infra*.) Notice of motion for contempt—Nature of proceedings—Particulars to be stated. 36 Bom.L.R. 992=1934 B. 452. When the High Court as a Court of record thinks fit to exercise summary jurisdiction and under that jurisdiction punishes for a contempt of Court, it is not open to the person concerned to ask the High Court for leave to appeal to His Majesty in Council. Summary proceedings for contempt of Court are not only competent but the decision, that is to say judgment, order and sentence must be taken to be final and not open to appeal. A Court of record is the sole judge of what constitutes a contempt. 39 C.W.N. 823.

SEC. 2.—The words "Subordinate Court" in the Contempt of Courts Act are used in a wide sense as including any Court over which the High Court has superintendence for the purposes of S. 85, Government of Burma Act, 1935, that is to say, all Courts subject for the time being to its appellate jurisdiction. Sub-Divisional Magistrate when holding an inquiry under S. 176, Cr. P. Code, is acting as a Court subordinate to the High Court for the purposes of the Contempt of Courts Act. 1940 Rang. L.R. 188=41 Cr.L.J. 470=1940 Rang. 68. The High Court of its own motion can issue a rule calling upon a person to show cause why he should not be committed for contempt of the High Court or for contempt of a Subordinate Court. The powers of the High Court with regard to

(2) Subject to the provisions of sub-section (3), a Chief Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of itself as a High Court referred to in sub-section (1).

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contempt of Subordinate Courts are precisely the same as its powers with regard to contempt of itself. Under S. 2 (1) of the Contempt of Courts Act of 1926, the High Court can do in the case of contempt of a Subordinate Court whatever it can do in the case of contempt of the High Court itself. Therefore even if an application for taking proceedings is not competent, as being taken out by a person not competent to represent the Executive Government, the High Court can take notice of the Contempt alleged of its own motion and issue a rule. 21 Pat.L.T. 980=20 Pat. 306=1941 Pat. 185. *Comment upon an Advocate* which has reference to the conduct of his cases may amount to contempt of Court. 58 C. 884=35 C.W.N. 189=1931 C. 257. In cases of contempt of *mosfussil* Courts the aggrieved person should make his application direct to the High Court. Where the alleged contempt is in the form of *obstruction to the receiver* appointed by the Court, the application may be made either by the party or by the receiver himself or by the Court which appointed him. Ordinarily however it is for the parties who are damaged to prefer the complaint. In contempt applications the same procedure should be followed as in applications in contempt to the High Court on the original side. (Application made to lower Court converted into one made to High Court). 35 C.W.N. 1265. See also 36 C.W.N. 645. The Court of Commissioners appointed under the Bengal Criminal Law Amendment Act is a subordinate Court and the High Court can entertain proceedings for contempt committed before the Commissioners. 37 C.W.N. 276=1933 C. 118=60 C. 603=34 Cr.L.J. 662. The expression "*man in the street has lost confidence in the administration of justice in the province*" used by a lawyer in a meeting of the Bar Association within the premises of the Court is contempt of Court. 144 I.C. 63=34 Cr.L.J. 726=1933 O. 118. During the course of a trial the counsel for the accused observed in reply to a suggestion that the accused was proposing to leaving the jurisdiction of the Court, that he would not be appearing if that were so. The accused in fact left during the trial. *Held*, that the accused cannot be proceeded against for contempt. 35 C.W.N. 1082. A statement made by a counsel before the Judge of a Full Bench to the effect that his instructions are that his client does not wish the matter to be argued before the bench as constituted, is a *deliberate and intentional insult to the Court*. It is highly improper on the part of the counsel to make such a statement and the statement amounts to a contempt of Court. 1932 L. 485 (F.B.). Where a contempt of Court committed by a counsel is due to his *erroneous view of law* and not to any improper intention on his part, the ends of justice can be met by the Judges of the Full Bench recording grave disapproval of his action. 138 I. C. 878=33 Cr. L.J. 675=1932 L. 502 (F.B.). Where a leading

advocate commits the offence of contempt of Court unconsciously and *tenders a written apology* to the Court, such apology can be accepted as sufficient amends. 1933 O. 118. See also I.L.R. (1941) Nag. 304; 191 I.C. 519; 191 I.C. 671 and notes under S. 3, *infra*. Attempts to interfere with the possession of a receiver (appointed by Court) and to intercept the rents properly payable by the tenants to the receiver undoubtedly amount to contempt of Court. (20 Beav. 332 and 18 C.W.N. 289, Ref.) 140 I.C. 140=36 C.W.N. 645=1932 C. 705. See also 35 C.W.N. 1265; 159 I.C. 180=1935 C. 684. The case of interference with or obstruction to a receiver appointed by the Court is treated as a contempt of a criminal nature. It is not necessary in such a case that the order appointing receiver should be served on the respondent as a condition precedent to a motion for contempt. It is enough if the applicant shows that the respondent was aware of the appointment of that receiver. The act of interference or obstruction is not a matter of infringement of any order, but amounts to interference with the administration of justice and with its officers. 36 Bom.L.R. 992=1934 Bom. 452. *Interference with receiver* may amount to contempt. That the person guilty of contempt is no party to the suit in which the receiver is appointed is no bar to jurisdiction. 59 Bom. 10=36 Bom.L.R. 992=1932 Bom. 452. But Court would act with caution and reluctance when outsiders are concerned. 59 Bom. 10. Where the Court comes to a decision that it will appoint a Receiver but does not name any officer or individual as receiver, it is not a contempt of Court for a person who knows that that decision has been arrived at even if he is a party to the proceedings who knows—to collect and disburse moneys which it is intended are to fall within the powers of the Receiver. It cannot be said that for a party bound by a judgment to do anything which will make that judgment ineffective, is in itself a contempt of Court. The equitable rule of deeming that to be done which ought to be done could not apply to such case, for it could not be imported into the realms of criminal or quasi-criminal law. Where a Receiver is appointed among other things to collect rents, there is no disturbance of his possession when there is a disposal of moneys already collected as rent, for such moneys are not moneys of which the Receiver is appointed receiver. The word 'rent,' in its proper sense, ceases to be such when it is paid by a tenant to a person authorized by the landlord to give a good discharge for it. 1941 Rang.L.R. 747. It is well settled that *when receivers are appointed by a Court, interference with them and obstruction to them will amount to contempt of Court*, and that the forcible taking of the rents and profits for which the receiver has been appointed or of chattels in his possession as receiver will amount to such interference and obstruction. 44 C.W.N. 925=1940 Cal.

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487. *Obstruction offered to a public servant* in the discharge of his public function is an offence by itself though the public servant may not be acting under the orders of a Court of justice so long as he was performing a legal function. But if that public servant is carrying out an order of a Court the offender commits another offence, namely, the offence of contempt of the Court whose order the public servant is carrying out. S. 186, I. P. Code, does not take note of this second offence which can be the subject of contempt proceedings 12 P. 172=1933 P. 204=14 Pat.L.T. 77. The necessity for personal service of an order of the Court (appointing the receiver) does not exist when the contempt complained of is obstruction of the Court's officers. 140 I.C. 140=36 C.W.N. 645=1932 C. 705. Where the accused were convicted by the trial Court but were released on bail the same day by the Sessions Court which later on confirmed the conviction and issued warrants of arrest against them and the accused evaded those warrants of arrest and applied to the High Court, in revision, making it appear to the High Court that they were in jail, while in fact they were at no time in jail, it was held that *both their evasion and misrepresentation amounted to contempt of Court*. I.L.R. (1940) All. 507=1940 A.L.J. 309=1940 A. 386. The widowed mother of a minor girl had re-married and thereupon her sister applied to the Court stating that the minor girl should be removed from the custody of the mother. The applicant was directed to take charge of the minor and she undertook not to marry the minor without the permission of the Court. Subsequently the mother under whose custody the minor continued got the minor married without the permission of the Court. *Held*, (1) that the mother was not guilty of an offence under S. 228, I. P. Code, the insult or interruption of a public servant while sitting in a judicial proceeding is not a phrase which applies to mere disobedience of an order of the Court; (2) that the accused might be proceeded against under the Contempt of Courts Act. 12 Pat. 1=1933 P. 142=34 Cr.L.J. 770. Contempt of Court is either (1) criminal contempt consisting of words or acts obstructing or intending to obstruct the administration of justice or (2) contempt in procedure, consisting of disobedience to the judgments, orders or other process of the Court and involving private injury. Ordinarily a party to an action who disobeys a prohibitory order, such disobedience though wilful is contempt in procedure, whereas persons who aid and abet such disobedience and are not parties to the action are guilty of criminal contempt. Where in spite of an order of prohibition a father performs the marriage of his minor daughter he is guilty of contempt along with the person who married the girl knowing of the prohibition. 189 I.C. 813=1940 Nag. 203. A Guzerati person applied for restoration of his minor boy from an Anglo-Indian lady who looked after him for a long time with the father's concurrence. In a previous proceeding, the father was appointed as the guardian of the boy and the father was ordered to have the custody of his boy and was to arrange to take the child for

a change. The father made the arrangement but the lady refused to deliver the child to its father in spite of many requests. *Held*, that the lady was guilty of contempt. 1938 Cal. 38=174 I.C. 785. The meaning of S. 2 (3) is that where under the I. P. Code there is already a provision for punishing a contempt of Court as a contempt of Court the Contempt of Courts Act itself shall have no application. It does not mean that when the Act which has constituted the contempt of Court also constitutes an offence under the Penal Code it may not be punished under the Contempt of Courts Act. A single act may be both an offence under the Penal Code and may also be a contempt of Court and may be punishable in either or both capacities 12 P. 1=1933 P. 142=144 I.C. 351. See also 1940 N.L.J. 425=1940 Nag. 407; 159 I.C. 180=1935 C. 684; 1938 A.L.J. 430.

Secs. 2 (2) and (3) : CHIEF COURT OF OUDH—JURISDICTION AS REGARDS CONTEMPT OF SUBORDINATE COURTS.—The Chief Court of Oudh is by virtue of the Oudh Courts Act and Ss. 219 and 220 of the Government of India Act, the High Court of Oudh and the one and only Court of record and by virtue of its position akin to that of the Court of King's Bench. It has its power of superintendence over all inferior Civil and Criminal Courts and it has power to protect its Subordinate Courts from improper interference in the administration of Justice. It would be absurd to think that such a Court, which is the custodian and protector of public Justice throughout the province of Oudh, has no power to deal with the contempt of Courts subordinate to it. Its powers in that respect are defined and limited by the Contempt of Courts Act of 1926. The Act is silent as to the powers of the Chief Court to deal with contempts of Court subordinate to it, but such power cannot be negatived by silence and is to be inferred from the wording of sub-Cl. (2) of S. 2 in which the words "subject to the provisions of sub-Cl. (3)" would be otherwise meaningless and in fact unnecessary. 14 Luck. 492=1939 Oudh 131 (F.B.).

PRACTICE AND PROCEDURE.—The fact that the rule for contempt is unsigned is by itself no ground for discharge of the rule. 37 C.W.N. 276=1933 C. 118=60 C. 603. When signing a petition for launching contempt proceedings a Secretary to Government should be presumed to be acting within the scope of the authority conferred on him until the contrary is shown. 60 Cal. 603. The legal remembrancer is *ex officio public prosecutor* on the Appellate Side of the High Court and as such has the power to instruct counsel, his authority to act for the local Government being in no way dependent on anything in the nature of a vakalatnama or warrant of attorney. 60 Cal. 603. Applications for contempt cannot be subject-matter of reference by the lower Court to the High Court. Such applications cannot be heard by a Bench of the High Court hearing criminal appeals unless they are specially referred by the Chief Justice. 35 C.W.N. 1265. When the contempt is committed in the face of a Court it is that Court which is the proper tribunal to decide the whole matter. 138 I.C. 878=1932 L. 502 (F.B.). In a case where a party is required to do something by order of Court,

(3) No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code.

3. Save as otherwise expressly provided by any law for the time being in force, a contempt of Court may be punished with simple imprisonment for a term which may extend to six months, or with fine, which may extend to two thousand rupees, or with both :

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it is necessary before an application is made for committal of a person to jail for disobedience of the Court's order, that he should have been personally served with notice of the order. Service upon his attorney is not sufficient nor is personal service after notice of motion for contempt. 34 Bom.L.R. 1416=1932 B. 638. The precise breach or breaches of the order complained of should be set out in the notice of motion itself and the other party should not be left to ascertain, if he can, from the affidavit relied upon in support what the charges are. 1932 B. 638. In cases of contempt the parties charged with contempt cannot be called upon to answer to anything which is not set out specifically in the grounds used before the Court at the time when the rule was issued ; where the grounds are insufficient the only course open to the Court is to discharge the rule. To such a case allegations set out in an affidavit cannot be taken notice of unless the source of the deponent's information is disclosed. 35 C.W.N. 1267. There can be no justification of contempt of Court even if the writer or speaker believes all that he states to be true ; and a person guilty of contempt is not entitled to lead evidence to establish the truth of his allegations. 36 Cr.L.J. 620=1935 A.L.J. 46=1935 A. 38. The general rule is a party in contempt is not entitled to be heard but the rule has never been applied to a case in which the order, for the breach of which contempt is alleged, is challenged on the ground of want of jurisdiction. 55 B. 803=33 Bom. L.R. 725=1931 Bom. 402. In an enquiry by the Court for contempt consisting of alleged disobedience of the order of Court, it is unnecessary to go into the previous history of the matters which led to the passing of the order. (7 B. 5, Ref.) 34 Bom.L.R. 1416=1932 B. 638. Where the breach of an order of Court complained of is a failure to pay a sum of money, the Court has no power to commit a private party for contempt. But a receiver is an officer of Court and on his failure to comply with an order of Court—even though it be only an order for the payment of money—he may be committed for contempt. (19 B. 152, Dist.; 4 C. 655, Foll.) 34 Bom.L.R. 1416=1932 B. 638.

Sec. 2 (3).—The prohibition contained in S. 2 (3) of the Act, refers to offences punishable as contempt of Court by the Indian Penal Code and not to offences punishable there otherwise than as contempt. 1940 N.L.J. 425=1940 Naz. 407. See also 1938 A.L.J. 430 ; 1935 C. 684. Where in answer to interrogatories, a party to a proceeding in a Magistrate's Court stated that the Chief Reader of that Court had friendly relations with and influence over the Court

which acted dishonestly and imposed a fine, the statement is clearly defamatory of the presiding officer and a criminal offence under the Penal Code. But the appropriate procedure is for the officer to file a complaint under the Penal Code and the High Court will not take cognizance under the Contempt of Courts Act. 36 C.L.J. 967=1935 A.L.J. 950 (1)=1935 All. 896.

Sub-S. (3), S. 2, means that the contempt must be punishable as a contempt under the Penal Code and not punishable only because it otherwise is an offence. 165 I.C. 813=1936 L. 917. The true interpretation of cl. (3) to S. 2 of the Contempt of Courts Act is that where there is already a provision in the Penal Code for punishing a contempt of Court as such the Contempt of Courts Act itself shall have no application. But where an act amounts to an offence under the Penal Code and also under the Contempt of Courts Act, it will be punishable under both Acts. I.L.R. (1938) All. 548=1938 A.L.J. 430=1938 All. 358.

Secs. 2 and 3.—Where a *leading advocate* commits the offence of contempt of Court unconsciously and tenders a written apology to the Court, such apology can be accepted as sufficient amends. 144 I.C. 63 (2)=1933 O. 118.

Sec. 3.—Threat used by Advocate to Judge an offence. Where an Advocate wrote a letter to a Judge informing him that steps were being taken to put a certain decree in execution while a revision was pending in the High Court and further stated that in case further action in execution was taken his client would institute a suit for damages against him, *held*, that the intention of the Advocate was to influence the mind of the Judge by the threat held out to him and that the Advocate was liable to be convicted under S. 3. 147 I.C. 330=1934 A.L.J. 145=1934 A. 317. See also 1939 N.L.J. 461. But see 18 Lah. 69 noted under S. 1, as regards the extent of punishment that can be given under inherent power of High Court. The Court has jurisdiction to direct the payment of costs of the Crown by the person punished under the contempt of Courts Act. The proper method by which these costs should be recovered should be on the lines on which decrees are executed by the Civil Court. 36 Cr.L.J. 1365=1935 A.L.J. 1153=1935 A. 1013. Where the contempt is of a very grave nature, the party in contempt may be punished in spite of apology tendered. (1938) 2 M.L.J. 520=1938 Mad. 975. The proviso to S. 3, no doubt, seems to contemplate an apology at a late stage. But where the accused takes such action as any reasonable man must realise to be likely to prejudice the trial of a case and where instead of apologising at the earliest possible opportunity he or his counsel contends most strenuously that no contempt has

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court :

¹[Provided further that notwithstanding anything elsewhere contained in any law no High Court shall impose a sentence in excess of that specified in this section for any contempt either in respect of itself or of a Court subordinate to it.]

THE INDIAN CONTRACT ACT (IX OF 1872).

EFFECT OF SUBSEQUENT LEGISLATION.

S. 1, rep. in part, Act X of 1914, S. 3 and Sch. II.

S. 16, subs., Act VI of 1899, S. 2.

S. 19, rep. in part, Act VI of 1899, S. 3.

S. 19-A, ins. Act VI of 1899, S. 3.

S. 21, rep. in part, Act XXIV of 1917, S. 3 and Sch. II ; am., A.O., 1937.

S. 25, am., Act XII of 1891, S. 2 and Sch. II.

S. 27, rep. in part, Act IX of 1932, S. 73 and Sch. II.

S. 28, rep. in part, Act I of 1877, S. 2 and Sch.

Ss. 43 and 63, am., Act XII of 1891, S. 2 and Sch. II.

S. 74, am., Act VI of 1899, S. 4 ; A.O., 1937.

Ss. 76 to 123, rep., Act III of 1930, S. 65.

S. 133, am., Act XXIV of 1917, S. 2 and Sch. I.

Ss. 178 and 178-A, subs. for the original S. 178, Act IV of 1930, S. 2.

Ss. 239 to 266, rep., Act IX of 1932, S. 73 and Sch. II.

Sch., rep., Act X of 1914, S. 3 and Sch. II.

PREFATORY NOTE.—A contract may be defined as an arrangement between competent parties, supported by a legal consideration, and in the form, if any, prescribed by law, creating an obligation on the part of one or both to do or refrain from doing some lawful thing.

The Bill which afterwards became the Contract Act was drawn in 1866 in England by the Indian Law Commissioners. In the following year it was introduced into the Council of the Governor-General during the absence of Mr. (afterwards Sir Henry) Maine by the Right Hon'ble W. N. Massey, referred to a Select Committee, and published and circulated to the Local Governments. Thereupon, a controversy arose between the Secretary of State and the Commissioners on the one side, the Home and the Indian authorities on the other, as to the Commissioners' proposals that all penalties should be treated as liquidated damages, and that the ownership of goods may be acquired by buying them from any person who is in possession of them, if the buyer acts in good faith, and under circumstances which do not raise a presumption that the possessor has no right to sell them ; in other words, that every place in India should become a market overt. The result was that the Secretary of State permitted the Government of India to take their own course as to altering the Bill ; the Commissioners resigned and the Bill (whose early enactment was directed by the Secretary of State) was carried

LEG. REF.

¹ Second Proviso inserted by Act XII of 1937.

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been committed, his apology thereafter can only be regarded as an after-thought put forward in the hope of avoiding the wrath to come. 1940 O.W.N. 1197. An apology is not a weapon of defence forged to purge the guilty of their offences. Nor is it intended to operate as a universal panacea. It is intended to be evidence of real contriteness. Only then is it of any avail in a Court of Justice. It must be tendered at the earliest opportunity unreservedly and unconditionally. Everything depends on the circumstances as well as upon the nature of the apology and the manner in which it is tendered. 1940 N.L.J. 425=1940 Nag. 407=I.L.R. (1940) Nag. 304. See also 1941 O. 67=16 Luck. 506 ; 1940 O.W.N. 1197. It does not follow that because an apology is offered the Court must accept it and is disarmed. A Court can refuse to accept an apology which it does not believe is genuine ; it can even when it accepts the apology, commit an offender to prison or otherwise punish him. Furthermore, there cannot be both justification and apology. The two things are incompatible. 1940 Sind 239 (F.B.). The principle underlying the case

in which persons have been punished for attacks upon Courts and interferences with the due execution of their orders is not the protecting of either the Court as a whole or the individual Judges of the Court from a repetition of them, but the protecting of the public and especially those who either voluntarily or by compulsion are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired. An article in newspaper containing comments on the finding of the Magistrate in an inquest under S. 176, Cr. P. Code, into the death of certain person amounts to contempt of Court if the comments impute deliberate perversity, incapability and partiality to the police on the part of the Magistrate in question. For the publication of this article the publisher and editor are liable to be dealt with for contempt of Court and they cannot be allowed to go unpunished merely because they have tendered an apology. 187 I.C. 308=41 Cr.L.J. 445=1940 Rang. 70. Where a contemner states that he is 'extremely sorry' it may amount to an expression of regret, but it is certainly not an apology—which is the word used in the Contempt of Courts Act, 1942 O.W.N. 6. See also 1933 Oudh 118.

through the Council with some important amendment by Mr. (afterwards Sir Fitzjames) Stephen.—Whitley Stokes' *Anglo-Indian Codes*, Vol. I, p. 534.

"The first draft of a law of Contract for India was prepared in England by the Indian Law Commissioners. Some points in the original Bill gave rise to prolonged discussion, and portions of the measure were re-cast in this country. It consists almost exclusively of the rules which govern the English Courts, thrown into the form of legal enactment. Whenever these rules have been departed from, it has been on account of some difference between the circumstances of the two countries which rendered it unsafe, in the opinion of those upon whom the responsibility of passing the measure ultimately devolved, to enact the English Law without modification. Some special and subsidiary chapters of the Law of Contract, such for instance as the law of Master and Servant, Consignor and Carrier, the law regulating Promissory Notes and Bills of Exchange, were intentionally omitted, inasmuch as, when the Act was passed, they had not received that elaborate consideration which their importance deserved, and because in the case of some, matters of principle had to be decided, the discussion of which was still unripe. The last of these subjects has been subsequently provided for in the Negotiable Instruments Act of 1881. The Law of Contracts specially affecting land sales, mortgages, leases and other forms of alienations of immovable property was also left aside as being of so special and technical a character and so diverse in its aspects in different parts of the Empire as to render it unsafe to deal with it in a general enactment. It has now been dealt with in the Transfer of Property Act of 1882, without however any modification of the general principles laid down in the present Act as applicable to all contracts. The subject of specific performance was also omitted, no doubt because intimate as is its connection with the Law of Contracts, it lies somewhat beyond the pale of contract in its strict sense and involves the consideration of topics other than those with which the Law of Contract is, strictly speaking, concerned. For this, too, special provision has been made in Act I of 1877." See Introduction to Shephard and Cunningham's Contract Act.

The drafting of this Code has been the subject of strong adverse criticism by several very eminent Judges and Jurists.

"Not only the work of different hands, but work done from quite different points of view has been pieced together with an incongruous effect Another source of unequal workmanship, and sometimes of positive error is that the framers of the Indian Codes, and of the Contract Act in particular, were tempted to borrow a section here and a section there from the draft Civil Code of New York, an infliction which the sounder lawyers of that State have been happily successful so far in averting from its citizens. This Code is, in our opinion, and we believe in that of most competent lawyers who have examined it, about the worst piece of codification ever produced. It is constantly defective and inaccurate, both in apprehending the rules of law which it purports to define and in expressing the draftsman's more or less not satisfactory understanding of them. The clauses on fraud and misrepresentation in contracts—which are rather worse, if anything than the average badness of the whole—were most unfortunately adopted in the Indian Contract Act. Whenever this Act is revised everything taken from Mr. Dundley Field's Code should be struck out, and the sections carefully re-cast after independent examination of the best authorities." In fact, the Contract Act passed through not less than three distinct stages. First, there was the draft prepared in England by the Indian Law Commission uniform in style and possessing great merit as an elementary statement of the combined effect of the common law and equity doctrine as understood about forty years ago. Next this was revised and in parts elaborated by the Legislative Department in India. The borrowing from the New York Draft Code seems to belong to this phase. Lastly, Sir James Stephen made or supervised the final revision and added the introductory definitions, which are in a wholly different style and not altogether in harmony with the body of the work. Evidently this process could not satisfy the conditions of a model Code. It is much to the credit of the workman that the result after allowing for all drawbacks, was a generally sound and useful one. See Preface to the first edition of Pollock's Contract Act.

Mr. Whitley Stokes wrote as early as 1887 as follows :—Unfortunately it (the Contract Act Bill) had been sent out to India in a very Crude form ; it never underwent the patient, penetrating revision by a skilled draftsman necessary in the case of such a measure ; and though the Indian Judges have loyally endeavoured to give effect to its provisions, these are so incomplete and sometimes so inaccurately worded that the time seems to have come for repealing the Act, and re-enacting it with the amendments in arrangement, wording and substance suggested by the cases decided upon it during the last fourteen years. Should this be done it would be well to incorporate the existing laws relating to negotiable instruments, to exchanges and to sales and mortgages and leases of immovable property and to add chapters on Carriers and Insurance."—Whitley Stokes' *Anglo-Indian Codes*, Vol. I, p. 534.

N.B.—The several criticisms on this Act offered by Sir Frederick Pollock and Sir William Anson in their Books on the Law of Contracts are also to the same effect.

The Indian Contract Act, 1872, endeavours to codify—that is to say—arrange clearly and systematically the chief rules relating to the formation, ratification and discharge of all agreements enforceable by law, made between two or more persons by which rights are acquired by one or more of them to acts or forbearances on the part of the other or others. It also deals specially with the following classes of those agreements, *viz.*, Sale of Goods : Indemnity and Guarantee : Bailment including Pledge : Warranty : Agency and Private Partnership (Public Partnerships are dealt with by the Indian Companies Act, 1882). It deals, lastly, with the quasi-contracts implied when

A pays something which *B* ought to pay or *B* receives something which *A* ought to receive. The obligation arising from breach of contract is partly dealt with by the section of the Contract Act relating to compensation. The law relating to the Specific Performance and Rescission of Contracts was subsequently codified by the Specific Relief Act, 1877, (Chapters II and IV. Then came the codification of the law of Negotiable Instruments Act (XXVI of 1881) which deals with the most important branch of the law relating to the assignment of contractual rights. The rules relating to the assignment by operation of law of obligations on the transfer of land to sale, mortgage and lease of immovables to exchange and gift of every kind of property, and to the assignment of contractual rights not comprised in Act XXVI of 1881, were codified by the Transfer of Property Act, 1882, Chapters III, IV, V and VI.

Special contracts of Carriage, Master and Servant and Insurance have also been subsequently dealt with by the Indian Legislature. (Whitley Stokes' Anglo-Indian Codes, Vol. I, p. 491.) The chapters relating to Sale of Goods and Partnership have been recently taken out of the Contract Act and enacted in the form of separate Acts (Act III of 1930 and Act IX of 1932).

THE INDIAN CONTRACT ACT (IX OF 1872.)

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THE INDIAN CONTRACT ACT (IX OF 1872).¹

[25th April, 1872.]

WHEREAS it is expedient to define and amend certain parts of the law relating to contracts ; It is hereby enacted as follows :—

PRELIMINARY.

Short title.

1. This Act may be called THE INDIAN CONTRACT ACT, 1872.

Extent, commencement.

It extends to the whole of British India² ; and it shall come into force on the first day of September, 1872.

LEG. REF.

¹ For the Statement of Objects and Reasons for the Bill which was based on a report of Her Majesty's Commissioners appointed to prepare a body of substantive law for India, dated July, 6th, 1866, see Gazette of India, 1867, Extraordinary, p. 34 ; for the Report of the Select Committee, see, *ibid.*, Extraordinary, dated 28th March, 1872 ; for discussions in Council, see *ibid.*, 1867, Supplement, p. 1064 ; *ibid.*, 1871, p. 313, and *ibid.*, 1872, p. 527.

The chapters and sections of the Transfer of Property Act, 1882 (IV of 1882) which relate to contracts are, in places in which that Act is in force, to be taken as part of Act IX of 1872—see Act IV of 1882, S. 4.

² Act IX of 1872 has been declared in force in—

the Sonthal Paragnas—see the Sonthal Parganas Settlement Regulation (III of 1872) as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), S. 3.

British Baluchistan—see the British Baluchistan Laws Regulation (II of 1913), S. 3.

Panth Piploda—see the Panth Piploda Laws Regulation (I of 1929), S. 2.

It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act (XIV of 1874) to be in force in—

the tarai of the Province of Agra—see Gazette

of India, 1876, Pt. I, p. 505 ;

the Districts of Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum—see Gazette of India, 1881, Pt. I, p. 504. (The District of Lohardaga included at this time the present District of Palamau which was separated in 1894. The District of Lohardaga is now called the Ranchi District—see Calcutta Gazette, 1899, Pt. I, p. 44.)

NOTES.

Sec. 1: CONTRACT ACT.—Act is not retrospective. 5 M.I.A. 109 ; 12 Bom.L.R. 451 (458, 472). It is an amending as well as a consolidating Act. 40 B. 630=31 M.L.J. 541 (P.C.). Act is not exhaustive. It does not purport to be a complete Code dealing with the law relating to contracts, but defines and amends certain parts of that law. 40 I.C. 194=19 Bom.L.R. 370 ; 35 M. 728=21 M.L.J. 600 ; 62 C. 612=39 C.W.N. 461. See also 31 Bom.L.R. 508 ; 40 Bom.L.R. 989=1939 B. 23. The Court must interpret the Act itself where it applies and the natural meaning of the words of the statute should be followed uninfluenced by the previous state of the law. But the Contract Act is not exhaustive and where the Act does not cover the

1* * * * nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

LEG. REF.

¹ The words "The enactments mentioned in the Schedule hereto are repealed to the extent specified in the third column thereof; but" were repealed by S. 3 and Sch. II of the Repealing and Amending Act (X of 1914.)

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case with which the Court has to deal, then the Court is bound to follow the principles of the English Common Law. 56 B. 101=34 Bom.L.R. 167=1932 B. 168; 62 C. 612=39 C.W.N. 461. S. 1 saves from its operation all Statutes, Acts and Regulations not expressly repealed by this Act, and also special usages and trade and mercantile customs. 18 C. 620=18 I.A. 121 (P.C.). See also 1933 L. 183=145 I.C. 188; 1935 Sind 38 (Pakki adat); 1935 Sind 38. This Act does not affect the following usages and custom—Pre-emption. 18 C. 620. Arbitrator's lien; Attorney's lien. 6 C. 1. Mercantile custom as to Hundis, Common Carriers and Maritime Law, etc. 18 C. 620 (P.C.); 98 I.C. 759=1927 N. 89. Where both parties are engaged in business and articles are purchased by one party from the other party for business purposes, the transaction falls within the term 'mercantile transaction'. 16 Luck. 357=1940 Oudh 443. It is open to a party to plead a trade usage in conflict with the provisions of the Contract Act. If a party relies on a trade usage its incidents and details ought to be indicated with clearness and precision; and where there is an issue between the parties as to the existence of such usage the *onus* of proof lies upon the party propounding the same. 1931 A.L.J. 390=1931 A. 583. See also 1933 L. 183=145 I.C. 188; 1935 Sind 38; 33 P.L.R. 985=1932 L. 633. (Trade usage as to sale of khathis in *shamli*); 1933 L. 127 (Mercantile usage in Delhi Town Market). The Contract Act is not exhaustive so far as the law relating to common carriers is concerned. 9 I. C. 966=32 P.W.R. 1911. Where an agreement is approved, ratified, confirmed and declared to be valid and binding on the parties thereto by an Act of the Legislature, the effect of this statutory confirmation is to render every provision and stipulation of the agreement as obligatory and binding on the parties as if these provisions had been repeated in the form of statutory sections. 169 I.C. 562=1937 P.C. 214 (P.C.). Although the Contract Act purports to deal only with certain parts of the law relating to contracts, yet it should be regarded as exhaustive and binding on the Courts in India when it treats a subject in a way at variance with the English Law. 38 I.C. 915=12 N.L.R. 177. Applicability of Act to contracts regarding land. See 19 S.L.R. 337. Principle of the

Act applicable to all transfers. 25 A.L.J. 708=1927 A. 693. A mercantile custom in contravention of the written terms of a contract can be of no avail in a suit under the contract, but evidence of custom not consistent with the contract can be admitted. 41 B. 518=18 Bom.L.R. 532. See also 1931 A.L.J. 390=1931 A.L.J. 583. Where there is reliance on custom there is necessarily a variation from the written contract, but the variation need not be in contradiction of or repugnant to it. 41 B. 518=18 Bom.L.R. 532. If in a case of a contract in which there is an apparent inconsistency according to the literal construction of the words used, there is any other reasonably possible construction by which the apparent inconsistencies can be reconciled, that construction should be adopted. 52 L.W. 591=1940 A.L.J. 701=1940 P.C. 151 (P.C.). English common law principles can be applied so far as they apply to Indian circumstances and are not inconsistent with this Act. See 4 I.A. 23. See also 1937 Rang. 302; 56 B. 101=34 Bom.L.R. 167=1932 B. 168. There is no reason why the principles enunciated in English cases should not be applied to suitable cases by Indian Courts which are Courts of Equity as well as of law, if such principles do not go against any provision of the Indian Contract Act. 1937 O.W.N. 136=1937 O. 82. *Cause of action* with reference to cases on contracts explained. 58 C. 539=134 I.C. 65=1931 C. 659. Where the deed forming the contract between the parties is not properly stamped, it cannot form the basis of a suit, nor is it permissible to fall back upon the previous oral negotiations. 41 P.L.R. 98=1939 Lah. 266. The fact that a hire purchase agreement is insufficiently stamped does not render the document invalid, although an objection might be taken to its admissibility in evidence. 1938 Cal. 654. There is no universal rule that a stranger to a contract can in no circumstance claim a benefit thereunder. 77 I.C. 261=35 C.L.J. 493=1923 C. 25; 153 I.C. 102=1935 M. 141. See also 165 I.C. 231=1936 A.L.J. 1012=1936 A. 700; 70 M.L.J. 581; 17 Pat. 751; 1939 A.L.J. 228=1939 All. 190=I.L.R. (1939) All. 185; 42 C.W.N. 1212; 40 Bom.L.R. 155=1938 Bom. 217; 39 P.L.R. 499; 41 C.W.N. 1008; 1940 Lah. 471; 1940 O. 425; 1939 A.L.J. 1139=1940 All. 98; 17 Pat. 751; 38 Bom. L.R. 610=1936 B. 344; 162 I.C. 754=1936 C. 260; 165 I.C. 113=1936 O.W.N. 1021=1937 O. 99; 1935 L. 354=16 L. 118; 1935 O. 496=158 I.C. 46; 62 C.L.J. 55. A stranger to a contract which reserves a benefit for him cannot sue upon it either in English or in Indian Law even though in India the consideration need not move from

Interpretation clause.

2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

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the promisee. There are two well-recognised exceptions to this doctrine: The first is where a contract between two parties is so framed as to make one of them a trustee for a third; in such cases the latter may sue to enforce the trust in his favour and no objection can be taken to his being a stranger to the contract. The other exception covers those cases where the promisor, between whom and the stranger no privity exists, creates privity by his conduct and by acknowledgment or otherwise constitutes himself an agent of the third party. Where the consideration for a sale of a property is that the purchaser would satisfy certain creditors of the vendor and release the latter from his liability in respect of the debts, and the property is not sold for a fixed consideration and the purchaser does not retain out of it a definite sum of money for payment to the creditors, the purchaser cannot be said to have constituted himself a trustee in respect of the property sold or the consideration money payable for it for the benefit of the creditors, and it is not competent for the latter to sue the purchaser for enforcement of his obligation under the contract of sale to which they were not parties. 74 C.L.J. 327. See also 1937 Oudh 99=1937 O.W.N. 1021; 1937 M.W.N. 408. A stranger to a contract can sue upon it at any rate in the following circumstances, namely, (a) where a party to the contract agrees with the stranger to pay him direct or becomes estopped from denying his liability to pay him personally and (b) where the contract creates a trust in favour of the stranger. 1940 Rang.L.R. 237=1940 Rang. 91. The English common law doctrine laid down in *Tweedle v. Atkinson* that a contract can create no right or liability in a person who is not a party to it applies in equity also. But certain exceptions (more apparent than real) have been engrafted on the rule. A person not a party to a contract has been held to be entitled to enforce it in case where a trust or an agency can be founded on the contract. Though the applicability of the rule in *Tweedle v. Atkinson* to Courts in India has been the subject of considerable discussion, opinions expressed have by no means been uniform. A general statement that where a person makes a contract with another for the benefit of a third person, that third person can sue on the contract apart from any reference to agency or trust, is a proposition not supported either by principle or authority. I.L.R. (1937) 2 Cal. 698=66 C.L.J. 373. See also 114 I.C. 658. A stranger is not entitled to sue on a covenant, in the performance of which he has only an indirect interest. 178 I.C. 322=1938 Cal. 578. A person who is not a party

can sue if he is claiming through a party to the contract or if he is in the position of a *cestui que trust* or of a principal suing through an agent, or if he claims under a family settlement. A person who merely takes a benefit under a contract to which he was not party cannot sue directly upon that contract without invoking the doctrine of trust or agency. 41 Bom. L. R. 538=1939 Bom. 309. A stranger, who renders services to an arbitrator as his legal adviser and indirectly to the parties, not being a party to the award itself, and there being no privity of contract between him and the parties to the award, cannot sue for an amount agreed to be paid to him under the same; for the principles of justice, equity and good conscience cannot be extended to cover all cases where parties contract to confer benefit upon a stranger so as to enable him to sue upon the contract but where it is clear on facts that some measure of privity is established between the third person and the contract, he may sue on it. I.L.R. (1939) Kar. 422=1939 Sind 125. Where the plaintiff is a beneficiary under a deed of settlement, the rule of law that third parties to a contract cannot take the benefit of the contract does not apply. 153 I.C. 102=1935 M. 141; 165 I.C. 113=1936 O.W.N. 1021=1937 O. 99. See also notes under S. 37, *infra*. A mortgagee is not entitled to rely on the terms of a sale-deed executed by the mortgagor in favour of a third person, as he is not a party to the sale-deed. 123 I.C. 42=1930 M. 567. But see also 134 I.C. 1011. A person who is not a party to a contract cannot ordinarily sue for specific performance of the contract but where a third person acquires some benefit under the contract he is entitled to enforce such benefit by way of equitable relief and what the Courts enforce in such circumstances is not the contract itself but equities arising under the contract. 121 I.C. 337; 141 I.C. 490=1933 L. 178. See also 138 I.C. 263=1932 L. 566; 1940 A. 98; 131 I.C. 210; 134 I.C. 1011=7 Luck. 292 (Vendee undertaking to discharge obligation of vendor can be sued on such undertaking); 131 I. C. 575=1931 A.L.J. 614. But see also 134 I. C. 100=32 P.L.R. 876; 55 M. 436=1932 M. 457=62 M.L.J. 533. A purchaser from a mortgagor who undertakes to discharge the mortgage debt and communicates to the mortgagee that he (the purchaser) held certain moneys for the mortgagee and asking the mortgagee not to press for payment of the mortgage amount is personally liable to pay the amount to the mortgagee in a suit by the latter. 41 L.W. 123=1935 M. 115=68 M.L.J. 159. Where a person transfers property to another and the deed of transfer contains a stipulation that the transferee should pay a certain sum of money to a

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal :

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise :

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creditor of the transferor, the creditor of the transferor is not entitled to institute a suit against the transferee to enforce the stipulation, as he is a stranger to the contract between the transferor and the transferee and the fact that the transferor also is impleaded as a party to the suit and is before the Court does not make any difference. 53 M. 270=58 M.L.J. 420 (F.B.) (43 M.L.J. 129; 47 M.L.J. 517; 25 L.W. 120, overruled). Cases where a trust, express or implied, has been created in favour of such a creditor of the transferor, or where there has been no novation or obligation undertaken by the transferee to the creditor or where the transferee is estopped owing to transactions between him and the creditor stand on a different footing, as also cases of family settlement of cases where on a partition a benefit is secured to the female members of the family who would be entitled in law to maintenance. 53 M. 270=1930 M. 382=58 M.L.J. 420 (F.B.). It is competent to a tenant to invoke the benefit of a contract between the Government, and settlement holder even though he may not be a party thereto. 53 M. 210. Where under an agreement the vendee is required to pay off the vendor's creditor, the latter has got an equitable claim which he can enforce against the vendee. The principle that a person who is not a party to a contract could not take advantage of its provisions is inapplicable to India. 141 I.C. 490=34 P.L.R. 192=1933 L. 178. See also 68 M.L.J. 159; 16 L. 118. Though a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party, there again the intention to constitute the trust must be affirmatively proved. It cannot be inferred from the general words in a policy of insurance. 1933 A.C. 70=1933 P.C. 11=64 M.L.J. 133 (P.C.). The assignee of a party to a contract is bound by an arbitration clause in the contract where the subject-matter of the reference is capable of assignment. A submission clause can be incorporated into a contract by reference. 140 I.C. 626=1933 S. 75.

Sec. 2 (a).—The definition of "contract" in S. 2 appears to be built upon a succession of definitions of the elements which go to make a contract, that is to say, proposal, acceptance, promise, promisor, promisee, consideration and agreement. The expression "reciprocal promises" is explained and finally a contract is defined as an agreement enforceable by law. On the other hand an agreement

not enforceable by law is said to be void; that is to say, it is not a contract at all. 161 I.C. 579=1936 P. 153. An offer must be distinguished from an invitation for an offer. 65 I.C. 282=1922 L. 100. Catalogue of goods is not offer, but only invitation for offer. 12 O.C. 17; so also statement of lowest price in answer to enquiry. 8 I.C. 601. A letter from a prospective buyer asking for quotations from a merchant is an invitation for an offer. 65 I.C. 282=1922 L. 100. See also 1939 Oudh 249=14 Luck. 710. If the merchant send his quotations and the buyer accept them and orders goods, that constitutes the proposal which the seller may or may not accept. 65 I.C. 282. A quotation submitted by a trader as the basis of a possible order from customers is distinct from an offer to sell, which, if accepted, creates a contract for the breach of which damages may be recovered. 37 M.L.J. 712=54 I.C. 550. But see also 7 Bur.L.T. 136=23 I.C. 322. A letter communicating willingness to sell certain property for a certain sum in reply to a letter inquiring whether the property is to be sold amounts to an offer or proposal within the meaning of S. 2 and is not merely an invitation to an offer, 161 I.C. 224=63 C.L.J. 86=1936 C. 87. A bid at an auction is nothing more than an offer and can be withdrawn like all other offers before it is accepted by the fall of the hammer. 43 M.L.J. 132=45 M. 799; 19 I.C. 904=18 C.L.J. 53. An offer to sell and to keep the offer open till a certain time is *nudum pactum* and can, at any time before acceptance, be re-called. 31 I.C. 890. Where there was a completed contract, reduction to writing is merely incidental to the completion of the contract. 21 M.L.J. 182=9 I.C. 104. Letter of request for a loan is only a proposal. 71 I.C. 698. See also 13 B. 669; 16 M. 283. It cannot be sued on as a promissory note. 71 I.C. 968. Where a boy runs away from home and the boy's father advertises reward to any one tracing him and bringing him home. Taking boy to Police Station, making report and sending telegram to boy's father are substantial performance of condition, for which reward may be claimed. See 23 A.L.J. 655=88 I.C. 908=1925 A. 539.

Sec. 2 (b).—As to when communication of acceptance becomes complete, see S. 4, Ill. (b), *infra*. As to contract by offer and acceptance, see 20 I.C. 282=277 P.L.R. 1913; 36 B. 557=14 Bom.L.R. 648. Offer by letter—Acceptance in minute—Terms of partly incorporated therein—Variance between letter and minute. 27 M.L.J. 74=18

(c) The person making the proposal is called the "promisor," and the person accepting the proposal is called the "promisee":

(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise:

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C.W.N. 1185=24 I.C. 506 (P.C.). Whether a particular transaction is a standing offer or completed transaction, *see* 142 I.C. 315=1933 M. 322=64 M.L.J. 354 (F.B.). Where a contract is made by letters, the place where the final assent is given to the offer is the place where the contract is made. 6 A.L.J. 213; 27 M. 535; 12 O.C. 17. A promise need not be in writing. 23 M. 94. Silence to a letter does not amount to an acceptance of the terms proposed. 1941 Rang. 270. What is proposal and promise in auction sales. 14 M. 235. Incomplete negotiation, not being complete contract cannot be sued upon. 39 B. 529. *See also* 39 C.W.N. 174. Reward, offered for the search of a missing boy, for whose search a servant was already sent, cannot be claimed by the servant though he found the boy out; the servant did not undertake the search after the offer nor on its strength and hence the finding out by him does not amount to acceptance by conduct. 19 I.C. 576=11 A.L.J. 489. *See also* 23 A.L.J. 655=88 I.C. 908=1925 A. 539.

Sec. 2 (c).—PROMISOR AND PROMISEE—MERGER.—No man can in his own right be under any obligation to himself. Hence when a hatchita is executed by a person in favour of himself and some others, such person cannot in law be said to be one of the promisees. In other words, the promisees must be taken in law to be the person mentioned in hatchita other than such person. And the portion of the debt of the promisor which is ascribable to himself as one of the promisees will stand discharged by the doctrine of merger or *confusio*. Even if all the promisees are assumed to be a person distinct from the promisor the position is not different because the debtor can make payment of such debt to the several creditors and get valid discharge in respect of the share of the creditor concerned. This being so, that portion of the debt of the promisor which is ascribable to himself as one of the promisees will stand discharged by the doctrine of merger or *confusio*. 1941 Cal. 595. Where an offer containing certain conditions has been made to a party and that party by adding to the conditions makes a counter-offer, the counter-offer amounts to rejection of the offer made to him. 178 I.C. 23=1938 Lah. 341. *See also* 1938 Cal. 343; 1938 Cal. 423; 50 L.W. 597=1940 M. 49.

Sec. 2 (d).—"Consideration" as defined in this section is wider than the meaning of the term in English law. 61 C. 841=38 C.W.N. 682=1934 C. 682; 165 I.C. 338=38 Bom.L.R. 610=1936 B. 344. Consideration

may move from a third party. 6 M. 351; 136 I.C. 17=1932 L. 135; 134 I.C. 1011; 1940 Rang.L.R. 237=1940 Rang. 91; 1939 Pat. 477; 1937 A.M.L.J. 110 (Cancellation or closing of accounts of a third party). Benefit received by third party would be good consideration for a promise. 147 I.C. 443=1934 A. 271; 165 I.C. 338=38 Bom.L.R. 610=1936 B. 344. It is well recognised that an agreement to pay debt due from a third person is good consideration in law. Where a son signs an acknowledgment in respect of money due from his deceased father presumably to save the estate of his father from sale in execution of any decrees that may have been passed against such estate, there is consideration for the acknowledgment and for assumption of personal liability by the son. 38 P.L.R. 85. Thus broker's undertaking to pay the premium is good consideration in marine insurance contract. 27 Bom.L.R. 1310=1926 B. 82. Old debts would be good consideration for a mortgage or transfer of property. 50 I.C. 117; 12 A.L.J. 629=23 I.C. 900=36 A. 365. So also a compromise of disputed claim. 3 C. 602; 90 I.C. 766=2 O.W.N. 849; 2 O.C. 300; 1925 P. 68 (F.B.); 116 I.C. 719. As well as the abandonment of a disputed claim. 1933 L. 121=34 P.L.R. 663; 20 C.W.N. 210 (P.C.). So also promise of marriage is good consideration for settlement. 9 L.W. 132. Time-barred debts may be valid consideration. 1925 O. 267; 27 A.L.J. 1132=1929 A. 657; 1924 A. 551. As to Act done in pursuance of moral obligation for joint benefit received. *see* 1934 L. 789. A subscription gratuitously promised to an institution cannot be recovered even if the promisor is the treasurer thereof. 36 A. 268=12 A.L.J. 351. *See also* 58 B. 660=36 Bom.L.R. 568; 1934 L. 789=153 I.C. 228; 14 C. 64; 49 C.L.J. 278=1929 C. 369. A gift in consideration of the donee performing certain religious services at a temple is a transfer for valuable consideration. 46 I.C. 19=20 Bom.L.R. 441. If the promisee does some act from which a third person is benefited which he would not have done but for the promise, the consideration is sufficient. 45 C. 774=22 C.W.N. 188. *See also* 147 I.C. 443=1934 A. 271; 36 Bom.L.R. 568=1934 B. 277; 89 I.C. 819 (Benefit to one co-promisor is enough). A compromise is an agreement to put an end to disputes and to terminate or avoid litigation. The real consideration is not the sacrifice of a right but the abandonment of a claim. 20 C.W.N. 210=32 I.A. 468 (P.C.). But *see also* 53 I.C. 497=137 P.R. 1919; 1925 P. 68 (F.B.).

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Whether an agreement by a landlord to accept rent at a lower rate is unenforceable for want of consideration is doubtful. 32 I.C. 185=20 C.W.N. 680. Payment and acceptance of rent at a reduced rate may be adduced as evidence to show that the parties never intended that the stipulation to pay the full rent was to be acted upon or in the alternative that there had been a waiver. 20 C.W.N. 680. See also 146 I.C. 524=52 C.L.J. 202=1933 C. 725. Release of original debtor may be a consideration for liability of another. 31 I.C. 29=22 C.L.J. 235. Discharge of a person from liability is a sufficient consideration for a contract. 1939 M.L.R. 12 (C.). Agreement by creditor to give up a part of his claim—No consideration is necessary. See 1925 M. 660=48 M.L.J. 721; 89 I.C. 174=1925 N. 455. Where the members of a community, who had rendered some help to the defendant, stipulated for payment by him of a certain sum of money to the community as a whole, and he promised to do so. *Held*, that the promise was for consideration and was enforceable. 44 M.L.J. 240=72 I.C. 95=1923 M. 434. A forbearance to sue a debtor on his promissory note is a good consideration for the latter executing a security bond for payment of the debt. An agreement for forbearance need not be for any definite or particular time. It is enough if an implied request for forbearance be inferred. 51 I.C. 963=36 M.L.J. 618. See also 60 C.L.J. 477; 119 I.C. 766=1929 L. 466; 26 N.L.R. 320; 23 A.L.J. 561=88 I.C. 768=47 A. 637=1925 A. 503; 22 Pat.L.T. 278=1941 P.W.N. 571=1941 Pat. 282. Any detriment suffered by defendant on the faith of the promise of the plaintiff will be sufficient consideration to make the plaintiff's promise enforceable. 44 I.C. 479=1918 M. W. N. 173. Mortgage by a person after attaining majority—Payment by mortgagee to creditor who has advanced money to mortgagor during his infancy—Consideration valid. 1933 A.L.J. 1399=1933 A. 659. Advance to minor is not good consideration for promise to pay after maturity. 16 L. 546=1935 L. 561 (F.B.). In order to create a valid contract there must be consideration and if a debtor pays his creditor some portion of the amount which is due, that payment cannot amount to consideration of a contract obliging the decree-holder to have the payment certified under O. 21, R. 2, C. P. Code. 1933 A.L.J. 670=1933 A. 511. Consideration may consist in abstention from taking legal proceedings. 32 I.C. 416; 65 I.C. 52=1922 L. 269. See also 17 B. 457. Forbearance to sue can be good consideration for a promise, provided some liability exists. 32 P.L.R. 667=1931 L. 756; 60 C.L.J. 477. The forbearance of a plaintiff to sue coupled with his forbearance to declare the defendant a defaulter constitutes good consideration for a fresh agreement,

although the original contract had been in the nature of a wagering transaction and the plaintiff is entitled to recover on the fresh agreement. The defendant is estopped from setting up the defence that the transaction was wagering. [(1908) 2 K. B. 620, Foll.] 1938 Lah. 781. Adjustment of decree—Agreement to accept less than amount of decree—Portion to be paid immediately and balance within time fixed—Default. *Held*, that in case of default the entire amount of the original decree could not be realised as it was not expressly stipulated that in case of non-payment the amount remitted would not be allowed. 65 C.L.J. 210. See also 134 I.C. 1105=32 P. L. R. 632; 1941 Pat. 282. Threat of bringing a false suit is really a form of blackmail and cannot be considered as a good consideration for a contract. 161 I.C. 347=1936 L. 6. The release of a claim by one person is a consideration for guarantee of payment by another only when that claim is given up and not when there is a mere promise. 29 I.C. 422=4 L.W. 553. See also 157 I.C. 811=1935 L. 527. An agreement not to appeal, the consideration for which is the mutual consent of the parties to refer the matter in dispute to the Court itself is binding on the parties. 26 I. C. 355. A consideration in law must be good and valuable. 27 M.L.J. 249=25 I.C. 726. A consideration paid to one joint promisor is legally sufficient to support a promise made by others. 38 M. 680=22 I.C. 1=26 M.L.J. 113; 26 M.L.J. 127=23 I.C. 951=38 M. 753. See also 1912 M. W. N. 930. An agreement in pursuance of which a member of a Hindu family declines to take share in the family property at a partition on the consideration that the others shall maintain their sister forms a good consideration for the sister to enforce her rights of maintenance against her brothers. 14 I.C. 517; 36 M. 157=13 I.C. 458=22 M.L.J. 231. As to when a third party can sue upon a contract, see 32 C.W.N. 634=47 C.L.J. 587; 114 I.C. 567; 1930 M. 567; 53 M. 270; 121 I.C. 337. (See also cases cited under S. 1. 138 I.C. 263; 131 I.C. 575=1931 C. 401; 134 I.C. 100=1932 L. 66; 62 M.L.J. 533.) A mere Ruzu Khata unsupported by oral agreement or consideration does not form a fresh contract. 58 I.C. 30. Forbearance to continue an appeal against a person on that person's brother agreeing to pay the amount claimed is a good consideration. 17 I.C. 466=15 O.C. 314; 74 I.C. 316=26 O.C. 204. Creditor's forbearance to sue the debtor was sufficient consideration for promise by third party. 11 I.C. 773; 4 Bur.L.T. 156; 119 I.C. 766=1929 L. 466; 134 I.C. 819=1931 L. 756; 134 I.C. 1105=32 P.L. R. 632. So also settlement of doubtful claim is good consideration. 60 C.L.J. 477. An agreement by which a party agreed to pay a sum of Rs. 60,000 to the other party in consideration of the latter supplying funds to the former and otherwise as-

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement:

(f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises:

(g) An agreement not enforceable by law is said to be void:

(h) An agreement enforceable by law is a contract:

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sisting him in a certain litigation is supported by consideration and binding on the parties. 138 I.C. 900 (P.C.). Promise by agent without consideration is not enforceable either against agent or principle. 105 I.C. 214. Past co-habitation as good consideration for pro-note; see 1929 M.W.N. 828. Sale-deed executed by a Mahomedan mother-in-law in consideration of the dower of his daughter-in-law is sale for good consideration. 1930 A. 434. Loan to minor, if good consideration for fresh promise to pay after majority; see 51 A. 164. An agreement to reconvey property is not without consideration, and is capable of being specifically enforced. 1931 A.L.J. 571 = 1931 A. 113. As to what constitutes failure of consideration, see 22 Pat. L. T. 12 = 1941 Pat. 333.

EVIDENCE.—Recitals as to consideration in documents is *prima facie* evidence thereof as between the parties. 27 A. 71; 23 C. 950 (P.C.); but can be rebutted by other evidence, oral or documentary. 5 M. 6; 8 A. 641; 27 I.A. 93. Evidence Act, S. 92, is no bar (*Ibid.*)

Sec. 2 (e).—See 86 I.C. 509 = 1925 M. 943.

Sec. 2 (g).—Where a contract is illegal only in part, if such part is separable from the rest, the illegal portion alone is void; but, if it is not so separable, the whole is void, 9 B. 176.

Sec. 2 (g) and (j): RELATIVE SCOPE OF—CONTRACT WHEN BECOMES VOID.—Not every unenforceable contract is declared void, but only those unenforceable by law, and those words mean not unenforceable by reason of some procedural regulation, but unenforceable by the substantive law. For example, a contract which was from its inception illegal such as a contract with an alien enemy, would be avoided by S. 2 (g) of the Contract Act and one which became illegal in the course of its performance, such as a contract with one who had been an alien friend but later became an alien enemy would be avoided by S. 2 (j). A mere failure to sue within the time specified by the statute of limitations or an inability to sue by reason of the provisions of one of the orders under the C.P. Code would not cause a contract to become void. 43 C.W.N. 641 = 41 Bom.L.R. 742 = 1939 A.L.J. 697 = 1939 P.C. 110 = (1939) 2 M.L.J. 253 (P.C.). To say that the contract is void from its inception is a contradiction in terms. A contract void in its inception is not contract at all; it has not passed from the stage of an agreement

to the stage of a contract, but comes within the broad and general principle that a contract void from its inception is no contract at all but an agreement not enforceable at law and therefore void. 31 S.L.R. 170 = 171 I.C. 1005 = 1937 Sind 211.

Sec. 2 (h).—A representation of fact is a contract and the party misrepresenting is bound to make good the representation. 31 I.C. 708 = 17 Bom.L.R. 783.

ORAL AND DOCUMENTARY CONTRACT.—An offer may be oral and the acceptance may be oral, and yet the terms may be embodied in a document in such a case the contract is in writing, and not oral, in spite of the oral offer and acceptance. Equally the offer and acceptance may be in writing and yet the terms may be oral, and then the contract is an oral one, not a written one, for it is the terms of the contract which must be embodied in a written instrument before the contract can be considered a written one, and not merely the offer and the acceptance. So also the contract may actually be contained in several documents which, when read together, constitute the entire contract, and they are then regarded as one instrument in the eye of the law, even as they form but one contract. 171 I.C. 553 = 1937 Nag. 289.

ORAL AGREEMENT—PROOF REQUIRED.—An oral agreement must be proved by the clearest and most satisfactory evidence of credible witnesses, and it would be unwise to act upon oral evidence unless there is contemporaneous written evidence to corroborate it. 43 P.L.R. 97. In the case of joint contractors the death of one does not put an end to the relationship, but the surviving contractor still remains a joint contractor with the heirs of the deceased. 66 C.L.J. 104 = 42 C.W.N. 18. As to the effect of apparent inconsistency in contract, see 43 Bom.L.R. 403 = 1940 P.C. 151 (P.C.). As to effect of a contract on printed form, when there is a variation between the printed portion and type-written matter, see (1941) 2 M.L.J. 281. Where when an agreement is reached as to the terms of a lease and sale the parties contemplate the execution of a formal deed of lease and sale, that would not *per se* make the agreement incomplete. 1941 A.L.J. 570 = 1941 All. 377. It is well settled that where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed, the real completed contract is to be found in the deed. The contract is merged in the deed. The most common instance perhaps of this merger is a contract for the sale of land followed by

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract :

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

CHAPTER I.

OF THE COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS.

3. The communication of proposals, the acceptance of proposals, and the

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conveyance on completion. All the provisions of the contract which the parties intend should be performed by the conveyance are merged in the conveyance, and all the rights of the purchaser in relation thereto are thereby satisfied. There may, no doubt, be provisions of the contract which from their nature or from the terms of the contract, survive after completion. 173 I.C. 88 (P. C.). In the case of a contract in which a draft agreement and engrossment are evidently contemplated by the parties, the contract cannot be said to be complete without the formal agreement being signed and executed, even though all the terms have been settled one by one and embodied in the draft. Once it is clear that the parties intended that the terms of their bargain are to be reduced to a formal contract, although that understanding is not in writing but is only a matter of oral agreement or of inference from the conduct of the parties, the consequence is that there must be a formal contract signed and executed by the parties before the contract can be said to be complete. I. L. R. (1941) Bom. 361 = 43 Bom. L.R. 293 = 1941 Bom. 247. In an action brought on an alleged contract the burden of proof is, of course, upon the plaintiff to show that a firm contract had been entered into between the parties and that something more than mere negotiations had taken place. The negotiations and correspondence must be looked at as a whole to see whether the parties to them have concluded a binding contract or not. Where only certain terms of the contract were settled and the other terms of the agreement were left open there is no concluded contract. Moreover, when a party to the contract has given the other party to the contract an *option for renewal of the contract* on terms which would be mutually agreed upon, this does not in any way imply that the terms of the prior contract, or any of them should be incorporated in the new one. In other words, the party does not bind himself in any way to renew the contract upon the old terms. 1939 Rang. 423.

CONTRACT BY GOVERNMENT OFFICERS—NEGOTIATION AND AGREEMENT—PROPER PROCEDURE.—It will be in the public interest and desirable from every point of view if the Government Officers, after an agreement is reached, take the precaution of preparing a

memorandum signed by both parties, setting out the terms which are reached. The practice of leaving the agreement in the form of correspondence and tenders in anticipation of a formal deed to be executed later on is irregular and has nothing to recommend. The proper procedure should be that after an agreement is reached, a memorandum of the agreement should be contemporaneously prepared and signed by both parties as evidence of the agreement to be followed later on by a formal document drawn up by a Government conveyancer; but it cannot be said that the law requires that contemporaneously with an oral agreement a document should also be prepared and signed, it is permissible to record the agreement, arrived at orally, later on by correspondence. 1941 A.L.J. 570 = 1941 O.A. (Supp.) 776 = 1941 A.W.R. (Rev.) 891 = 4 F.L.J. (H.C.) 361 = 1941 All. 377.

Sec. 2 (i).—S. 2 cannot be invoked as a clause importing the *doctrine of "mutuality"* into the law of contract in India. 118 I.C. 220 = 1929 S. 83. See also 152 I.C. 947 = 1934 B. 277 = 58 B. 660. If an arbitration clause in a contract does not speak of arbitration under the *Indian Arbitration Act of 1897* but the words used are simply, "Arbitration Act," and the overriding intention of the parties as can be gathered from the contract is that in the matters specified therein their differences should be settled by arbitration, that general intention is to be given effect by taking the words "Arbitration Act" to mean "statutory provisions relating to arbitration" in a case to which the *Indian Arbitration Act* has no application. This construction will include arbitration under Sch. II, C. P. Code. I.L.R. (1939) 2 Cal. 181 = 70 C.L.J. 148 = 43 C.W.N. 879. See now the new *Arbitration Act, 1940*. As to construction of arbitration clause in a contract, see I.L.R. (1937) 1 Cal. 606; 1940 Cal. 105. As to distinction between void and voidable contracts, see 1938 Nag. 335 (F.B.).

Sec. 3.—Offer must be intended to create legal relations. 23 B. 420. Thus mere invitation to dinner is no offer. 23 B. 420. A promise to keep an offer open for a certain time is binding if supported by consideration. 2 M.L.J. 52. Acceptance must be absolute and correspond with the offer. 24 B. 510. Else it is only a counter-offer. 24 B. 510; 37 I.C. 792. (See also notes

Communication, acceptance and revocation of proposals. revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

Communication when complete. 4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor ;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it ;

as against the person to whom it is made, when it comes to his knowledge.

Illustrations.

(a) *A* proposes, by letter, to sell a house to *B* at a certain price. The communication of the proposal is complete when *B* receives the letter.

(b) *B* accepts *A*'s proposal by a letter sent by post.

The communication of the acceptance is complete,—

as against *A*, when the letter is posted ;
as against *B*, when the letter is received by *A*.

(c) *A* revokes his proposal by telegram.

The revocation is complete as against *A* when the telegram is despatched. It is complete as against *B* when *B* receives it.

B revokes his acceptance by telegram. *B*'s revocation is complete as against *B* when the telegram is despatched, and as against *A* when it reaches him.

Revocation of proposals and acceptances.

5. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

NOTES.

under S. 7.) Though a contract implies two parties, a contract in writing does not require the signature of both parties. 22 C.L.J. 311=20 C.W.N. 408. A bond executed and delivered by one party which is accepted by another is a contract in writing. 20 C.W.N. 408. Revocation of contract requires concurrence of both parties. 1925 P.C. 232=23 L.W. 182 (P.C.). Evidence of completion of contract. See 16 I.C. 75 (P.C.). In the case of an ordinary member of public the contract to take shares in a company is completed when an application for shares has been submitted, and allotment on the foot of that application has been made and the notice of the allotment has been communicated to the applicant. In the case of directors, company is under obligation to allot shares. In such cases it often happens that the company is regarded as making an offer to the directors to take shares; the director's subsequent application for shares is an acceptance of that offer and when the application is made the bargain is completed. 1929 L. 656.

Sec. 4.—An offer is made not at the

place from which it is sent but at the place where it reaches the acceptor. 37 M.L.J. 712=54 I.C. 550. See also 1941 N.L.J. 37; 4 Bom.L.R. 215 (Proposal made through agent). An insurance policy was effected by means of the local agent in Madras of the insurance company; it was accepted by the company by its directors in Calcutta. The local agent at Madras was not authorised to accept proposals; he was merely a post office. Held, that the policy was effected in Calcutta and not in Madras. 38 L.W. 504=1933 M. 764=65 M.L.J. 455; 1941 N.L.J. 37. As to acceptance of insurance proposal and communication of the same, see 148 I.C. 522=1934 A.L.J. 719=1934 A. 298; 16 C. 702 (Revocation of proposal when can be made).

Secs. 4 and 5.—See 30 Bom.L.R. 570=1928 B. 201.

Sec. 5.—Where there is no unqualified acceptance before revocation which does not reach the person owing to his own misrepresentation about his address, the offerer must be deemed to have validly revoked his proposal. 51 I.C. 860.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustrations.

A proposes, by a letter sent by post, to sell his house to *B*.

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when *B* posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches *A*, but not afterwards.

Revocation how made.

6. A proposal is revoked—

(1) by the communication of notice of revocation by the proposer to the other party ;

(2) by the lapse of the time prescribed in such proposal for its acceptance or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance ;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance ;

or
(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Acceptance must be absolute.

7. In order to convert a proposal into a promise, the acceptance must—

NOTES.

Sec. 6 (2).—Scope and effect—Offer and acceptance—Communication—Revocation. 6 Mys.L.J. 587. If a proposer revokes his offer before its acceptance, then S. 6 (1) applies; even if he does not revoke, S. 6 (2) applies unless of course the proposer's conduct amounts to a waiver of the revocation which would follow on the lapse of a reasonable time. Where allotment of shares was made more than five months after the application and it was not even communicated, it was held that the offer to take shares must be deemed to have been revoked. 1939 N.L.J. 305=I.L.R. (1941) Nag. 567=1939 Nag. 225.

Sec. 7.—Where a letter by an intending seller making an offer for the sale of certain property directs that the purchaser will have to write about the acceptance of the offer to a certain person at a particular address, the letter is to be read in a reasonable and a sensible manner and it does not exclude the case where the intending purchaser instead of writing to the person concerned puts himself into communication with him, and where the intending purchaser does so, it cannot be said that there is any contravention of S. 7, as to render the contract not binding on intending seller. 63 C.L.J. 86=1936 C. 87. See also 162 I. C. 327 (P.C.). Mortgage by deposit of title-deeds—Creditor asking debtor to send title-deeds by post—Debtor posting them accordingly—Effect—Transaction when complete—Equitable mortgage not created. 38 Bom.L.R. 1222=1937 B. 39.

Secs. 7 to 9.—To convert a proposal into a promise the acceptance must be absolute, unqualified and without condition. 1922 P. 24. See also 120 I.C. 482=1930 L. 374; 134 I.C. 1110=1931 L. 260; 37 I.

C. 792. When once a proposal is practically refused it does not hold good and no acceptance after the refusal could convert the proposal into a promise so as to create a contract. 1922 P. 24=80 I.C. 308. The acceptance of a proposal must be unqualified and proposer cannot impose on the party to whom it is addressed the obligation to refuse it under the penalty of imputed assent or attach to his silence the legal result that he must be deemed to have accepted it. 54 I.C. 437=18 A.L.J. 73. See also 37 I.C. 792=5 L.W. 149; 18 A.L.J. 73; 24 B. 510. Acceptance of a proposal may be made without express communication, by conduct of the acceptor. 54 I.C. 437=18 A.L.J. 73. See also 92 P.R. 1913=22 I. C. 811; 49 A. 674=25 A.L.J. 372=1927 A. 407; 113 I.C. 780=1928 L. 938. A written offer to take goods accompanied by a sum of money representing the price is acceptance, if the purchaser credits the money received to his account. 54 I.C. 437=18 A.L.J. 73. Acceptance of an offer with a variation is no acceptance at all; it is simply a counter-proposal which should be accepted by the original promisor before a contract can be made and such an acceptance need not be in writing. 92 P.R. 1913=22 I.C. 811; 120 I.C. 482=1930 L. 374. Mere failure to reply to a counter-proposal would not *per se* amount to an acceptance thereof. 120 I.C. 482=1930 L. 374. Acceptance is not conditional, merely by an immaterial addition, or by the mere fact that some other terms are discussed in subsequent letters. 5 Bom.L.R. 9=36 B. 110. A qualified acceptance of a proposal is but a counter-proposal, omission to reply to which would not be an acceptance of it. 5 L.W. 149=37 I.C. 792=1917 M.W.N. 91. Acceptance "subject to confirmation by

(1) be absolute and unqualified ;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise ; but if he fails to do so, he accepts the acceptance.

Acceptance by performing conditions, or receiving consideration.

8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

9. In so far as the proposal or acceptance of any promise is made in words the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

CHAPTER II.

OF CONTRACTS, VOIDABLE CONTRACTS AND VOID AGREEMENTS.

10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

What agreements are contracts.

NOTES.

mail" is only conditional acceptance. 1930 L. 325. See also 123 I.C. 838=1930 L. 114; 120 I. C. 482=1930 L. 374; 18 A. L.J. 73; 45 B. 8=57 I.C. 971=22 Bom. L.R. 872.

Secs. 7 and 8.—A contract is concluded as soon as all the essential terms are settled, though the formal documents have yet to be executed. 54 I.C. 550=37 M.L.J. 712; 21 M.L.J. 182. See also 148 I.C. 522=1934 A.L.J. 719=1934 A. 298 (Acceptance and communication of the same in respect of contract of insurance). An acceptance must be absolute and unconditional and must correspond with the terms of the offer, without leaving any term open to future negotiation. If it contains a material variation of the terms of the offer there is no *consensus ad idem* or agreement upon which a contract can be founded. If it introduces terms not comprised in the offer, no contract is made, the original offer must be deemed to have been refused and a counter offer made. A qualified acceptance is equivalent to a new offer which may be either accepted or rejected. But the person making the counter-proposal cannot subsequently make a binding contract by accepting the original offer. 12 Mys.L.J. 81=39 Mys. H.C.R. 263. Mistake of telegraph officials in transmitting terms of proposal will prevent the proposal from maturing into a contract. 1910 M.W.N. 513. If a contract has to be made out from the correspondence between the parties, the whole of the correspondence is to be seen in order to determine whether there was a completed contract. 54 I.C. 550=37 M.L.J. 712. When the proposal and acceptance are made by means of letters the contract must be

deemed to have been made at the place where the letter of acceptance is posted. 73 I.C. 205=1923 L. 427. See also 39 M. 509=31 M.L.J. 58=34 I.C. 921 (P.C.).

Sec. 8.—Prospectus of company in case of insurance policy, railway receipts, etc., are deemed part of the contract. 25 M. 183; 21 M. 172. Acceptance may be implied from conduct. 49 A. 674=1927 A. 407.

AUCTION SALES.—In the absence of any restriction to the contrary in the conditions of sale, a person may bid as benamidar for another and the fact that the bidder did not disclose his character of benamidar does not entitle the principal to revoke the auction sale. 29 I.C. 12=28 M.L.J. 617. When an amin holding an auction sale accepts the highest bid on behalf of his principal subject to the principal's giving his assent to it, there is a valid and enforceable contract when that assent has been given. 28 M.L.J. 617.

Sec. 9.—Implied contracts are as much binding as express contracts on the parties. 16 I.C. 609; 31 I.C. 783=29 M.L.J. 749; 49 A. 674=1927 A. 407. See also 9 M.L.J. 256 (Contract to pay interest implied from mercantile usage). S. 9 proclaims the existence of both express or implied promises. 1939 A.M.L.J. 137. Agreement to pay compound interest may be inferred from course of business for a long period. 38 M.L.J. 387=44 B. 474=47 I.A. 17 (P. C.). Agent's claim for extra remuneration on implied contract is enforceable. 31 I. C. 783=29 M.L.J. 749.

Sec. 10: CONSTRUCTION OF CONTRACT.—Each contract must be construed with reference to its own terms, and not by reference to any other contract. 19 C. W. N.

Nothing herein contained shall affect any law in force in British India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

11. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

Who are competent to contract:

NOTES.

623. Evidence of what took place after the contract is not good evidence as to construction of contract. 36 B. 387 (P.C.). As to construction of contracts, *see also* 1933 M. 322=64 M.L.J. 354=56 M. 433 (F.B.); 1931 M. 799=135 I.C. 540; 1931 L. 657=132 I.C. 489. If the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties it is a question of construction whether the execution of the further contract was intended as a condition or term of the bargain or whether it was a mere expression of the desire of the parties for a formal agreement. In the former case there is no concluded or enforceable contract until the condition is fulfilled, i.e., until the former agreement has been executed. In the latter case there is a binding contract and the reference to the more formal document may be ignored. 1933 P.C. 29=37 C.W.N. 265=64 M.L.J. 103 (P.C.). If a party to an agreement embodied in a document is told that any stipulation in the agreement would not be enforced, he cannot be held to have assented to it. The document does not amount to real agreement between the parties and the other party cannot sue on it. 63 I.A. 126=59 M. 446=40 C.W.N. 353=70 M.L.J. 232 (P.C.). Where a written contract is doubtful in its meaning the surrounding circumstances existing at the creation of the contract and the subject-matter to which it is designed and intended to apply can be looked into. The Court may also look into the conduct of the parties to obtain a true meaning of the contract. 1932 A.L.J. 329=1932 A. 600. In case of conflict between printed portion of a contract and the written portion, the written portion prevails. 19 Bom.L.R. 845. But *see* 30 B. 1. A Barrister-at-Law practising as an Advocate in the High Court is not disentitled to sue his client for recovery of fees due. 55 A. 570=1933 A. 417=1933 A.L.J. 451 (F.B.) [overruling 25 A. 509]. A Subordinate Judge is a person and is capable of entering into a contract. 52 A. 844=1931 A.L.J. 41=1931 A. 189 (F.B.). But, there is no provision in the C. P. Code or any other statute empowering a Judge to enter into a contract on behalf of the Secretary of State. The Courts are given statutory power to pass decrees and orders and to perform certain acts but not enter into contracts. 52 A. 844. A bare promise to pay is not a contract enforceable at law unless it is sup-

ported by consideration. Where the original debt, which is the consideration, is not proved the contract is not legally enforceable. 8 O.W.N. 1210. A deed of sale supported by ample consideration and executed by persons who have attained majority and are otherwise competent to act and dispose of their property is binding upon them, in the absence of evidence that they were wrongfully induced so to act. 44 C.W.N. 1=1939 A.L.J. 844=1939 P.C. 219 (P.C.).

ILLUSTRATIVE CASES.—A mortgage without consideration is a nullity and inoperative. 35 I.C. 455. An agreement to give time to judgment-debtor like all other agreements must be supported by consideration. 24 I.C. 391. An entry by a broker embodying the terms of the contract signed by the broker is a written intimation by the broker to each party that a contract has been effected. 19 I.C. 925=6 S.L.R. 278. *See also* 39 B. 528=29 I.C. 943=17 Bom. L.R. 566.

Sec. 11: CONTRACT BY MINOR.—A minor is not estopped from pleading his minority at the time of a contract and the minor is not liable on the contract. 21 C.W.N. 257=19 Bom.L.R. 157=43 I.A. 256 (P.C.). *See also* 54 I.C. 876=162 P.R. 1919; 1924 L. 294; 66 P.W.R. 1921. Minority at the time of contract must be proved beyond reasonable doubt by the party pleading the same. 89 I.C. 108=1925 O. 487. (As to duration of minority when guardian is appointed by Court, *see* 134 I.C. 293=1931 L. 394; Majority Act, S. 3.) A mortgage made by a minor is wholly void and the mortgagee is not entitled to enforce his security created under the mortgage. 162 P.R. 1919=54 I.C. 876. Where a partition is alleged to have taken place between a father and his minor children by an agreement, entered into between them, the partition is not valid. 1934 R. 2. A promissory note executed by a person for whom a guardian of person has been appointed by the Court before he attained eighteen years is a void contract if it was executed by him before he attained twenty-one years. 57 I.C. 678=11 L. W. 596 (30 C. 539, Ref. to). *See also* 134 I.C. 293=1931 L. 394; 152 I.C. 262=1934 M. 560=67 M.L.J. 257 (Fraudulent misrepresentation as to age makes no difference as regards the liability of the minor). Estoppel cannot overrule a plain provision of law or form the basis of a cause of action for a suit upon a contract

NOTES.

when the contract itself is void. 57 I.C. 678=11 L.W. 596; 152 I.C. 262=67 M.L.J. 257. See also cases under heading *Estoppel, infra*. Where a person under the Court of Wards borrows money, debt comes into existence though the person is not liable and a subsequent bond by his son for that debt is not merely ratification of a former void contract but is a fresh contract. 46 I.C. 974. A judgment-debtor to whom Sch. III, para. 11, C.P. Code, applies is a person disqualified within the meaning of S. 11 to the extent stated in the paragraph and any transaction entered with him in contravention thereof is a mere nullity in capable of subsequent ratification or of enforcement in equity. 42 I.C. 200=13 N.L.R. 130 (F.F.). See also 1941 N.L.J. 363; 171 I.C. 96=1937 O.W.N. 1034=1938 Oudh 14. Vakalatnama—Competency of minor to execute in favour of advocate to conduct criminal case—Minor—Competent. See 44 Mys.H.C.R. 119=18 Mys.L.J. 26.

MINOR BENEFICIARY.—A person competent to contract may validly create a trust by purchasing property in the name of minor. If a minor is not a contracting party himself but is the beneficiary under a sale, the transaction will be upheld. 18 I.C. 963=24 M.L.J. 352. When a contract by the minor is not a necessary condition for upholding the rights of the minor in the property, his rights should be maintained; when it is a necessary condition preliminary to the transaction or contractual obligations flow from the transaction, the transaction is void. 18 I.C. 963=24 M.L.J. 352.

MINOR COPARCENER.—Minor member of a joint Hindu family of whose person a guardian is appointed cannot contract. 57 I.C. 678=11 L.W. 596.

MINOR PARTNER.—A minor coparcener cannot sue as partner for dissolution of a partnership. 38 I.C. 111. A minor in India cannot become a partner in his own rights, as he is incapable of contracting under S. 11. (*Ibid.*)

MINOR PROMISEE.—A contract of sale negotiated by a minor who settled the terms, paid consideration and got a sale-deed executed in his name is altogether void *ab initio* and no title passes thereby to the minor. 27 I.C. 733=13 A.L.J. 185; 10 I.C. 906. See also 32 I.C. 636. The subsequent ratification of a contract entered into by a minor cannot form a valid contract on which a suit can be maintained. Hence nothing could be recovered on a pronote which is in novation of a prior pronote which is entirely void, by reason of its having been executed during minority. 1941 N.L.J. 363. See also 1937 O.W.N. 1034; 196 I.C. 785=1941 O.A. 1028 (P.C.). There is a fundamental difference between a contract of sale and a completed conveyance. 27 I.C. 733=13 A.L.J. 185; 10 I.C. 906; 32 I.C. 636 (39 C. 232; 33 M. 12; 33 A. 657; 31 A. 68, Ref. to). A sale

in favour of a minor is valid. 33 A. 657=11 I.C. 20=8 A.L.J. 670; 18 O.C. 115=30 I.C. 200. See also 18 I.C. 451. Where a certificated guardian sells his property to his ward there is a presumption that the guardian accepts the sale on behalf of his ward. (*Ibid.*) A mortgage bond executed by a person of full age in favour of minors as a security for a loan is not void and is enforceable at their instance. 33 I.C. 994=22 C.W.N. 130. An infant can purchase property. 39 I.C. 44 (33 A. 657; 38 A. 62; 38 A. 154; 18 I.C. 451; 30 I.C. 200; 24 M.L.J. 352, Ref.; 33 M. 312, Disappr.). There is nothing in the Contract Act that prevents an infant from being a promisee. When consideration passes from a minor he can enforce the contract. 40 M. 308=31 M.L.J. 575=36 I.C. 921 (F.B.). A purchaser of property for the benefit of a minor by his maternal uncle is valid and if the property is alienated by the minor's father the minor can recover. 26 I.C. 195=37 M. 390; 24 I.C. 927=1 L.W. 379. See also 59 B. 656=37 Bom.L.R. 461=1935 B. 353. A contract creating only rights in favour of a minor and not involving any contractual obligation on his part is valid. 18 I.C. 968=24 M.L.J. 363. A pronote executed in favour of a minor is valid though he does not incur liability by endorsing it. 18 I.C. 968=24 M.L.J. 363. See also 76 I.C. 810=1924 R. 136. A mortgage in favour of a minor is valid and enforceable by him, for there is no contract by the minor which still remains to be performed. 4 Pat.L.J. 682=52 I.C. 338. See also 161 I.C. 579=1936 P. 153. A lease in a minor's favour imposing a liability on him is null and void. 3 Pat.L.J. 518=46 I.C. 670.

MINOR PROMISOR.—Where a minor purports to contract, his alleged contract is void and not merely voidable; he is a person who is not competent to contract. 18 A.L.J. 335=22 Bom.L.R. 531=38 M.L.J. 353 (P.C.). Fresh bond executed by minor on attaining majority in lieu of one executed during minority is void and unenforceable. 1937 O.L.R. 522=1937 O.W.N. 1034. Where a minor on attaining majority records his approval of the action of his guardian in granting a lease of his land and strikes his own bargain with the lessee by executing a new patta, that patta and the corresponding kabuliyat alone record the bargain between the parties, and govern their respective rights and liabilities, and the terms of the lease granted by the guardian cannot be treated as incorporated in that patta. 196 I.C. 785=1941 O.A. 1028 (P.C.). A minor cannot make a valid contract of sale of land. He can sue for recovery of the property on attaining majority. 33 I.C. 133; 21 A.L.J. 596=45 A. 644=1924 A. 156. A contract by a minor is void, not merely voidable. 26 I.C. 195=37 M. 390. See also 33 I.C. 132. Execution of bond—Consideration—Suit for cancellation of bond

12. A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

What is a sound mind for the purposes of contracting.

NOTES.

—Duty to restore benefit. 69 I.C. 888=25 O.C. 237.

MUTUALITY.—It is not within the competence of the guardian of a minor or the manager of his estate, to bind the minor or his estate by a contract for the purchase of immovable property. If the guardian or manager of the minor's estate enters into such a contract for the minor, there is no mutuality in the contract as the minor is not bound by it and the minor cannot, on attaining majority, obtain specific performance of the contract. 39 C. 232=39 I.A. 1=21 M.L.J. 1156 (P.C.). A contract for the minor's benefit may be specifically enforced against him. 13 I.C. 673=16 C.W.N. 297.

ESTOPPEL.—A deed executed by a minor is a nullity and incapable of founding a plea of estoppel. 47 C.L.J. 628=1928 P.C. 152=55 M.L.J. 88 (P.C.); 1930 M.W.N. 891=1930 M. 945; 122 I.C. 266=25 N.L.R. 85=1929 N. 156. But see also 122 I.C. 466=11 L. 167; 31 Bom.L.R. 340; 30 Punj.L.R. 584=1929 L. 880. Mere misrepresentation as to age, in the absence of fraud, will not operate as an estoppel against the minor. 140 I.C. 325=1933 M. 94. See also 58 C. 224=132 I.C. 84=1931 C. 393; 55 B. 741=33 Bom.L.R. 1313=1931 B. 561 (F.B.) (55 M.L.J. 88 (P.C.), Rel. on.); 1937 Lah. 598 (failure of minor to reveal his age, if and when fraud). When granting relief to minor on ground of minority, Court can direct refund of money received and applied for benefit of the minor. 141 I.C. 152=1933 A. 372; 45 A. 644=1924 A. 156; 69 I.C. 888=25 O.C. 237.

RATIFICATION.—A contract by a minor is void and cannot be ratified by him after attaining majority. 46 I.C. 765; 53 I. C. 123; 99 I.C. 318=1927 L. 24; 130 I.C. 598=33 Bom.L.R. 111=1931 B. 178; 16 L. 546=1935 L. 561 (F.B.). But see 1937 Sind 310=31 S.L.R. 502. Fresh bond on attaining majority ratifying previous bond given while minor is unenforceable. 49 A. 137=25 A.L.J. 132=1927 A. 242. See also 1937 O.W.N. 1034; 51 I.C. 410; 31 Punj.L.R. 471; 33 Bom.L.R. 111. A contract of exchange made by a minor is void and as such cannot be ratified by him after attaining majority or by his mother. 51 I.C. 410=38 P.R. 1919 (30 C. 539, Ref.). A minor has no right to enforce a fraudulent contract of his guardian. 65 I.C. 459=11 L.B.R. 83.

REFUND OF CONSIDERATION RECEIVED BY MINOR.—Where a minor brings a suit to set aside a sale brought about by him by misrepresenting his age to the vendee, it is open to the Court under S. 41 of the Specific Relief Act, at the time of setting aside

the sale, to direct the minor to refund the consideration to the vendee. 141 I.C. 152=1933 A. 372. As to refunding of benefit received by minor, see also 1924 A. 156=45 A. 644.

BARRISTER-AT-LAW—RIGHT TO SUE FOR FEES.—A barrister-in-Law practising as an advocate in the High Court is not disentitled to sue his client for recovery of fees due. (25 A. 509, Overr.) 55 A. 570=1933 A.L.J. 451=1933 A. 417 (F.B.).

Sec. 12: SCOPE.—The contract of a lunatic is void. 17 M.L.J. 78. Original presumption is in favour of sanity. 1 M.H.C. R. 214. Test of soundness of mind. 68 I.C. 372=4 Pat.L.T. 7. See also 27 A. 1 (P.C.). As to validity of mortgage in favour of a lunatic, see 27 O.C. 214=1925 O. 37. Unsoundness to render a contract invalid must exist at the time of contract. 104 I.C. 527=1927 C. 889. Proof of unsoundness of mind. 1927 C. 889. Unsoundness of mind and undue influence are totally different things. 1927 C. 889.

BURDEN OF PROOF AND PRESUMPTION.—The question whether a contract is invalidated by unsoundness of mind does not depend merely on belief or unbelief of the witnesses before the Court, but depends largely upon inferences to be drawn from the evidence. (1927 C. 889, Foll.) 144 I.C. 741=34 P.L.R. 297=1933 L. 458. The onus of proving insanity or unsoundness of mind is in the first place on the person who alleges it, the normal presumption being of sanity. But where there is sufficient evidence to discharge that primary burden then the burden shifts to the person who alleges his sanity to prove that the contract was made during a lucid interval. 1941 N.L.J. 287=1941 Nag. 251. Where the fact of undue influence was not seriously disputed the burden lies on him who denies to show that no undue influence was used and the transaction was made in good faith. 1934 A.L.J. 817=1934 A. 507. As to burden of proof of lucid intervals, see 137 I.C. 766=1932 R. 24 (case-law reviewed). Effect of deep drunkenness leading to frequent insobriety and unsoundness of mind. See 13 O.L.J. 574=2 Luck. 226. Where mental incapacity is proved, such as senile dementia in the case of an old man, it is reasonable to presume its continuance, and the onus will be on persons who wish the Court to uphold transactions entered into by the patient subsequent to the date when it was proved, to prove that the transactions were not vitiated on the ground of his incapacity. 1940 Mad. 73=50 L. W. 668=1939 M.W.N. 1023. Old age—Loss of vigour owing to old age is not sufficient to invalidate contract. 104 I.C. 527=1927 C. 889. Where a party executing a deed

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations.

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

"Consent" defined.

13. Two or more persons are said to consent when they agree upon the same thing in the same sense.

"Free consent" defined.

14. Consent is said to be free when it is not caused by—

- (1) coercion, as defined in section 15, or
- (2) undue influence, as defined in section 16, or
- (3) fraud, as defined in section 17, or
- (4) misrepresentation, as defined in section 18, or
- (5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

15. "Coercion" is the committing or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful

"Coercion" defined.

detaining, or threatening to detain, any property, to

the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

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seeks to avoid the effect of the same by pleading insanity at the time of executing the same, it is of the utmost importance that the pleadings and evidence of parties on record are scrutinized with advertence to the law of contract as contained in S. 12. 177 I.C. 80=1938 Nag. 204.

LUNATIC—LUCID INTERVAL — CONTRACT MADE DURING—VALIDITY.—When a person has been found lunatic by inquisition, so long as the inquisition has not been superseded, but continues in force, he cannot, even during a lucid interval, execute a valid deed dealing with or disposing of his property. The Court will not recognise such a deed even by directing proceedings to be taken to try the question of its validity or to perpetuate testimony as to the state of the lunatic's mind when it was executed but will treat the deed as entirely null and void. (*Walker, In re*, (1905) 1 Ch. 160, Foll.) 56 M. 904=1933 M. 624=65 M.L.J. 279.

Secs. 14 to 17.—Fraud, undue influence and coercion are separate and separable categories in law. Specific allegations and particulars must be given in respect of each. 39 B. 441=27 M.L.J. 34=42 I.A. 135 (P.C.).

Sec. 15.—Every conceivable form of improper pressure falls under S. 15. 25 B. 10; 4 A. 352; 22 A. 224 (as threat of sui-

cide); 41 M. 33. S. 15 does not control S. 72 and coercion in S. 72 is not the same as defined in S. 15. 40 C. 598=40 I.A. 56=25 M.L.J. 104 (P.C.). Coercion—Plea of, and proof. 39 B. 149=28 I.C. 921=17 Bom.L.R. 157. A suspicion or mere probability is not sufficient to support a plea of coercion. (*Ibid.*) A mortgagee who refuses to re-convey the mortgaged properties to the mortgagor except on certain terms is not guilty of coercion. 45 I.C. 738=27 C.L.J. 78. In dealing with a case of "coercion" as invalidating a contract, the Court should decide whether the alleged act of coercion amounts to an offence under the I. P. Code. 34 I.C. 578=3 L.W. 490. A threat to commit suicide to induce a document to be executed by a person is a threat to commit an act forbidden by the Indian Penal Code and amounts to a 'coercion' and the document executed in pursuance of that threat is invalid and inoperative. Though suicide itself is not punishable its attempt is. 41 M. 33=32 M.L.J. 494 (F. B.). *Per Wallis, C.J., and Seshagiri Aiyar, J.* (Oldfield, J., dissenting).—The 'coercion' need not proceed from a party to the contract or be immediately directed against the party whom it is intended to coerce, to enter into the contract or specifically prejudice him or his property. 3 L.W. 490=34 I.C. 578. A threat even from a third person amounts to coercion. 16 I.C. 344=15 O.

Illustration.

A, on board an English ship on the high seas, causes *B* to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code.

A afterwards sues *B* for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code was not in force at the time when or place where the act was done.

¹[16. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that "Undue influence" defined. one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

LEG. REF.

¹ This section was substituted by S. 2 of Act VI of 1899.

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C. 192. The law of duress of English Common Law is not applicable in India, as the law laid down in S. 15 is other than that contained in English Law texts. 16 I. C. 344=15 O.C. 192. In order to establish coercion, a person must prove (1) the utterance of threat, (2) of an act forbidden by law, (3) with the intention of compelling the plaintiff to make the agreement complained of. 16 I.C. 344; 1927 M. W. N. 761. Mere threat of bringing a criminal charge does not amount to coercion as defined in the Act, as it is not *per se* forbidden by Penal Code. 1927 M.W.N. 761; 13 L. 356; 140 I.C. 220=1932 L. 541. But the case is different when the threat is bringing false charge. 1927 M.W.N. 761. As to threat of bringing a false suit, *see* 161 I.C. 347=38 P.L.R. 727=1936 L. 6. Coercion may consist in the unlawful detaining or threatening to detain property. 55 I.C. 741=12 Bur.L.T. 195; 1927 M.W.N. 761; 13 L. 356=1932 L. 546. According to S. 15 'coercion' among other things, includes the unlawful detention of another man's property with the intention of causing him to enter into an agreement. Where in order to recover a fine imposed on a son the property belonging both to the father and son is attached and the father, to save the property from sale, pays the amount of the fine, his payment can in no sense be said to be voluntary. The father is made to pay under the force of a legal process. Legally this amounts to coercion. The father can sue to recover it back. 1939 All. 373=183 I.C. 134. Release deed executed by principal to agent under coercion is not valid. 1927 M. 852=53 M.L.J. 606. Mere need for borrowing money is no proof of coercion. 1936 A.W.R. 84.

Sec. 16.—Section whether exhaustive. *See* 29 A. 303 (307); 32 B. 208 (211 and 212). *See also* 1938 Bom. 97.

ESSENTIALS OF UNDUE INFLUENCE.—Acts of undue influence range themselves under one or other of these heads—Coercion or fraud. Therefore a case of misrepresentation fails when its evidence falls under neither of these heads. 61 I.A. 224=9 Luck. 178=67 M.L.J. 7 (P.C.). The fact

that a person accepted the terms of a compromise, as he had no other option, cannot be the test to determine whether compromise is liable to be attacked as vitiated by undue influence. 183 I.C. 855=1939 Pat. 477. S. 16 relates to transactions entered into by persons *between whom* there is fiduciary relationship. 165 I.C. 597=1936 O.W.N. 1106=1937 O. 56. *Advice and persuasion* in the case of a person who does not readily agree to do a thing would not be proof of undue influence. Persuasion, appeals to the affections or ties of kindred, to a gratitude of sentiment for past services, or pity for future destitution or the like,—these are all legitimate, and may be fairly pressed on a promisor. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid contract or transaction can be made. Importunity or threats, such as the promisor has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the promisor's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. A party may be led but not driven; and his will must be the offspring of his own volition and not the record of someone else's. Where a party has entered into a transaction when he is surrounded and pressed by those whose interest clearly lies in his entering into it, without any independent advice or opportunity to acquaint himself as to his rights, S. 16 of the Contract Act will apply, and a Court of Equity will protect a young man of tender age who has entered into such a transaction at the instance of those who are in a position to dominate his will. The righteousness of the transaction is one of the factors to be considered, but it is not the only one. All the circumstances connected with it must be taken as a whole. 39 Bom.L.R. 1233=1938 Bom. 97. Under S. 16 of the Act contracts are not avoided simply because they are hard or harsh. They are avoided because there is no such consent on the part of the other party as in principle can be regarded as a contract by him. In order to

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872.

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establish undue influence, two things must be shown; the person in a position to dominate the other's will and using that position to obtain an unfair advantage. Where the transaction was finished through an attorney and the borrower had also other advice. *Held*, that undue influence was not proved. 61 C.L.J. 283. *See also* 160 I.C. 1073=1936 P. 78. The essentials to constitute undue influence are (1) that the transaction was not a righteous transaction, that is, that it was not a thing which a right-minded person might be expected to do; (2) that it was improvident, that is to say, that it showed so much improvidence as to suggest the idea that the donor was not master of himself and not in a state of mind to weigh what he was doing; (3) that it was a matter requiring a legal adviser; (4) that the intention of making a gift originated with the donor. 118 I.C. 737. Under S. 16 (1) of the Contract Act, three things must be proved before a contract can be said to be induced by undue influence, namely (1) that the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other; (2) that he used that position; and (3) that an unfair advantage over the other has been obtained by the use of that position. 1937 O.L.R. 114=1937 O.W.N. 277=1937 Oudh 254. *See also* 1937 C. 492. To establish a plea of undue influence it must be shown that plaintiff (mortgagee) was in a position to dominate the will of the defendants (mortgagors) and secondly that he used that position to obtain unfair advantage. If the terms of the contract appear on the face of them to be unconscionable or are shown to be so, the second point may be presumed. 38 M.L.J. 349=43 M. 546=47 I.A. 1 (P.C.); 48 A. 666=96 I.C. 684=24 A.L.J. 822; (1937) 1 M.L.J. 719 (P.C.). In the category of cases of undue influence might be covered cases where the party to a transaction exercised that influence in conspiracy with or through the agency of others. 43 M. 546=47 I.A. 1=38 M.L.J. 349 (P.C.). To avoid contract for undue influence the promisee must have used his dominating posi-

tion to obtain an unfair advantage. 24 I.C. 67=7 Bur.L.T. 90. *See also* 32 B. 37; 11 O.C. 295; 10 Lah.L.J. 27.

TRANSACTION UNCONSCIONABLE — PRESUMPTION OF UNDU INFLUENCE.—Even if a transaction of mortgage be unconscionable, that fact alone is not sufficient to shift the burden of proof to the mortgagees by raising a presumption of undue influence. 145 I.C. 432=1933 L. 682. The mere fact that a party to an agreement has very strong motive for executing it raises no presumption that he has been unduly influenced. 14 L. 827=144 I.C. 497=1933 L. 835.

CONFIDENTIAL RELATIONS GIVING RISE TO UNDU INFLUENCE.—The following involves confidential relations:—It is well-established that when a person obtains any benefit from another, whether under a contract or as a gift by exerting his influence which, in the opinion of Court, prevents the grantor from exercising an independent judgment in the matter in question, the latter can, in a Court of Equity, set aside the contract or recover the gift. The Court of Equity imposes on the grantee the burden, if he wishes to maintain the contract or gift, of proving that in fact he exerted no influence for the purpose of obtaining it. This rule of equity is not restricted to cases where strictly or technically fiduciary relationship is established. It extends to cases where the possibility of exercising influence exists from confidence created or established by the relation between the donor and donee. The principle has been established to cases of *pardanashin* ladies. The rule must apply to all variety of relations in which the Court is satisfied that the possibility of exercise of dominion and influence exists; that is the relation of active confidence justifying the raising of the presumption of undue influence. The application of the rule of presumption must, however, depend not merely upon the circumstances attending the transaction but upon the relationship itself. The relation of *paramour* and *mistress* may be included in such cases if the party obtaining the benefit is in a position to dominate and influence the will of the other. When the power of influence and the influence itself are established, something more than a bare

Illustrations.

(a) A having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

(c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money-market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.]

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assertion of affection or a generous feeling of gratitude must be furnished to turn the scale. 40 Bom.L.R. 132=1938 Bom. 304.

(1) PARENT AND CHILD, 30 M. 169; see also 53 M.L.J. 842. The influence is to be inferred from the special relationship between the parties, quite apart from proof of actual fraud or unfair advantage. In English law a special relationship of confidence does exist between parent and child, notwithstanding that the child is actually of age at the time the transaction takes place. These principles are equally applicable to a case under S. 16. 1940 Rang.L.R. 35=1940 Rang. 278.

(2) GUARDIAN AND WARD, 6 C.W.N. 716; 36 C. 493; 5 M.L.J. 234; 53 M.L.J. 842; 1939 Rang.L.R. 35=1939 Rang. 278.

(2-a) LANDLORD AND TENANT. See 158 I.C. 257=1935 L. 479.

(3) SOLICITOR AND CLIENT. 1935 L. 479; 21 B. 699.

(4) Also ATTORNEY'S CLERK AND CLIENT, 21 B. 699.

(5) PATIENT AND DOCTOR, 30 B. 578.

(6) TRUSTEE AND BENEFICIARY, see 1939 Rang. 278.

(7) SPIRITUAL ADVISOR AND CLIENT, 12 A. 523.

(8) HINDU REVERSIONER.—The question whether the assignment by the reversioner of his rights in favour of a third person is an unfair or unconscionable bargain by reason of the inadequacy of consideration is a question which it is unnecessary to decide in a suit by reversioner and his assignee against widow's alienees where the assignor does not repudiate the transaction, but asks that effect be given to it. 10 L. 613=1929 L. 295.

(9) EXPECTANT HEIRS.—In case of a sale of reversion by expectant heirs of transfers by persons under pressure without adequate protection, the burden of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract. The Court protects expectant heirs against the consequences of their not being on equal terms with the buyer, or in a position fully to understand the value of their interest, and justly to estimate the proposals made to them. Inadequacy of price is not alone sufficient to authorise the

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vacating of a contract for the sale of a reversion, but inadequacy of price coupled with the inexperience and absence of any competent advice on the part of the seller are sufficient to set in motion the protective powers of the Court of Equity. 46 L.W. 429=1937 P.C. 14=(1937) 2 M.L.J. 87 (P.C.).

(10) HUSBAND AND WIFE do not necessarily and always stand in such relation. 33 C. 773 (P.C.). There is no presumption that a young wife is always in a position to dominate the will of her husband. 123 I.C. 369=1930 A. 169. A wife does not fall within the class of "protected" persons in respect of whom in certain relationships there is a presumption of undue influence, though in some cases it is easy for the wife to discharge the onus which lies on her as on every one else outside the protected class to show that a particular contract was, in fact, procured by the undue influence of her husband. 1934 A.L.J. 763=40 L. W. 400=1934 P.C. 210 (P.C.).

(11) TRANSFER BY ELDERLY INVALID PERSON TO ONE NURSING HIM.—When people who are nursing an elderly invalid get a transfer of practically the whole of his remaining property in their favour to the complete exclusion of his heir, the transaction being made without the knowledge of his heir, it is for them to prove the *bona fides* of the transfer. 144 I.C. 673=1933 R. 90.

(10-a) PARAMOUR AND MISTRESS. See 40 Bom.L.R. 132=1938 Bom. 304.

(12) PRINCIPAL AND AGENT.—Release deed by principal to agent—Agent in possession of documents, account books and cash refusing to hand over the same to new agent till release was executed constitutes coercion and undue influence—Release deed not enforceable. 50 M. 786=1927 M. 852=53 M.L.J. 606.

(12-a) LANDLORD AND TENANT.—A presumption of undue influence is not warranted by the mere fact of the existence of the relationship of landlord and tenant between the parties to a transaction. Before such a presumption could arise there must be some positive evidence to show that the Zamindar exercised some undue influence on the tenant. 1942 O.W.N. (B.R.) 27=1942 A.W.R. (Rev.) 25.

(13) DEBTOR AND CREDITOR.—As to the

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lending money to a profligate young man, *see* 90 I.C. 39=26 Punj.L.R. 506=1925 L. 430. *See also* 1931 M.W.N. 215; 166 I.C. 834=1937 P.C. 14. (Sale of reversionary expectant heir to his creditor); *see also* 1935 L. 479=158 I.C. 257. Defendants 1 and 2 were two Hindu brothers and 3rd defendant was their nephew. The latter had from his infancy been living with his uncles and under their protection. The brothers stood in a fiduciary relation to the 3rd defendant and they used their influence to obtain an undue advantage and got him to undertake on their behalf certain liabilities to their creditor, the plaintiff. The plaintiff gained a substantial advantage in that the 3rd defendant made himself jointly liable for the amounts advanced by him (plaintiff) to defendants 1 and 2. It was clear from the evidence that the plaintiff knew of the circumstances and that the 3rd defendant had only recently come of age and it was at the instance of his uncles that the 3rd defendant entered into the transaction. *Held*, that S. 16, Contract Act, did not apply. That section deals only with the exercise of undue influence by one party to the contract to another. But according to the principles of English law, as embodied in S. 89 of the Trusts Act, once it was shown that the plaintiff was aware of the existence of a fiduciary relationship between defendants 1 and 2 and the 3rd defendant, plaintiff would be under the same disability as the party who occupied the position of confidence; and consequently the 3rd defendant could not be held liable to the plaintiff under the undertaking. 58 M. 454=69 M. L.J. 104.

(14) HEAVY INTEREST is not by itself sufficient to bring the contract under S. 16. 101 I.C. 759=1927 A. 538; 100 I.C. 679=1927 A. 315; 1927 A. 44; 1928 O. 330=5 O.W. N. 435; 164 I.C. 325=1936 A.L.J. 919=1936 A. 611. Nor mere need of money by borrower. 31 C.W.N. 693=1927 P.C. 84 (P.C.); 123 I.C. 175; but *see also* 102 I.C. 707=1927 L. 536; 1930 P.C. 139; 1936 A.W.R. 84. The mere fact that the rate of interest charged was high, although the security was good, is not sufficient by itself to raise a presumption of undue influence. Where there is no great pressure upon the mortgagors at the time of executing the mortgage-deed, there is no reason to infer that the mortgagees would be in a position to dominate the will of the mortgagors. [3 P. 279 (P.C.), Ref.] 130 I.C. 817=1931 N. 91. *See also* 134 I.C. 489=32 P.L.R. 378. A rate of interest of 25 per cent. per annum compound is *prima facie* an excessive rate of interest in a mortgage transaction in any district. Where the agreement to pay interest at such a high rate was the result of the lender being in a position to dominate the will of the borrower and it is also clear that he used that position to exact unconscionable terms for the loan, the contractual

rate of interest is liable to reduction by the Court and a rate of 12 per cent. per annum simple is a fair and reasonable rate in a mortgage transaction. 153 I.C. 695=1934 A. 938.

(15) SISTERS AND BROTHERS-IN-LAW.—The onus of proving undue influence ordinarily rests on the party who sets up that plea, but the circumstances of a case may make it an exception to the general rule. The plaintiff was married to the eldest sister and it appeared from the circumstances that she was in a position to influence her younger sisters, who had lost, not only their father but also their mother, before they executed a promissory note in favour of the husband of the eldest sister, for a certain sum in consideration of certain services rendered by him to them. At the time of the execution both of them were *sui juris*, but the youngest had attained majority only a month or two before she was asked to sign the promissory note. The plaintiff was their agent managing their estate and stood to them in a position of active confidence. The plaintiff after getting a draft of the note prepared by a lawyer dictated it to the second sister, making all the executants jointly and severally liable. *Held*, that the plaintiff was in a position to dominate the will of each of the sisters and whether the case came within the purview of S. 111, Evidence Act, or S. 16, Contract Act, the onus in either case was upon him to prove the good faith of the transaction, and if he failed to discharge it, the claim on the basis of the promissory note should be dismissed as against them. *Held, further*, that the above failure did not involve the dismissal of his alternative claim to recover remuneration for services rendered by him to them. 41 C.W.N. 677=1937 P.C. 50=(1937) 1 M.L.J. 719 (P.C.).

(15) BROTHERS.—Where a Mahomedan younger brother who has just come of age enters into a transaction of a mortgage at the instance and for the benefit of his elder brothers who till recently were his guardians and under whose influence he was admittedly living, and the effect of the transaction is to make him and his property liable as security for a heavy debt for which he was not in law liable at all, it is not necessary for him, to sustain his plea of undue influence, to prove by direct evidence that his elder brothers exercised undue influence. The exercise of undue influence may in the circumstances be fairly presumed, in view of the relationship of the parties and the nature of the transaction. When there is evidence of overpowering influence and the transaction is immoderate and irrational, proof of undue influence is complete. 1940 Mad. 285=1939 M.W.N. 976. *See also* 1930 O. 34.

INDEPENDENT ADVICE GIVEN AFTER TRANSACTION—VALUE OF.—Where it is incumbent upon a party to a transaction to prove that the other contracting party had independent

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advice, such advice to be of any value must have been given before the transaction, for the question is as to the will of the party at the time of entering into the disputed transaction. Advice given after the event when the supposed contracting party is already bound is given under entirely different circumstances with a different position presented to the minds both of the adviser and his client. 151 I.C. 981=1934 P.C. 210 (P.C.).

SECS. 16 AND 19.—Where undue influence is alleged it is necessary to examine very closely all the circumstances of the case. 65 I.C. 380=8 O.L.J. 681; 56 M.L.J. 349 (P.C.).

ILLUSTRATIVE CASES.—Blindness by itself, unaccompanied by other circumstances, will not lead to a presumption of undue influence. 11 I.C. 775=4 Bur.L.T. 157. But see 147 P.L.R. 1913=20 I.C. 8; 58 I.C. 13=24 C.W.N. 769=16 N.L.R. 94 (P.C.); see also 66 I.C. 642=8 O.L.J. 358.

ILLITERACY.—If the contents of a written contract are not fully explained to or understood by a party who is an illiterate man, it is not binding on him. Reading audibly is not sufficient. 39 I.C. 177=21 C.W.N. 979. See also 18 C. 575; 83 I.C. 239=1925 N. 211 (Ignorant agriculturist).

FEAR OF PUNISHMENT.—Fear of punishment in a criminal case by itself does not constitute undue influence and the money cannot be refunded unless the circumstances disclose pressure or undue influence. 46 I.C. 424; 28 I.C. 434 (42 C. 286, Rel. on). The term "fraud" has a very wide meaning. 33 I.C. 396=18 Bom.L.R. 134.

HARD TERM.—[See also Notes under S. 74, *infra*.] Court's power to give relief from hard terms as to interest and compound interest when money-lender is not shown to have taken undue advantage of his position. 101 P.R. 1918=23 C.W.N. 130=48 I.C. 933 (P.C.); 29 O.C. 253=96 I.C. 413=1926 O. 408. See also 1925 P. 326. It is difficult for a Court of justice to give relief on grounds of simple hardship in the absence of any evidence to show that the money-lender had unduly taken advantage of his position even when the transaction appeared to be undoubtedly improvident. 23 C.W.N. 130 (P.C.). In a case of a mortgage bond the Court should not infer undue influence from the mere fact that the rate of interest stipulated for is heavy and there is a provision in the bond for capitalizing the interest in arrears. 47 I.C. 11; 10 I.C. 249; 54 I.C. 785; 54 I.C. 558. In the case of an agreement reduced to writing, a Court cannot, in the absence of fraud or undue influence, refuse to enforce its terms however unreasonable they may be. Under such circumstances, the Court has no discretion. 15 I.C. 377=1912 M.W.N. 416; see also 10 I.C. 249; 54 I.C. 985. [See now the Usurious Loans Act, 1918.] The fact that the borrower failed to realise what the rate of compound interest would work

out in a few years would not entitle him to relief from a Court of justice on the ground of hardship. 54 I.C. 558. There is nothing inherently wrong or oppressive in an agreement to pay compound interest. 4 L. 76=72 I.C. 765; 1923 L. 634; 56 I.C. 74; 130 P.L.R. 1912=16 I.C. 119; 55 I.A. 85=1928 P.C. 64=54 M.L.J. 427 (P.C.). Inequitable and unconscionable conditions such as one providing for oppressive rate of interest, should not be enforced against the mortgagor or his successor in title. 128 P.L.R. 1911=11 I.C. 519. See also 73 P.L.R. 1914=22 I.C. 528. Where a contract provides for a high rate of interest, Courts cannot interfere to cut down the same unless there is satisfactory evidence of the exercise of undue influence. 22 I.C. 769=36 M. 533. Neither prior indebtedness nor a high rate of interest would by itself be sufficient to prove undue influence by the mortgagee on the mortgagor. 77 I.C. 383=1924 O. 118 (2). It is not a universal proposition of law that wherever there is a security for the debt a rate of interest over ten per cent. per annum is penal. 74 I.C. 346=1923 O. 139. In cases where there is no proof of undue influence a Court has no power to reduce the contract rate of interest merely on the ground that it is very high. 69 I.C. 657=1923 O. 8 [Special powers have now been conferred on Courts by the Usurious Loans Act, 1918, to give relief in cases of very excessive rates of interest, apart from fraud or undue influence.] The Court disallowed costs on the ground that the interest decreed was high. 69 I.C. 657=1923 O. 8 (1). The rate of interest, however exorbitant, cannot be abrogated unless the agreement was tainted by undue influence, fraud or misrepresentation such as are mentioned in the Contract Act. 2 P. 488=4 Pat.L.T. 707=74 I.C. 695. See also 2 P.L.J. 212=39 I.C. 352; 95 I.C. 1019=1926 O. 273. (See now the Usurious Loans Act, 1918.) A high rate of interest cannot always be regarded objectionable as penalty within S. 74. But when the contract provides a special condition for a change in the rate or mode of calculation of interest as a punishment for some default, that special condition is a penalty. 39 I.C. 352=2 P.L.J. 212. But 2 per cent. compound interest was held unconscionable. 1925 A. 31.

LONG INDEBTEDNESS.—The mere fact that one of the parties to a contract was antecedently indebted to the other is not by itself sufficient proof of undue influence. 68 I.C. 597=1922 N. 212. But see 11 I.C. 198=213 P.L.R. 1911; 48 P.L.R. 1914=22 I.C. 406; 20 I.C. 47=20 C.L.J. 424. See also 83 I.C. 1019=27 O.C. 374=1924 O. 423; 89 I.C. 348=1925 O. 535.

SMALL INDEBTEDNESS of short duration cannot raise any inference of undue influence. 123 I.C. 417=1930 L. 65.

FALSE INDUCEMENT.—See 1929 O. 44.

MENTAL DISTRESS.—It is not enough to

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prove undue influence that a vendor of property was in a distressed state of mind and anxious to dispose of his property at the time of sale. 72 I.C. 1032=1924 L. 334. As to mental distress, *see also* 22 A. 224; 28 B. 639; 10 A. 535; 11 B. 566; 13 M. 214.

OLD AGE.—Mere loss of vigour and infirmity on account of old age is not sufficient to invalidate a contract. 104 I.C. 527=1927 C. 889; nor the fact that an old man did not make provision in his settlement for his wife's maintenance. 1927 M. 255=52 M.L.J. 20. When people who are nursing an elderly invalid get a transfer of practically the whole of his remaining property in their favour to the complete exclusion of his heir, the transaction being made without the knowledge of his heir, it is for them to prove the *bona fides* of the transfer. 1933 R. 90.

UNCONSCIONABLE BARGAIN—BURDEN OF PROOF.—Where an ignorant, illiterate and a poor young man, on whom a right to the inheritance of his deceased relation had devolved and who is a fool, executes a sale-deed in favour of persons offering their help to recover the inheritance for him as volunteers and making the bargain with him which is entirely on their side, and wholly unconscionable, the conclusion is that the vendees were in a position to dominate the will of the vendor and exercised undue influence. 1 Luck. 144=95 I.C. 995. *See also* 1935 R. 174; 1935 P.C. 146=69 M.L.J. 335 (P.C.); 158 I.C. 973=18 N.L.J. 67. *See also* 1937 P.C. 50=(1937) 1 M.L.J. 719 (P.C.); 1938 Lah. 333; 1938 Nag. 470=I.L.R. (1938) Nag. 535; 1940 Mad. 285. Once this is established, sub-section (3) of this section will apply and the burden of proving that the contract was not induced by undue influence lies upon the person who was in a position to dominate the will of the other person. (*Ibid.*) 38 M.L.J. 349=43 M. 546=47 I.A. 1 (P.C.); 104 I.C. 527=1927 C. 889; 100 I.C. 679=1927 A. 315; 1927 A. 44. *See also* 11 O.C. 295. If such person does not discharge the *onus*, the sale must be set aside subject to payment of compensation to the vendee. 1 Luck. 144=13 O.L.J. 42=1927 O. 92; 35 M.L.J. 614=48 I.C. 1=21 Bom.L.R. 558 (P.C.). *See also* 65 I.C. 380=8 O.L.J. 681; 83 I.C. 239=1925 N. 211; 90 I.C. 463=29 C.W.N. 1029; 1927 A. 44. Question of undue influence depends on circumstances. 85 I.C. 169=1925 L. 196. When the contract is *prima facie* unconscionable, the party seeking to enforce it must prove that the contract was not induced by undue influence. 2 Pat.L.T. 663=41 I.C. 337; 1 Pat.L.J. 604=38 I.C. 235. The Courts have ample power under the amended Contract Act to go behind hard and unconscionable bargains on the ground that where there is ample security, the exaction of excessive and usurious interests in itself raises a presumption of undue influence which it requires very

little evidence to substantiate. Where there is no security, no rate of interest can be considered excessive. 42 C. 690=19 C.W.N. 809. *See also* 45 I.C. 778=8 A.L.J. 407. There can be no standard rate on personal loans. 42 C. 690. Where the parties are reasonably on terms of equality a Judge cannot do better than adopt what they themselves have agreed upon. The dicta of English Judges under the English Money Lenders Act can safely be accepted in India since the Indians lean more in favour of the debtors. 42 C. 690. Extortionate and inequitable agreement is not enforceable. 56 I.C. 272=1 L. 124. Compound interest at 24 per cent. with half-yearly rests may be enforced in the absence of undue influence. 50 M. 614=1927 M. 620=52 M.L.J. 612. The actual value of the land in dispute at the time of agreement, determines if it is extortionate and inequitable. 56 I.C. 272=1 L. 124. A Court of justice is not a blind and humble instrument of the creditor to plunder the debtor. 25 I.C. 719=149 P.L.R. 1914. A creditor who got securities at a very high rate of interest (30 per cent.) from an expectant heir, who was a very inefficient clerk in a Court, is guilty of undue influence. 25 I.C. 719. Champertous bargains not having been held in the country contrary to public policy stand on the same footing as any other contract. 65 I.C. 129=24 O.C. 313. Apart from the Usurious Loans Act, the mere fact that a bargain is unconscionable in the sense that the rate of interest charged is excessive, is not in itself a sufficient ground for interference. 48 I.C. 17=5 O.L.J. 579; 22 I.C. 132=16 O.C. 267.

URGENCY AND INADEQUACY OF CONSIDERATION.—Urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within S. 16. 29 C.L.J. 488=49 I.C. 794=23 C.W.N. 609; 29 O.C. 253=96 I.C. 413=1926 O. 408. *See also* 26 M.L.J. 315=1 L.W. 276; 1922 O. 268; 42 C. 652=21 C.L.J. 79; 18 I.C. 965=17 C.L.J. 221. The mere fact of the existence of an urgent necessity on the part of the borrower is not sufficient to raise the presumption that undue influence was exercised. Nor does the existence of urgent need accompanied by a high rate of interest established such a presumption. In ordinary circumstances, the more pressing the necessity, the higher the rate of interest is likely to be, for the borrowers have no time to make such inquiries as will ensure that they are borrowing at the cheapest rate obtainable. 66 I.C. 687=8 O.L.J. 418 (34 C. 150; 8 O.C. 193, Rel.); 9 O.L.J. 439=69 I.C. 667; 48 I.C. 32=5 O.L.J. 572; 26 I.C. 26=1 O.L.J. 518; 69 I.C. 697=1 P. 263. Where the creditors are in a position to take advantage of the embarrassment of their debtors the bargain is unconscionable. 42 C. 652=21 C.L.J. 79. The mere fact that one party is

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in a position to dominate the will of another is not enough to avoid a contract between them in the absence of proof that the transaction is also unconscionable. 18 I.C. 965=17 C.L.J. 221. A transaction may be unconscionable in many ways and a Court should see in each case whether according to its sense of justice it is really so. 18 I.C. 965. Excess of interest and charges may, if unexplained, of itself be evidence of a harsh and unconscionable bargain. 18 I.C. 965. Inadequate consideration may lead to inference of fraud or undue influence. 96 I.C. 468=1926 P. 539. But the inadequacy of consideration must be apparent and must not be left to be spelled out by dexterous arguments as to value. 96 I.C. 468=1926 P. 539. The mere fact that properties had to be parted for an unduly low price owing to pressure of necessity will not indicate undue influence. 26 M.L.J. 315=23 I.C. 72=1 L.W. 276. See also 47 L.W. 714=1938 Mad. 426=(1938) 1 M.L.J. 676; 1938 Nag. 391; 1938 Nag. 470=I.L.R. 1938 Nag. 535. Where the bargain is fair and reasonable the plea of undue influence collapses. 24 I.C. 67=7 Bur.L.T. 90; 1938 Nag. 391; 1938 Nag. 400.

PARDANASHIN WOMEN AND YOUNG PERSONS.—Where a deed of gift by a pardanashin lady is impeached on the ground of undue influence, the questions that arise are (1) was the transaction a righteous transaction? (2) was it an improvident act? (3) was it a matter requiring advice? (4) did the intention of making the act originate with the donor? 65 I.C. 380=8 O.L.J. 681. If a family settlement or the award of panchayat is impeached by a pardanashin lady on the ground that her consent was obtained by fraud, practised by her kinsmen, whose interests conflicted with hers and who, therefore, misled her and the woman is shown to be illiterate and lacking in business capacity, the Court has to consider not whether she knew what she was doing, had done or proposed to do, but how her intention to act was produced. Fraud cannot be condoned unless there is full knowledge of the facts and the rights arising therefrom and the parties are at arm's length. 35 M.L.J. 362=20 C.W.N. 957=14 A.L.J. 1236 (P.C.) See also 35 I.C. 395; 23 I.C. 401=18 C.W.N. 133. A pardanashin lady, in the true sense of that term, is a lady living in seclusion, that is the *zenana*, and having no communication with any male strangers except from behind a screen. But a lady with a certain amount of education, who subscribes to newspapers, manages her affairs and even appears in Courts is not a pardanashin lady. 1930 L. 985. See also 60 C.L.J. 25=1935 C. 234. There is no reason why a rule which is applicable to pardanashin ladies on the ground of their ignorance and illiteracy should be restricted to that class only and

should not apply to the case of a poor woman who is equally ignorant and illiterate and is not pardanashin, simply because she does not belong to that class. If that view of the matter were adopted the effect clearly would be to confer an unfair advantage upon rich women as compared with the poor women. The object of the rule of law is to protect the weak and helpless and it should not be restricted to a particular class of the community. Consequently, even in a case of woman who is outside the regular pardanashin class, it is for those who deal with her to establish that she had the capacity of understanding that she entered into the transaction voluntarily and with full knowledge and import of what the transaction meant. 1930 C. 591=51 C.L.J. 465. The principles to be applied in testing the validity of documents executed by a pardanashin lady are not merely deductions from the law as to undue influence which finds a place in S. 16; they are founded upon the wider basis of equity and good conscience which have always been pillars of the administration of justice in India. 58 I.A. 450=11 P. 227=62 M.L.J. 60 (P.C.). The disposition made must be substantially understood and must really be the mental act, as the execution is the physical act, of the person who makes it. It is for the party setting up the deed of a pardanashin lady to satisfy the Court that it has been not only explained to, but understood by, her. If the explanation has been partial or erroneous, or has not been given at all, the question will then arise, as it arises, where there has been no independent legal advice, whether if proper information had been given, it would have affected the mind of the executant in completing the deed. And in order to ascertain whether the deed was the free and intelligent act of the executant, the Court must consider the whole history of the parties. 58 I.A. 450 (P.C.) Where the history of the parties disclosed that the respondent, in whose favour the pardanashin lady had executed a deed of mortgage, had purchased somewhat a speculative half of the lady's estate, it was he who launched, managed and financed the litigation on her behalf, it was he who supported the young and friendless lady through ten years of poverty and anxiety, it was he who had the mortgages prepared, it was at his house that they were executed and the only man to whom the lady could turn for advice was in the service of the respondent, *held*, that the respondent was clearly the dominating personality, and that the burden of proof was on him to show that the lady understood the nature of the deeds executed by her. 58 I.A. 450=1931 P.C. 303=62 M.L.J. 60 (P.C.). It is for the person claiming the benefit from the disposition of property by the pardanashin lady to establish affirmatively that it was substantially understood by the lady and was really her free and intelligent act: if she is

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illiterate it must have been read over to her. If the terms are intricate they must have been adequately explained, and her degree of intelligence will be a material factor, but independent legal advice is not in itself essential. 33 C.W.N. 633=1931 P.C. 100=61 M.L.J. 94 (P.C.). See also 11 P. 50=1932 P. 105. The donee, a priest, worked on the religious feelings of a lady when she was in mental distress and illness. The lady was not rich but made a substantial gift to the priest. *Held*, the transaction should be set aside. 39 C. 933=16 C.W.N. 649. When a deed is executed by a pardanashin lady or a boy of tender years, mere reading over is not sufficient. The language should be thoroughly explained especially when it is vague and ambiguous. 38 I.C. 454=3 O.L.J. 746; 10 O.L.J. 86=74 I.C. 547. See also 29 C. 749 (P.C.); 24 C. 664; 31 B. 165; 13 I.A. 215; 39 I.A. 156; 18 I.A. 545; 3 C. 324; 28 C. 546; 16 Bom. L.R. 147=36 A. 81 (P.C.); 4 Bom.L.R. 146; 7 C. 245; 5 B. 453; 11 B. 636; 33 C. 773. The principles of law applicable to a pardanashin woman will not be extended to a person said to be old and not in robust health. 74 I.C. 517=1923 O. 254. A knowledge of letters and figures and a capacity of dealing at first hand to some extent with her tenants will not convert a pardanashin lady into a woman of the world so as to rebut the presumption. The burden of proving *bona fides* lies on the party affirming it. 35 I.C. 395. See also 10 Mys. L.J. 217. A pardanashin lady sued for a declaration that a darpatni lease of a jalkar executed by her in favour of her deceased husband's cousin was invalid, and inoperative, having been executed under undue influence. It was found that the lady who lived with her father and brother understood the transaction and knew its full nature and effect, that the lessee, though a relation of her husband, was not in a position to dominate her will, that his relationship was not such as to suggest that they were not on equal terms, that she was intelligent that she had her father, brother and intelligent neighbours to advise her, that the transaction was not unconscionable or unfair and that the lessee had not taken an undue advantage of the position of the lady, and further that the plaintiff was in distress and in urgent need of money. *Held*, that the transaction was valid and that there was nothing from which undue influence could be inferred. 60 C.L.J. 25=1935 C. 234.

PRINCIPAL AND AGENT.—Even in a case where an agent was the object of the bounty of his principal there is nothing to prevent this and if an agent can clearly show that a gift was made in his favour by a donor who was in a position to exercise a free and unfettered judgment with full knowledge of what he was doing, the gift will be upheld. 10 O.L.J. 86=74 I.C. 517. See also 1923 L. 634; 20 I.C. 812=195 P.W.R. 1913; 50

M. 786=1927 M. 852=53 M.L.J. 606.

POSITION OF PARTIES.—The fact that one party to a contract stands in the relation of a debtor to the other is not by itself sufficient to prove undue influence. 68 I.C. 597=1922 N. 219; 42 A. 230=18 A.L.J. 100; 102 I.C. 707=1927 L. 536. See also 132 I.C. 452=1931 N. 63. A creditor can ask his debtor to execute documents in a particular form and where a creditor writes to his debtor's servant to get his master's signature to such a form, no inference that undue influence was used can arise. 42 A. 230=18 A.L.J. 100. A karinda who is a servant of very minor status cannot be presumed without very distinct evidence to be in a position to dominate the will of his employer. 48 I.C. 17=5 O.L.J. 579. When a Buddhist lady made a gift to her nephew who was also acting as her agent, *held*, that the relationship was not such a fiduciary one as would lead the Court to infer undue influence. 46 I.C. 738. See also 130 I.C. 119=1931 O. 34 (case of undue influence exercised by a brother over his weak-minded brother). Undue influence might proceed from a third person. 23 I.C. 401=18 C.W.N. 1133. There is no presumption of undue influence in India as well as in England in the case of a gift to a son, grandson or son-in-law during the donor's last illness. 26 I.C. 39=8 Bur.L. T. 75; 68 I.C. 372=4 Pat.L.T. 17 (33 C. 733 Foll.). As to presumption in cases of dealing with pardanashin woman, see 39 I.A. 156; 29 C. 749; 13 I.A. 215; 31 B. 165; 36 A. 81; 18 I.A. 545; 33 C. 773; 23 A. 137.

TRANSACTIONS IN FAVOUR OF THIRD PARTIES WHEN CAN BE AVOIDED—CONDITIONS.—Under S. 16 of the Contract Act, a transaction would be voidable against a third party if it is the result of undue influence and that party took the benefit either as a volunteer or with the knowledge of the exercise of undue influence by a person who was in a position to dominate the will of the executant, as the third party's knowledge of the fiduciary relationship between the parties to a contract and the exercise of undue influence puts that party under the same liability as the other party who occupied the position of confidence. 39 Bom.L.R. 1233=1938 Bom. 97.

PLEADINGS—WHO CAN PLEAD UNDUE INFLUENCE.—Plea of undue influence can be raised only by executant of document or his representative in estate, but not by a third party claiming adversely to such executant. 1931 S. 78. A man of mature age and of some intelligence and activity managing his affairs previous to a transaction, cannot resort to the plea of undue influence. 42 A. 422=24 C.W.N. 529=47 I.A. 116 (P. C.). See also 26 I.C. 67=7 Bur.L.T. 90 (petition writer). A speculator who pursues the equity of redemption on the chance of getting redemption on easy terms cannot be allowed to set up the plea, as his

17. "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :—

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vendor might have done, that the bargain was brought about by the exercise of undue influence. 305 P.L.R. 1913=20 I.C. 812. See also 1923 L. 634. Nor contest by aggrieved party disentitles other defendants to any relief. 84 I.C. 124=1925 C. 94.

PROOF.—A deed cannot be treated as void for undue influence merely because it is unreasonable or its terms are prejudicial to the donor. 44 I.C. 483=7 L.W. 339; 1 Luck. 144=1927 O. 92; 102 I.C. 707=1927 L. 536; 1927 A. 44. See also 112 I.C. 602; 56 M.L.J. 349 (P.C.). To establish a case of undue influence it is not sufficient to raise an atmosphere of suspicion, but there must be clear and definite evidence of the case propounded. (9 Luck. 178 (P.C.), Rel. on.) 40 P.L.R. 146=1938 Lah. 383. Undue influence is not a matter always capable of direct proof, and must depend in its very nature on the circumstances in which the transaction had its origin. 44 I.C. 483=7 L.W. 339. To establish undue influence it must appear that there was something unconscionable either in the original dealing or in the subsequent stages of the transaction. 52 I.C. 335; 42 C.W.N. 14. See also 40 P.L.R. 146; 39 Bom. L.R. 1233=1938 Bom. 97.

BURDEN OF PROOF.—See 1930 P.C. 139=59 M.L.J. 14; 56 M.L.J. 349; 1929 P.C. 3=33 C.W.N. 205 (P.C.). As to burden of proof in case of transactions by pardanashin ladies, see 58 I.A. 450=11 P. 227=62 M.L.J. 60=1931 P.C. 303 (P.C.); 58 I.A. 148=54 M. 440=61 M.L.J. 91=1931 P. C. 109. A document executed under undue influence is not void but only voidable and the onus is on the first instance on the person who raises that plea. Before the onus can shift on the other party to prove that the contract was not induced by undue influence, the person raising the plea of undue influence has to prove not only that the other party was in a position to dominate his will, but that the transaction appeared on the face of it or on the evidence adduced unconscionable. 1931 S. 78. See also 36 C. W.N. 994=1932 P.C. 202=63 M.L.J. 54 (P.C.); 171 I.C. 605=1937 O.W.N. 1123. Where any person deals with one who has just attained majority and is inexperienced, the burden of proving that the contract is made in good faith and for adequate consideration lies on the person who takes the benefit of the contract. (20 B. 367; 43 M. 739, Ref.) 132 I.C. 452=1931 N. 63. See also 1931 M.W.N. 215; 1937 Cal. 492.

LACHES AND LIMITATION.—In the case of gift deed executed under undue influence, the fact that the party seeking to avoid it has been guilty of delay and laches will not be a bar to the grant of the equitable relief

of avoidance of the deed. The plea of laches and delay cannot apply to the case of a gift as opposed to a contract. In any case the delay can only begin from the time when the plaintiff discovers the true nature of the deed. He has a period of three years in such a case under Art. 91 of the Limitation Act. So long therefore as the suit is not beyond the three years relief should not be denied to him on the ground of delay and laches. 39 Bom.L.R. 1233=1938 Bom. 97.

Sec. 17.—To prove a case of fraud, it must be proved that representations were made which were false to the knowledge of the party making them. 45 A. 624=21 A. L.J. 571=1924 A. 17. Mere silence is not fraud unless there is a duty to speak or unless it is equivalent to speech. 60 C. 262=1933 C. 366. See also 133 I.C. 372=1931 M. 603; 53 A. 374=1931 A.L.J. 153=1931 A. 154. The principle applies even in cases of transactions with pardanashin ladies. 60 C.L.J. 25=1935 C. 234. Equal means of knowledge is immaterial where there is an express representation or anything calculated to deceive or to full suspicion upon a particular point. 133 I.C. 372=1931 M. 603 (2). It is a truth confirmed by all experience that in the great majority of cases fraud is not capable of being established by positive and tangible proofs. It is by its very nature secret in its movements. It is therefore sufficient if the evidence given is such as may lead to the inference that fraud must have been committed. In the generality of cases circumstantial evidence is the only resource in dealing with questions of fraud. If this is not done the ends of justice would be constantly, if not invariably, defeated. 132 I.C. 51=1931 O. 333. The principal difference between fraud and misrepresentation is that in the one case the person making the suggestion does not believe it to be true and in the other he believes it to be true, though in both cases it is a misstatement of fact which misleads the promisor. 53 A. 374=1931 A. L.J. 153=1931 A. 154. See also 3 B. 242. If a contract is obtained by fraud or cheating, it is voidable at the instance of the person defrauded or cheated. But where a performance has been obtained by fraud or cheating, the contract cannot be avoided. 23 Bom.L.R. 1144=46 B. 489. In order to avoid a contract fraud must be in the making of the contract and not in its performance. 15 Bom.L.R. 92=37 B. 158; and the fraud must be committed by party to contract or his agent or with his connivance. 28 B. 639. A party cannot set up his own fraud to avoid the contract. 15 W.R. 273; 31 B. 405. Mere failure of a minor enter-

- (1) the suggestion as a fact, of that which is not true by one who does not believe it to be true ;
- (2) the active concealment of a fact by one having knowledge or belief of the fact ;
- (3) a promise made without any intention of performing it ;
- (4) any other act fitted to deceive ;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Illustrations.

- (a) *A* sells, by auction, to *B*, a horse which *A* knows to be unsound. *A* says nothing to *B* about the horse's unsoundness. This is not fraud in *A*.
- (b) *B* is *A*'s daughter and has just come of age. Here, the relation between the parties would make it *A*'s duty to tell *B* if the horse is unsound.
- (c) *B* says to *A*—"If you do not deny it, I shall assume that the horse is sound." *A* says nothing. Here, *A*'s silence is equivalent to speech.
- (d) *A* and *B*, being traders, enter upon a contract. *A* has private information of a change in prices which would affect *B*'s willingness to proceed with the contract. *A* is not bound to inform *B*.

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ing into a contract to reveal his age would not amount to fraud, *see* 168 I.C. 730=1937 Lah. 598=39 P.L.R. 508. A plea of fraud is not sustainable where there is no misleading on any question of fact or law. 20 I.C. 47=20 C.L.J. 424; 31 P.R. 1918=45 I.C. 101. Fraud in contract of service—Concealment of contract forbidding service elsewhere. 66 I.C. 441. Where the parties have made an agreement and one party records it erroneously, the other party, if he knows at the time that there is an error, acts fraudulently if he seeks to take advantage of that error, and cannot be allowed to enforce it. Where, therefore, the plaintiff agreed to accept service under the defendant company on a monthly salary of Rs. 500 and the agreement was drawn up for a salary of Rs. 600 owing to a mistake on the part of the latter and did not express the intention of the parties and the plaintiff, fully realising the mistake, deliberately sought to take advantage of it, his conduct was fraudulent and the Court would not enforce the contract as drawn up. 61 C. 548=38 C.W.N. 908=1934 C. 778. In a proposal for insurance the utmost degree of good faith is required. Where the insured in reply to the questions of the insurance company during the course of inquiry into his proposal withholds facts and deliberately gives false replies, such withholding of material information is wilful and in the nature of fraud and the company is entitled to avoid the contract. I.L.R. (1939) Kar. 611=184 I.C. 575=1939 Sind 254. Where a person orders and obtains possession of goods with the deliberate intention of not paying for them, he commits fraud. He must then be considered to be the agent of the vendor and his possession as that of the vendor. If vendee tries to dispose of the goods before payment by transfer of the invoices to a third party's name, the third party gets no title to the goods. 14 P.L.

R. 1917=39 I.C. 169. Seller selling property already sold by him to a third person is fraud, and the buyer can recover back the price, in spite of agreement that seller could not be responsible for defect of title. 25 A.L.J. 708=1927 A. 693. Such conduct on the part of seller would amount to active concealment of a material fact. 1927 A. 693. Mere failure to fulfil a promise is not fraud unless from the outset the promisee did not intend to fulfil it. 42 I.C. 113 (L.B.). The making of promises without the intention of keeping them is fraud under the section, though under the English rule such a thing is not fraud. 33 I.C. 396=18 Bom.L.R. 134. A plaintiff who relies upon fraud must both plead and prove it, and must give the particulars of the alleged fraud and can succeed upon proof of the fraud as alleged and not of any other kind of fraud. 10 I.C. 922=4 Bur.L.T. 18. That a party misreads a document (the acceptance memo.) and believed it to be something different from what it was, would not vitiate the contract. 1923 S. 25. But *see* 56 B. 180, *infra*. *Rangnekar, J.*—If a man who cannot read has a written contract read over to him and the contract written differs from that pretended to be read, the signature of the document is of no force because he never intended to sign and therefore in contemplation of law did not sign the document, as his mind did not accompany the signature. 56 B. 180=34 Bom. L.R. 26=1932 B. 151. A Court should not declare a decree a nullity on the ground of fraud unless it can define in clear terms the fraudulent acts by which the decree was obtained. But it will not take fraud in the narrow sense of S. 17. 25 I.C. 789=8 S. L.R. 3. On this section *see also* 1925 C. 555=79 I.C. 330.

Secs. 17 and 19.—Building contract—Decision of owner's agent regarding rates and measurements to be final—Latter passing bill for payment—Mortgage executed by

Misrepresentation defined.

18. "Misrepresentation" means and includes—

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;
- (3) causing however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

19. When consent to an agreement is caused by coercion, [* * *]¹

Voidability of agreements without free consent.

fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

LEG. REF.

¹ The words "undue influence" were repealed by S. 3 of Act VI of 1899.

NOTES.

owner for balance due on bill—When can be avoided. 1940 Lah. 505. As to building contracts, see also 1940 N.L.J. 486; 71 C. L.J. 309=1940 Cal. 494.

Sec. 18.—As to what amounts to misrepresentation, see 4 C.W.N. 369; 29 Bom. L.R. 1535; 27 A.L.J. 1122=1929 A. 837; 30 N.L.R. 196=1934 N. 29. Fraud and misrepresentation distinguished. See 3 B. 242; 53 A. 374=1931 A. 154. Misrepresentation as to part may make the whole contract voidable. 17 C. 296 (P.C.). Silence will in equity, in some cases, be equivalent to misrepresentation. 24 I.C. 193=42 C. 28. Failure to make such inquiries as an ordinary prudent man would make, may under certain circumstances be evidence that the person to whom misrepresentation was made was not actually deceived. 16 S.L.R. 112=1923 Sind 5 (F.B.).

Sec. 18 (2).—There is no misrepresentation, if there are means of discovering truth with ordinary diligence. 112 P.L.R. 1916=36 I.C. 34; 46 I.C. 21=42 P. R. 1918; 38 I.C. 500; 140 I.C. 209. As to misrepresentation by agent. See 6 B. 309; 14 B. 241. Document signed by blind man—Contents of documents misrepresented—Rights of *bona fide* purchaser for value. See 1925 P. 140=80 I.C. 67.

Sec. 18 (3).—When the area (or any other similar particular) is set down as part of the description of the property sold, it must have been regarded as material by the parties. Where it is found to be inaccurate, the Court gives effect to the rule of proportionate compensation. Where the terms of the contract are self-contradictory, the contract will not be enforced. But if it appears that one of the two contradictory parts is true and the other part is false and the part that is true describes the subject of sale with sufficient legal certainty, the true part is adopted and the false rejected. Where the plaintiff sold to the defendant a parcel of land specifically described with reference to its boundaries and survey number, its measurement being also stated as three acres and four gunthas, and subsequently it

was found that the land conveyed in fact measures four acres and four gunthas, in a suit by plaintiff to get back the excess of the land, *held*, that the parties intended to convey, and take a conveyance of, the actual plot of land, that the measurement was not the governing portion of the description and the plaintiff was not entitled to relief. 137 I.C. 583=34 Bom.L.R. 212=1932 B. 449.

Sec. 19.—Under S. 19 the right is given to a party, who has entered into a contract under fraud or misrepresentation, to avoid the contract or to insist on the contract being performed. S. 19 does not entitle a party to insist on an entirely different contract being performed. 25 N.L.R. 187=1929 N. 254 (F.B.). The right to avoid a transfer or a conveyance executed under undue influence or fraud is not a mere personal right but can be exercised by the heirs or legal representatives of the person unduly influenced or defrauded unless the person has indicated his election to stand by the transaction. 43 B. 173=20 Bom.L.R. 911. Though 'undue influence' and 'fraud' are separately dealt with in Contract Act, 'undue influence' is a kind of 'fraud' in equity and invites the same relief as fraud. 33 I.C. 576=18 Bom.L.R. 27. "Fraud" and "misrepresentation" distinction between. See 1931 A. 154=53 A. 374; 3 B. 242. Silence when amounts to fraud—Burden of proving that silence amounts to fraud under particular circumstances. See 53 A. 374; 60 C. 262=1933 C. 366; 60 C.L.J. 25. In the case of an active misrepresentation knowing the fact to be false, as distinct from mere silence or concealment, it is not incumbent upon the party defrauded to establish that he had no means of discovering the truth with ordinary diligence. The words "fraudulent within the meaning of S. 17" as used in S. 19 (Exception) apply exclusively to "silence" and not to misrepresentation. Where a mortgage suit had abated and the mortgagee took a fresh mortgage in consideration of the barred debt without disclosing that the suit had abated, *held*, that the non-disclosure did not amount to fraud. 53 A. 374=1931 A.L.J. 153=1931 A. 154. See also Notes under S. 17, *supra*. A misrepresentation should in fact materially induce the contract in order to give a right of avoidance. 55 I.C. 817=31 C.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

NOTES.

L.J. 158; 29 Bom.L.R. 1535. See also I.L.R. (1939) 1 Cal. 389=43 C.W.N. 347=1939 Cal. 473. The Legislature in inserting the Exception to S. 19 of the Act did not intend to depart from the English law, under which it is accepted that where a vendor has deliberately made a false statement with the object of concealing the true position with regard to the property, the vendee is not put upon inquiry. Where a vendor sells property which he has previously leased out to a third party, and not only fails to disclose the lease but also makes a false and fraudulent representation that the vendee can take immediate possession, he cannot, in a suit by the vendee to set aside the conveyance, plead the Exception to S. 19, and contend that since the lease was a registered lease, the vendee could with ordinary diligence discover the lease by a search in the registration office. 51 L.W. 249=1940 Mad. 560=(1940) 1 M.L.J. 314. If a transaction which is voidable is admitted by the person who is entitled to avoid it, it cannot be questioned by a third party. 34 I.C. 956=23 C.L.J. 122. See also 43 B. 173; 36 B. 37; 28 B. 639. The section does not apply where the object of the agreement was illegal to the knowledge of both parties at the time it was made and both parties are *in pari delicto*. 9 I.C. 161=15 C.W.N. 408. A person is not liable on an acknowledgment, where the money has been paid and his signature to the acknowledgment had been obtained by intimidation. 59 I.C. 751=24 P.W.R. 1921. *Misrepresentation inducing consent to marry* cannot upset a marriage. The position in law is that the party imposed upon must be deceived to such an extent that there is in reality no consent at all to the marriage. Such consent cannot be given by a child of nine years of age and consequently a person who, though 54 years old, is found by the Court to be very feeble-minded and to have the mentality of a child of nine years of age is incapable of giving his consent. 1933 A. 122=55 A. 185. A contract voidable on the ground of fraud or misrepresentation can be ratified by the person at whose option it is voidable. 46 I.C. 21=42 P.R. 1918; 38 I.C. 500=43 P.W.R. 1917; 28 B. 639. See also 1938 Rang. 264. As to what is ordinary diligence, see 4 C. 801. As to effect of

laches on right of avoidance of contract, see 4 C.W.N. 369.

CONTRACT OF MARRIAGE—NATURE OF MISREPRESENTATION NECESSARY TO NULLIFY.—55 A. 185=144 I.C. 906=1933 A. 122.

Secs. 19 and 19-A: RIGHT OF SUIT.—A right to have a contract set aside on the ground of fraud or undue influence does not cease on the death of the contracting party who was deceived, but passes on to his representatives. 51 B. 133=29 Bom.L.R. 115=1927 B. 384.

RELIEF OPEN TO AGGRIEVED PARTY.—Under S. 19 the party whose consent is obtained by fraud or misrepresentation may insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representation made had been true. But it must be proved that the consent of the party who claims to avoid the contract is caused by fraud or misrepresentation and that he is actually deceived. Further, even if the party is so deceived it should be shown that he did not have the means of discovering the truth with ordinary diligence. Where the consent to an agreement is caused by misrepresentation the promise can either avoid the contract and ask for specific performance but he cannot sue for damages. 140 I.C. 209=1932 N. 148.

Secs. 19 and 20.—Decree for possession with costs—Offer by judgment-debtor not to file appeal if plaintiff gave up costs—Appeal time barred at time of offer—Agreement is void or voidable. 1939 Lah. 511=1. L. R. (1940) Lah. 392=42 P.L.R. 769.

Secs. 19 and 23.—The Civil Court is not prevented from enforcing a contract *inter partes*, which is in itself in no way illegal or fraudulent *qua* those parties merely because a third person may have a right to refuse to give effect to that contract. 18 I.C. 5=58 P.R. 1913. Dishonest concealment of identity of contracting party—Agent secretly procuring a running contract with his principal—Contract voidable. 43 M.L.J. 444=69 I.C. 927=45 M. 1005.

ILLUSTRATION (b) is not exhaustive of the class of cases which could come under the explanation. 13 L.W. 525=62 I.C. 764=1921 M.W.N. 340. A finding on the question whether a misrepresentation induced the consent of the party who relied on it is one of fact and the High Court will not

Illustrations.

(a) *A*, intending to deceive *B*, falsely represents that five hundred maunds of indigo are made annually at *A*'s factory, and thereby induces *B* to buy the factory. The contract is voidable at the option of *B*.

(b) *A*, by a misrepresentation, leads *B* erroneously to believe that five hundred maunds of indigo are made annually at *A*'s factory. *B* examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this *B* buys the factory. The contract is not voidable on account of *A*'s misrepresentation.

(c) *A* fraudulently informs *B* that *A*'s estate is free from incumbrance. *B* thereupon buys the estate. The estate is subject to a mortgage. *B* may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

(d) *B*, having discovered a vein of ore on the estate of *A*, adopts means to conceal, and does conceal, the existence of the ore from *A*. Through *A*'s ignorance *B* is enabled to buy the estate at an under-value. The contract is voidable at the option of *A*.

(e) *A* is entitled to succeed to an estate at the death of *B*. *B* dies; *C*, having received intelligence of *B*'s death, prevents the intelligence reaching *A*, and thus induces *A* to sell him his interest in the estate. The sale is voidable at the option of *A*.

¹[19-A. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Power to set aside contract induced by undue influence.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustrations.

(a) *A*'s son has forged *B*'s name to a promissory note. *B*, under threat of prosecuting *A*'s son obtains a bond from *A* for the amount of the forged note. If *B* sues on this bond, the Court may set the bond aside.

(b) *A*, a money-lender, advances Rs. 100 to *B*, an agriculturist, and, by undue influence induces *B* to execute a bond for Rs. 200 with interest at 6 per cent. per month. The Court may set the bond aside, ordering *B* to repay the Rs. 100 with such interest as may seem just.]

Agreement void where both parties are under mistake as to matter of fact. 20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

LEG. REF.

¹ S. 19-A was inserted by S. 3 of Act VI of 1899.

NOTES.

interfere with it in second appeal, though the finding may not be quite satisfactory. 62 I.C. 764. Where one of the parties to a contract says: "I am well known to the National Bank in your city". It is not a statement of fact but only his own opinion, as to the state of his credit though it may be false. Such a statement is not one of fact and even if false does not avoid the contract under S. 19. 29 I.C. 575.

RESCINDED CONTRACT.—A rescinded contract becomes a void contract and the person who has received any advantage under it, is bound to restore it to the other party. 27 I.C. 130.

Sec. 19-A.—Under S. 19-A of the Contract Act when consent to an agreement is caused by undue influence the contract is voidable at the option of the party whose consent was so caused. When the party so consenting has no opportunity to cancel the contract after removal of the undue influence, it is open to his representatives after his death to raise the defence of undue influence in an action to enforce the contract. Absence of consideration, though it itself cannot affect the title of the promisee, goes

to show that the contract was the result of undue influence. 59 C.L.J. 387=1934 C. 762. A contract induced by undue influence is voidable under S. 19-A of the Contract Act not only at the option of the party induced by such undue influence but also by his representatives, unless the party, at the date of his death, has lost such right by acquiescence or otherwise. Further, such representatives may set up undue influence by way of defence to an action based on the contract by the other party. 1936 A.L.J. 1215=1936 A. 672. Undue influence must be pleaded with precision and unless a case is made out in the pleadings, the Court will not investigate it. 2 Pat.L.T. 111=5 Pat.L.J. 744=60 I.C. 282. Power of Court to grant relief on certain terms. See 31 B. 348, see also 84 I.C. 124=1925 C. 94; 47 A. 932=88 I.C. 1013=1925 A. 783.

Sec. 20.—Scope of S. 20 indicated. 1933 R. 79. Reason of the rule in the section explained in 28 B. 420. Application of principle of *caveat emptor*. 40 B. 638=34 I.C. 515=18 Bom.L.R. 201. Relief can be granted if there is mistake as to existing facts, not on account of mistaken expectations, which are not realized. 40 B. 638. See also 5 I.A. 61; 4 B. 473; 3 B. 154. If parties contract under a mutual mistake and misapprehension as to their relative and respec-

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

Illustrations.

(a) *A* agrees to sell to *B* a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

(b) *A* agrees to buy from *B* a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) *A*, being entitled to an estate for the life of *B*, agrees to sell it to *C*. *B* was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

NOTES.

tive rights, the result is that the agreement is void. 16 Pat. 159=18 Pat.L.T. 95=1937 Pat. 65 (S.B.). Mistakes as to collateral circumstances do not avoid a contract. 30 M. 284; 35 C. 955=33 C. 713; nor mistake as to immaterial terms. 100 I.C. 730=1927 O. 198. Ignorance of particular rights, however, inexcusable, is on the same footing as ignorance of the general law. Where money is paid voluntarily with full knowledge of all the facts, it cannot be recovered on the ground that the money was paid under a mistake of law. 39 C.W.N. 174. See also 16 P. 424=1937 O. 254. Where a lease of land is given for the purpose of manufacturing bricks and cultivation and the land is found unfit for manufacturing bricks of good quality the lease is not void under S. 20 as the tenancy was to be both for manufacture of bricks and cultivation. 1930 L. 772. S. 20 deals with the question of common mistake; the general principle of frustration may govern such cases. 70 I.C. 379=26 C.W.N. 573; 50 C. 615=27 C.W.N. 639; 40 B. 638=18 Bom.L.R. 201. See also 3 R. 477. In order to entitle a party to relief under this section, it must be proved that the mistake was common to both parties, and one of fact, and that the common mistake was with respect to a fact essential to the agreement in question. 33 C. W. N. 626=1929 C. 547. See also 61 C. 548=1934 C. 738. Unilateral mistake (not amounting to fraud, legal or equitable) is not a ground for rectification and would, therefore, if proved, not entitle the party alleging it to a decree or order for rectification or cancellation of the instrument. 1931 M. 785=61 M.L.J. 437. Even mutual mistake was not relieved against at common law save where the contract had not attached but equity relieved against mutual mistake, subject to equitable defences. 1931 M. 785=61 M.L.J. 437. Terms understood by parties in different sense—Contract is void. 95 I.C. 614=1926 N. 435. Compromise under mistake of fact—Setting aside. See 51 I.C. 955=29 C.L.J. 526; 4 C. 687. Compromise under mutual mistake as to terms which are not material will not be set aside. 100 I.C. 730=1927 O. 198. See also 1939 Lah. 511. Settlement of doubtful rights, whether of law or fact, even under a mistake of fact will be upheld. 11 O.W.N. 1176=1934 O. 442; 60 C.L.J. 477. As to case of decree obtained by mistake of parties, see 1937 A.L.J. 1095

=1937 All. 731.

ARBITRATION.—A contract appointing arbitrators is a contract *uberrima fide* and unless there is complete confidence between the tribunal and the parties, it would be wrong to bind a party to his contract, when there is a probability that injustice would result from doing so. Where therefore both arbitrators have already adopted strong views in the case and this was unknown to the party who was made to join in the reference the effect and nature of which was also not explained to him, it would be manifestly unjust to bind a party to reference by his contract to appear before a tribunal from which he is scarcely likely to receive impartial justice. 1933 S. 347. See also 41 L.W. 130=1935 M. 356.

ONEROUS LIABILITY SUBSEQUENTLY CAST BY STATUTE.—Vendors who had agreed to supply a certain number of tins of matches at a particular rate refused to give delivery to vendee under the contract unless in addition to the contract price the vendee paid the sum equal to the proposed excise duty imposed on such goods by the Tariff Act which was published in the Gazette and which had come into force subsequently: *Held*, that the vendors were not entitled to refuse delivery as no excise duty had been imposed when they refused to give delivery and that S. 20, Contract Act, had no application to the case. (Scope of S. 20 indicated.) 11 R. 201=1933 R. 79. Mistake as ground for setting aside consent decree, see 10 P.L.T. 164. Mutual mistake—Effect of. 25 C.L.J. 459=21 C.W.N. 404. A mistaken assumption which has reference to the motive which induced the execution of a document is not a mistake as to his rights which would justify a Court in passing a decree for its cancellation. 32 M.L.J. 439=40 I.C. 205. Where both parties to a reference to arbitration are under a mistake of fact as to something which is not essential to the agreement, the agreement of reference is not void and cannot be set aside. 47 I.C. 783=12 S.L.R. 41. But see 57 I.C. 481=7 O.L.J. 312. Pleadings. 9 B. 351. As to restitution of benefit where both parties acted honestly and there was a *bona fide* mutual mistake of fact, see 1930 A.L.J. 65=1929 A. 803. On this section, see also 1930 R. 12.

BURDEN OF PROOF.—Is on the party alleging mistake. 61 C. 548=152 I.C. 117=1934 C. 778.

21. A contract is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to a law not in force in British India, has the same effect as a mistake of fact.

¹[After the establishment of the Federation of India this section applies in relation to Central Acts made for a Federated State as it applies to laws in force in British India.]

Illustration.

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation: the contract is not voidable.

²[* * * * *]

Contract caused by mistake of one party as to matter of fact

22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

What considerations and objects are lawful, and what not.

23. The consideration or object of an agreement is lawful, unless—

it is forbidden by law; or
is of such a nature that, if permitted, it would defeat the provisions of any law; or
is fraudulent; or
involves or implies injury to the person or property of another; or
the Court regards it as immoral, or opposed to public policy.
In each of these cases, the consideration or object of an agreement is said

LEG. REF.

¹ This paragraph was inserted by A.O., 1937.

² The second *Illustration* to S. 21 was repealed by S. 3 and Sch. II of Act XXIV of 1917.

NOTES.

MISTAKE OF LAW BY SUBSEQUENT MORTGAGE.—A mistake as to the law in force does not make a contract voidable. A man cannot go back upon what he has deliberately done merely because he alleges that he acted under a misapprehension of the law. A subsequent mortgagee took a mortgage in his favour, knowing of a previous but unregistered mortgage in favour of another mortgagee. This transaction was done under the impression that even if the prior mortgagee was able to obtain registration of his deed, yet the deed in favour of the subsequent mortgagee would take precedence as it was first registered. *Held*, that S. 21, applied to the case, and that the subsequent mortgage must be postponed till the period fixed in the prior mortgage has expired or the mortgage otherwise came to an end. 1933 Lah. 836.

Sec. 21.—Applicability of section—Payment of surcharge to railway—Pure error of law—Suit to recover money paid—Maintainability. 1928 M.W.N. 385. Where a consumer of electricity pays the bill to the Electricity Supply Co, under mistake that the company had made rules after all necessary legal preliminaries had been gone through, this is not a mistake as to any law in force in British India. This is a mistake

of fact and is covered by S. 72. Besides this, if the payment is made under protest after being warned that supply would be disconnected if the payment is not made, this is sufficient to constitute coercion in the general sense of the word and the consumer would be entitled to refund under S. 72. 181 I.C. 345=1939 Pesh. 8.

Sec. 22.—A contract entered into under a mistake of fact is only voidable and is binding until it is avoided. 10 I.C. 343; 58 I.C. 591=14 S.L.R. 22; 21 Bom.L.R. 986=44 B. 631. *See also* 16 B. 561; 3 R. 477. Mistake due to negligence of a party, if good ground for re-opening decree passed. *See* 33 C.W.N. 739=1929 C. 670. Contract cannot be avoided on the ground of its becoming more onerous than was originally supposed. *See* 86 I.C. 364=1925 Sind 80.

BURDEN OF PROOF.—When a written contract has been signed by the parties, the party alleging that it has been erroneously recorded and that he signed it under a mistake; must establish that fact beyond all doubt. 61 C. 548=38 C.W.N. 908=1934 C. 778.

REFUND OF MONEY PAID.—Where a contract is a result of a mistake on either side, there is no contract at all between the parties and the party who has advanced money thereunder is entitled to get refund of same. 41 L.W. 476=1935 M. 287.

Sec. 23.—MEANING OF WORDS.—The words "consideration" and "object" of an agreement do not mean the same thing. 33 C. 702. Burden of proof. *See* 107 I.C. 903.

to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations.

(a) *A* agrees to sell his house to *B* for 10,000 rupees. Here *B*'s promise to pay the sum of 10,000 rupees is the consideration for *A*'s promise to sell the house, and *A*'s promise to sell the house is the consideration for *B*'s promise to pay the 10,000 rupees. These are lawful considerations.

(b) *A* promises to pay *B*, 1,000 rupees at the end of six months, if *C*, who owes that sum to *B*, fails to pay it. *B* promises to grant time to *C* accordingly. Here the promise of each party is the consideration for the promise of the other party and they are lawful considerations.

(c) *A* promises, for a certain sum paid to him by *B*, to make good to *B* the value of his ship if it is wrecked on a certain voyage. Here *A*'s promise is the consideration for *B*'s payment, and *B*'s payment is the consideration for *A*'s promise, and these are lawful considerations.

(d) *A* promises to maintain *B*'s child and *B* promises to pay *A*, 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) *A*, *B* and *C* enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) *A* promises to obtain for *B* an employment in the public service, and *B* promises to pay 1,000 rupees to *A*. The agreement is void, as the consideration for it is unlawful.

(g) *A*, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for *B* a lease of land belonging to his principal. The agreement between *A* and *B* is void, as it implies a fraud by concealment by *A*, on his principal.

(h) *A* promises *B* to drop a prosecution which he has instituted against *B* for robbery, and *B* promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) *A*'s estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. *B*, upon an understanding with *A*, becomes the purchaser, and agrees to convey the estate to *A* upon receiving from him the price which *B* has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) *A*, who is *B*'s mukhtar, promises to exercise his influence, as such, with *B* in favour of *C*, and *C* promises to pay 1,000 rupees to *A*. The agreement is void, because it is immoral.

(k) *A* agrees to let her daughter to hire to *B* for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.

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UNLAWFUL OBJECT.—A promissory note executed by a minor under the Court of Wards though void, is not unlawful consideration for a bond executed by his son after his death and after the estate had ceased to be under the Court of Wards. 21 A.L.J. 446; 73 I.C. 428=1923 A. 590. An agreement by a Parsi husband with his wife that they should live separately is lawful and a reference to arbitration on the question as to the amount of maintenance to be paid to the wife is quite legal. 45 C. 318=22 Bom.L.R. 1293 (23 B. 279, Foll.). Agreement between expectant heirs to divide property after the succession opened is legal and enforceable. 14 Pat.L.T. 27=1933 P. 165. Debt contracted by the father for trading purposes—Liability of sons. 17 Bom.L.R. 955=40 C. 126. Suit to recover money on a hundi drawn to cover betting losses. 27 C.W.N. 442=1923 C. 445. Where a pleader is appointed by Court in a suit as Commissioner the work done by the Commissioner is no work done for the party but for the Court. 27 C.W.N. 430=1923 C. 436. Consequently where a Commissioner who had been appointed at the instance of a party to a suit took a bond from that party for a certain sum of money and subsequently sued upon it, held, that the consideration for the bond was illegal and that it represented an improper advantage obtained

by an officer of Court by abuse of his position as such. Consequently the bond was unenforceable. 27 C.W.N. 430. Alienation of service inam lands unlawful. 45 M. 620=42 M.L.J. 477=1922 M. 197 (F.B.). Where a mortgage of a tenancy holding is unlawful, the consideration paid at the time of its execution must be held to be also unlawful. Where, therefore, at the time of redeeming that mortgage, the mortgagor, instead of paying the mortgage-money in cash, executes a simple money bond for that amount there is no valid consideration either for that bond or for the bond executed by him in renewal of it. Accordingly, a suit to recover the amount due on the bond is not maintainable. 12 Luck. 679=1937 Oudh 150. When a transaction has been entered into for unlawful or immoral purpose and that purpose has been achieved, the Court would not interfere at the instance of a *particeps criminis* to relieve him from the legal effect of the transaction. 44 M. 329=39 M.L.J. 525=59 I.C. 1003. But a suit can be maintained if the illegal object was not carried out. 31 P.L.R. 987. A hundi passed for an illegal consideration is unenforceable. 40 M. 285=34 I.C. 401=31 M.L.J. 264. A contract which is void because it is forbidden by law cannot become valid even if the parties act according to the contract. 119 I.C. 505=1929 A. 394. An agreement between two priests by which certain disciples were specifically

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allotted to each of them with the stipulation that that arrangement would be binding on them and their heirs and that if one of them would perform any religious service in the family allotted to the other priest, he would be liable to pay compensation, is invalid being opposed to public policy. Consequently a suit for damages for breach of that agreement is not maintainable. 42 C. W. N. 1038.

ILLEGALITY DISCLOSED IN EVIDENCE.—If the illegality of a transaction is brought to the notice of the Court, the Court should not assist the person who invokes its aid even though the defendant has not pleaded the illegality and does not wish to raise the objection. This is based on grounds of public policy. 145 I.C. 599=1933 M. 187. See also 53 I.C. 773=24 C.W.N. 306.

COLLATERAL CONTRACT.—An agreement by a Government tenant with plaintiff to the effect that if the plaintiff helped the former in bringing the land under cultivation the former would give to the plaintiff one-half of whatever rights he might acquire in the land is not opposed to public policy. 3 L. 92=64 I.C. 18=1922 L. 287. The sale of a share in a chance in the Turf Club sweep is not a wager and is not opposed to public policy. 25 I.C. 355=258 P.L.R. 1914. No suit lies for recovering money lent and used for an illegal object as bribe. 24 I.C. 692=185 P.L.R. 1914 (8 C. 24, Foll.). Where the defendant borrows money from the plaintiff with the clear intention of utilising the money for the purpose of gambling but there is nothing to indicate that the plaintiff was privy to this intention, there is nothing to preclude the plaintiff from recovering the amount from the defendant by suit. 131 I.C. 546=1931 A. 458 (1). See also 29 I.C. 573; 100 I.C. 345. Collateral contract—Right of agent to recover gambling debt paid for principal if opposed to public policy. 13 I.C. 319=79 P.L.R. 1912. A bond for payment of a loan was taken by the creditor in the name of his concubine's mother. The debtor cannot plead that the consideration for the bond is tainted with immorality and that the bond therefore is unenforceable. 56 I.C. 616. The concubine's mother or her assignee can sue as benamidar and it cannot be treated as involving the enforcement of an immoral contract. 56 I.C. 616. A contract, which is *ultra vires* is not necessarily illegal. A Bank lent money on mortgage to the defendant. The memorandum of association of the Bank prohibited the Bank from lending on mortgage. Held, that the Bank could sue to enforce the contract. 1930 M. 512=59 M.L.J. 28. Where a person applied to the municipal committee for sanction to build so as to encroach upon a street and the Municipality having sanctioned the same on condition of his paying certain rent he agreed to the same, held, that the contract was not illegal and that the Municipality

was entitled to recover the rent reserved. 32 P.L.R. 607=1931 L. 634. If an agreement is void but not illegal, plaintiff can recover from a third party money which the latter has received on his behalf under the void agreement. 51 I.C. 530=12 Bur. L. T. 9.

PARTIES TO ILLEGAL ACTS.—Where the assistance of equity was not being asked to carry out an illegal agreement, defendants could recover on their counter-claim. 44 B. 631=21 Bom.L.R. 986; 1923 M.W.N. 335=1923 M. 626. See also 1925 L. 65. If the illegality of a transaction is brought to the notice of the Court and the person invoking the aid of the Court is himself implicated in the illegality, the Court will not assist him. 72 I.C. 653. See also 1933 M. 187. A party cannot recover money paid in respect of a contract which is tainted with criminality or immorality, even though the contract has not been performed. 51 I.C. 280=4 Pat.L.J. 542. See also 1935 C. 748; 157 I.C. 1096=1935 A.W.R. 200=1935 A.L.J. 339=1935 A. 256. Where the illegal portion of an agreement has been wholly carried into effect, the whole matter is outlawed and the Court will not aid either party to retrieve if he is not able to show that he has been less to blame than the other. 20 C.W.N. 760=1 Pat. L. J. 48=33 I.C. 711; 44 M. 329=39 M.L.J. 525. A partnership is *prima facie* legal unless it is proved that the object of the same was illegal or that the object of the partnership necessarily involved something illegal or contrary to public policy, and so while it is the duty of the Court not to render its aid to the enforcement of transactions which are illegal, it is at the same time incumbent that the illegality should be sufficiently proved and the facts constituting illegality were established. 122 I.C. 342=1930 M. 361. See also 1931 A. 83=53 A. 316.

ILLUSTRATIVE CASES, ACTS DEFEATING STATUTE.—No man can exclude himself from the protection of Courts by a contract entered into with another. 42 B. 380=35 M.L.J. 262=45 I.A. 61 (P.C.); 1930 S. 175. See also 1 A. 267. A sale-deed which tends to defeat the provisions of the Tenancy Act or other Act is void and unenforceable. See also 145 I.C. 163=1933 L. 291; 39 A. 647=15 A.L.J. 656; 32 M.L.J. 383=21 C.W.N. 616=44 I.A. 54=39 A. 173 (P.C.); 117 I.C. 298=1929 M. 68; 11 L. 8=31 Punj.L.R. 397; 1936 R.D. 384; 165 I.C. 587=1936 R.D. 235=1936 O.W.N. 1115=1937 O. 150. An agreement in an absolute sale deed to pay annual rent to vendor is void under S. 11, T. P. Act. 171 I.C. 504=1937 O.W.N. 1138. A contract by which land is sought to be tied down at a fixed rent is void as it offends against S. 35 of the Oudh Rent Act. 16 R.D. 235. Contract though unenforceable will not vitiate a transfer merely because the contract is unenforceable. 38 A. 232=14 A.

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L.J. 270; 27 I.C. 503=13 A.L.J. 6. As to the effect of invalidity of terms of contract intended to defeat provisions of an Act of the Legislature, *see* 25 I.C. 508=13 A.L.J. 6; 35 A. 19=10 A.L.J. 416; 16 I.C. 42; 24 Bom.L.R. 449=1922 B. 84. Public servant—Salary below attachable limit—Agreement between public servant and execution creditor for deducting portion from salary void and not enforceable. *See* I.L.R. (1941) Bom. 415=43 Bom. L. R. 758=1941 Bom. 389. Acts prohibited by statute—Release of certificate debtor under Bengal Public Demands Recovery Act—Security bond therefor—Consideration is lawful. *See* I.L.R. (1937) 2 Cal. 698. A contract to prepare by printing and to supply copies of a picture produced in England is not unlawful or against policy. 44 B. 720=22 Bom.L.R. 808. Act defeating statute—Public policy—Speculation in gold against Government Notification. 44 B. 6=21 Bom.L.R. 788. Loan for gambling is not one forbidden by law unless it be proved that the gambling was in a public place. 100 I.C. 345=1927 N. 155. *See also* 131 I.C. 546=1931 A. 458. Dicta of English Judges on public policy, how far to be considered by Judges in India. 44 B. 6. Public policy should not be interpreted under S. 23 as comprehending all the political policies of the Government of India. 44 B. 6. Government Servant's Conduct Rules are rules of conduct and not a statutory prohibition. Hence a disregard of these does not taint Government servant's transactions with immorality or illegality. 40 B. 126=17 Bom.L.R. 955; 33 Bom.L.R. 250=1931 B. 269. Agreement to share profits from the forest license though not allowed by the terms of licence, is not void. 40 B. 64=17 Bom.L.R. 701. An option by purchaser to resell the property to the vendor on certain terms and conditions is valid. The purchaser is bound to fulfil if the conditions are complied with strictly. 35 I.C. 631. Hatchitta executed by insolvent debtor to plaintiff—Suit upon—Consideration—Illegality—Transferability. 14 I.C. 519=16 C.L.J. 162. *See also* 1936 L. 831 (act intended to defeat provisions of insolvency law). A transfer for consideration made by a person with the intention of defeating or delaying his creditors is merely voidable and not void *ab initio* and as such does not fall within the ambit of S. 23. 1936 N. 268. *See also* 1938 Rang.L.R. 19=1938 Rang. 11. In cases of a composition, where all creditors have joined in on equal terms and a secret preference is given to certain creditors to induce their agreement to the composition, the contract whereby such a preference is given is void under S. 23 as being a contract based on fraud. The essence of the offence against S. 23 is that there is a secret agreement by some creditors that they are to be preferred, so that there is a fraud upon the other creditors, who,

ignorant of this secret agreement, have signed the deed of composition in the belief that all are to lose equally and none is to be preferred. I.L.R. (1939) Kar. 147=1939 Sind 33. As to reservation of a portion of property to insolvent debtor by agreement between purchasers and insolvent, *see* (1937) 2 M.L.J. 508. Act defeating statute—One of several judgment-debtors getting assignment of decree is not against law. 44 M. 334=39 M.L.J. 692=60 I.C. 127. Fraudulent perpetual lease by widow to defeat reversioners—If can confer ordinary tenancy rights, at the least. *See* 1941 A. W. R. (Rev.) 858. A promise to abstain from raising the plea of limitation in a suit is void as it defeats the provisions of Law of Limitation. 40 M. 701=35 I.C. 575=31 M.L.J. 231. The sale of palanquin bearing service inam is not opposed to public policy. 13 I.C. 190=(1911) 2 M. W. N. 588. Benami purchase by police officer while in service is not void as being opposed to public policy. 52 I.C. 153=16 N. L. R. 25. Where land which is not transferable under a special statute is transferred in contravention thereof a suit by the vendee for damages for breach of covenant for title is maintainable. 54 I.C. 669; 47 I.C. 32=14 N.L.R. 125. A purchase made benami by a Government servant in contravention of executive orders and rules governing the conduct of public servants is void on the ground of public policy and the real purchaser does not get a title under the purchase. 47 I.C. 694; 1930 A. 732. *See also* 19 Mys.L.J. 262. A pro-note payable to "so and so order or bearer" contravenes the provisions of S. 24 of the Paper Currency Acts and is therefore void. It is a contract forbidden by law and nothing can be recovered on the document. 24 I. C. 721=(1914) 11 U.B.R. 13.

ACTS PROHIBITED BY STATUTE.—Where a transaction consists of two separate considerations for two severable objects consisting of legal and illegal parts in which the lawful is separable from unlawful, it is always possible to give effect to the lawful and reject the unlawful; in fact that is what the Courts are bound to do unless the whole transaction is prohibited by statute or unless it involves serious moral turpitude or is otherwise against public policy. 177 I.C. 6=1938 Nag. 335 (F.B.). A transfer of property to Kanungo is not against public policy. 14 A.L.J. 969=36 I.C. 319=39 A. 58. Assignment of mortgage in the name of a patwari's mother is not against public policy, though the patwari cannot engage in trade or money-lending according to rules framed by Revenue Board. 14 A.L.J. 962=39 A. 51. A patwari acquiring land in his own circle is against public policy and illegal. 1927 L. 18=7 L. 463. It is an established principle that the Court will not lend its aid to enforce a contract entered into with a view to carry into effect anything which is prohibited by law. *Prima-*

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facie, there is nothing illegal about trying to avoid or successfully avoiding having one's property taken under the superintendence of the Court of Wards so long as the device adopted is not illegal in itself. There is nothing in the adoption of such a device which would make it invalid in law. The purpose is not an unlawful one. 196 I.C. 787=1941 Oudh 529. Where in a compromise, one of the parties agrees not to claim ex-proprietary rights on a transfer by him, the agreement, is neither forbidden by, nor defeats the provisions of S. 7-A (5) of the Oudh Rent Act and hence is neither unlawful nor would it defeat the provisions of any law. 1941 O.W.N. 1138. Agreement not to apply for restoration of possession under S. 35, U. P. Encumbered Estates Act—Legality. See 1940 O.W.N. 1246. As to mortgage of occupancy holding forbidden by the Tenancy Act, see 157 I.C. 1096=1935 A.L.J. 339=1935 A. 256. A police officer who was forbidden from purchasing land under S. 33, Police Act, purchased land in the name of his mother. After his death she sold a portion of it to her daughter. The son of the deceased officer sued to have the sale set aside alleging that his father was the true owner of the property. *Held*, that the contract under which the plaintiff's father obtained the property was void, that no claim could be made on the basis of such illegal agreement and that as the father had no title the son was not entitled. 35 Bom.L.R. 404=1933 Bom. 262. Where money is advanced by a creditor for the purpose of defraying the expenses already incurred in celebrating a marriage of an infant in violation of the Child Marriage Restraint Act, the consideration is not rendered illegal under S. 23 of the Contract Act. 65 C.L.J. 557=41 C.W.N. 1176. See also (1940) 2 M.L.J. 353. An agreement for the payment of a monthly sum by the defendant to the plaintiff (the permanent Karnam) in consideration of the plaintiff recommending the defendant to the office of Karnam gumastha during the minority of the plaintiff's heir is opposed to public policy and unenforceable. 1933 M. 768=65 M.L.J. 532. An agreement to do an act which is prohibited by the Rules framed under the Motor Vehicles Act is illegal and void, though the parties did not know of the prohibition. 91 I.C. 1029=1926 N. 259. See also I.L.R. (1940) Kar. 347 (Omission in contract with corporation to comply with statutory requirements). Agreements which have been held to be void under this section include a sublease of an excise contract, a transfer of a share in an excise contract, a transfer of occupancy rights declared by statute to be non-transferable and a transfer by a disqualified proprietor and a transfer in contravention of S. 8 of the Punjab Tenants Act. 3 P.R. 1915 (Rev.)=31 I.C. 400. So also a contract for the possessory mortgage of

occupancy holdings is void. 1931 A. 461. Municipal Council has no power to farm out the right to collect slaughtering fees. A lease of such a right is void. 36 M. 113=21 M.L.J. 790=11 I.C. 669. Agreement in contravention of S. 257-A, old C. P. Code, is not opposed to public policy. 21 M.L.J. 709=9 I.C. 875=35 M. 75. Pledger advancing loan to a person not his client is not opposed to public policy. 39 I.C. 135=20 O.C. 67. See also 1930 S. 175=123 I.C. 299. There is no law or regulation laying down that an agreement between any two persons living in the Santal parganas to pay compound interest on the amount borrowed is unlawful within the meaning of S. 23, Contract Act. All that the law provides is that compound interest will not be decreed by any Court. 1930 P. 442=10 P. 63. Per *Vivian Bose, J.*—When the contract is void because prohibited by statute the Court has power to work out the equities and place the parties upon terms. No question of limitation arises, that is to say, in connexion with the Court's powers to place the parties upon terms if the suit is otherwise good, nor does any question of Court-fees. 177 I.C. 6=1938 Nag. 335 (F.B.). When a contract is void for illegality as opposed to being merely nugatory, money paid or goods delivered in pursuance of it cannot ordinarily be recovered unless it is still executory because of the maxim *ex turpi causa non oritur actio* in fact the test of illegality is the applicability of maxim. But there are several exceptions to this rule, one of which is where the contract is made illegal by statute with the object of protecting a particular class of persons, in which case restitution can be ordered. The refusal to direct restitution is not founded on any section of the Contract Act but is because of the matters like public policy, *ex turpi causa*, *in pari delicto* and the like. 177 I.C. 6=1938 Nag. 335 (F.B.).

SLAVERY BOND, or any other bond approaching this is void as forbidden by laws. 103 I.C. 96=1927 M. 818. See also 106 I.C. 803=1928 N. 89 (2); 1929 M. 267.

AGREEMENT TO ADOPT OR NOT TO ADOPT.—Where a Hindu widow having authority from her husband to adopt agrees in consideration of a pecuniary advantage to herself, not to adopt, the agreement is void as being opposed to public policy. The authority is given not for her but for her husband's benefit. 49 I.C. 929=1919 M.W. N. 52. Compromise in a suit providing that the plaintiff should adopt the son of one of the defendants and giving the plaintiff certain rights on condition of his so adopting was held to be a *bona fide* family settlement and not opposed to public policy. 1926 M. 1093=51 M.L.J. 366.

AGREEMENT TO PREVENT BIDDING.—An agreement by a person promising to pay money to another if the latter would not compete for the purchase of certain pro-

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perty with the former is legal. 10 I.C. 627; 10 M.L.T. 338. An agreement to abstain from bidding at an excise auction is not void under S. 23 as being against public policy. 44 I.C. 223. (18 B. 342; 16 C. 194; 6 C.L.J. 111, Rel.) Agreement between two or more persons not to bid against one another at a public auction is not unlawful or against public policy. 56 I. C. 963=12 Bur.L.T. 241; 44 I.C. 223; 46 I. C. 755; 32 P.L.R. 879; 10 O.W.N. 1. But see 28 I.C. 40=8 S.L.R. 247, *contra*. There is no warrant for holding that a combination or persons not to bid against one another at a public sale or auction of Government tolls offends against public policy. The law will always encourage freedom to contract. "Public policy" is that principle under which freedom of contract or private dealing is restricted by law for the good of the community. It is a variable thing and must fluctuate with the circumstances of the time. But it is still an untrustworthy ground for legal decision and it must be resorted to within the prescribed limits. A partnership formed solely with a view to taking toll contracts at a public auction is in itself not illegal such partners who agree to take tolls for the benefit of their firm would naturally agree not to bid against one another. The principle of public policy cannot be made to apply in its result to a combination of persons who agree not to bid against one another at a public sale held for forming out public revenues. The fact that in certain cases such a combination might result in possible loss to public revenue would not make the act, which is perfectly legitimate, opposed to public policy so as to render it void and illegal. 42 Bom.L.R. 750=1940 Bom. 369 =I.L.R. (1941) Bom. 71.

BENAMI TRANSACTION.—Plaintiff, to whom a railway company had refused to grant any contracts, entered into an agreement with the defendant that the defendant should put himself forward as the applicant for the contracts, and when the same was secured he would serve the plaintiff, the real contractor. The plaintiff sued for declaration that he was the real person who held the contract. *Held*, that the object of the agreement was to commit fraud on the railway company and therefore was void. 1930 A. 732.

BRIDE FOR PERJURY.—See 1 L.W. 300=23 I.C. 540=1914 M.W.N. 322; 10 I.C. 801 =4 Bur.L.T. 95. See also 146 I.C. 240 =1933 R. 199.

BRIBE TO PUBLIC OFFICERS.—A Court will not assist a party who has entered into a contract involving moral turpitude. 43 C. 115=19 C.W.N. 919=29 I.C. 625. Money paid as bribe is not legally recoverable. 1931 R. 83. See also 146 I.C. 240=1933 R. 199. S. 23 is not concerned with motive. It is confined to the object of the transaction and not to the reasons or motives which

prompted it. The law does not prevent even the most degraded of men from having their own friends and from receiving gifts from them whatever the motive of the donors may be, provided the object is not to induce or encourage the commission of an illegal or an immoral act. *B*, a Hindu, borrowed a certain amount from *A* in order to bribe a certain officer. After the bribing was done and completed *B* obtained a loan from *C* in order to pay off *A* and executed a mortgage in favour of *C*. *Held*, that the purpose of the mortgage loan was not to effect an illegal purpose. Such illegal purpose as had been effected had been effected. The mortgage loan was at worst a loan designed to enable the borrower to pay back a lender who could not have sued the borrower in a Court of law successfully and therefore it was no more contrary to public policy than would be a loan to a borrower to enable that borrower to make a gift. I.L.R. (1940) Nag. 573 and 618=1940 Nag. 305.

CHAMPERTY AND MAINTENANCE.—An agreement to finance a litigation and to share the fruits thereof ought to be carefully watched and when found to be extortionate and unconscionable or made not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper object so as to be contrary to public policy, effect ought not to be given to it. 43 I.C. 74. See also 1934 L. 1017; 14 R. 392=1936 R. 491; 15 Las.L.T. 26; 1938 Lah. 23. Champerty is *per se* not illegal. But a champertous agreement if extortionate and unconscionable, should however be held to be contrary to public policy and cannot be enforced. 1933 R. 418 (2); 48 M. 230=1924 P.C. 162 (P.C.); 1925 O. 71; 89 I.C. 229; 131 I.C. 401=1931 P.C. 100=61 M. L.J. 94 (P.C.); 14 R. 392=1936 R. 491; 15 Lah.L.T. 26; 166 I.C. 194=1937 O. 82; 39 P.L.R.J. & K. 33; 42 Bom.L.R. 165. An agreement to transfer property for financing a suit is valid provided that the agreement is fair and equitable and not extortionate or unconscionable or for an improper purpose. 33 A. 626=8 A.L.J. 652; 16 S.L.R. 278=1923 S. 50; 70 I.C. 904; 93 I.C. 959; 39 P.L.R. (J. & K.) 33. Champerty is not void in India unless the transaction is not a *bona fide* one for the acquisition of an interest in the subject of litigation, but an illegitimate transaction got up for the purpose merely of spoil or of litigation disturbing the peace of families and carried on from an improper and corrupt motive. 59 I.C. 10; 1 R. 565=77 I.C. 372 =1924 R. 48. Champertous transactions are in their essence speculative and the fairness or otherwise of a particular bargain is almost always open to some debate. The fairness of the agreement must be considered independently of unproved suggestions that it may have been improperly obtained. In applying the principle that "a fair agreement to supply funds to carry on a suit in

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consideration of having a share in the property, if recovered, ought not to be regarded as being, *per se* opposed to public policy" it is essential to have regard not merely to the value of the property claimed but to the commercial value of the claim. This has to be estimated by the parties in advance of the result; and where they have weighed the probabilities in a manner which has not operated unfairly, it is more reasonable to regard this as confirming their shrewd estimate of the chances, than to condemn the agreement outright as unfair, by reason only of the possibility that a great gain to the claimant would have had to be shared with the financier. Though it is not conclusive, the proportion to be retained by the claimant is an important matter to be considered when judging the fairness of a bargain made at a time when the result of the litigation is problematical. The uncertainties of litigation are proverbial; and if the financier must need risk losing his money he may well be allowed some chance of exceptional advantage. 67 I.A. 50=I.L.R. (1940) Lah. 1=51 L.W. 86=44 C.W.N. 345=1940 P.C. 19=(1940) 1 M.L.J. 278 (P.C.). There is no law in India prohibiting champertous agreement and such an agreement cannot be attacked on the ground that it is against public policy. 121 I.C. 295=1930 L. 392. The English Law of Champerty is not in force in India. 1 L. 124=56 I.C. 272. See also 1923 N. 214; 55 I.C. 635; 1 R. 565=2 Bur.L.J. 177; 1928 M.W.N. 5. Where a person contracts with the real claimant of an estate to litigate on his behalf for its recovery and agrees to share a portion of the net assets realised by him out of the estate, such agreement is not void as opposed to public policy; yet when it is extortionate, it should not be enforced in its entirety but the amount which he spent in litigation *plus* a reasonable amount for the trouble which he has taken should be awarded; where the agreement gave half the share in the net assets realized, the Court allowed the amount spent in litigation together with 12 per cent. interest on it. 1934 R. 346. A transfer of a right of a reversioner is illegal and opposed to public policy as stimulating gambling in litigation. 41 I.C. 347=135 P.L.R. 1917. There is nothing illegal in a plaintiff agreeing to sell the suit property to a third person if the suit prove successful. 98 P.L.R. 1913=18 I.C. 485. Champerty—Agreement to finance litigation—Suit for moneys advanced is maintainable. 47 I.C. 563. An agreement to obtain for a nominal sum the right to carry on a litigation with a very poor chance of success, is champertous and cannot be given effect to on principles of equity and good conscience. 63 I.C. 356; 61 I.C. 884. Purchase of interest in the property for the purpose of litigation for its realisation is unlawful. 55 I.C. 635. Champerty—Test of. See 52 C.L.J. 492=1931 C. 144; 61 M.L.J. 94=

1931 P.C. 100 (P.C.).

BURDEN OF PROOF.—A party being unable to pay the Court-fees and other expenses for certain suits which he had to institute, the defendant undertook to raise the requisite amount by subscriptions on the understanding that in case the suits succeeded half the decretal amount should be paid to the subscribers. Plaintiff was one of the subscribers and paid amounts. The parties having fallen out, plaintiff sued the defendant for return of the amount of subscriptions paid by him. *Held*, that the burden of proving that the litigation proposed was a just one and that the agreement to finance it was just and equitable was on the plaintiff; that the terms of the agreement in question were on the face of them inconsistent with a proper motive, i.e., an intention to help a litigant unable to finance himself in the pursuit of a proper claim; and that the claim was one for the recovery of a gambling debt, and being opposed to public policy, must fail. 151 I.C. 969=1934 A. 1023. See also (1941) 1 M.L.J. 807.

CHEATING.—Certain persons were being tried for an offence. The accused representing that he could influence the Court in their favour received money from those persons. The accused was prosecuted for cheating. It was urged for the defence that the money having been paid for an illegal purpose a prosecution for cheating in regard to that money could not be maintained. *Held*, that the plea was untenable. 146 I.C. 240=1933 R. 199. See also 1931 R. 83. Compromise of suit dealing with property of minors, not parties to suit. See 61 C.L.J. 88.

COPYRIGHT—ASSIGNMENT OF—VALIDITY OF TERMS.—See 39 C.W.N. 224.

EVIDENCE.—An agreement by the parties to a suit, even apart from the Oaths Act, that they will abide by the statement of a witness, including one who is a party to the suit, is perfectly valid. It is in no way opposed to public policy nor in any way repugnant to the provisions of any law, nor does it defeat any law. There is nothing in the Contract Act which offends against such an agreement. It is only a waiver of the right to produce any other evidence. 1933 A.L.J. 1127=1933 A. 861 (F.B.).

EXCISE CONTRACT.—An agreement to sub-lease salt pan in contravention of terms of licence is not specifically enforceable. 24 Bom.L.R. 111=46 B. 651=1922 B. 78. Contract infringing Abkari laws is void. 18 S.L.R. 16=87 I.C. 353=1925 S. 55. See also 58 M. 727=1935 M. 440=68 M.L.J. 570 (F.B.); 69 M.L.J. 490; 1937 Nag. 250; 1941 Mad. 64=(1940) 2 M.L.J. 694. Abkari Sale—Bidder entering into partnership with another after sale and before grant of license in respect of running of business of sale of toddy not legal. 52 L.W. 530=(1940) 2 M.L.J. 694. A contract to sublet or assign a licence is one to evade the excise rules and is void and illegal. 9

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I.C. 115=15 C.W.N. 169; 29 I.C. 480; 37 B. 390=19 I.C. 442=15 Bom.L.R. 227 (31 C. 798, Foll.); 8 L. 310=100 I.C. 846=1927 L. 333. A lease to a person not licensed under the Madras Abkari Act for tapping toddy is not illegal and can be enforced. 61 I.C. 537=14 L.W. 226. The taking of a partner by an Abkari licensee is in effect a sale to him of a portion of the business and making him an agent for the sale of liquor contrary to the terms of the licence and the partnership is consequently illegal. 43 M. 141=38 M.L.J. 123; 68 M. L.J. 570=1935 M. 440=58 M. 727 (F.B.). But *see* 8 L. 310=100 I.C. 846=1927 L. 333, holding that though the state may refuse to recognise such partnership, the parties cannot wriggle out of it. An agreement subletting the right to vend *ganja* is illegal and unenforceable, where one of the conditions of an Abkari licence prohibits vending, transferring or subletting of the licence. 34 I.C. 927. A promissory note given in consideration of the transfer of a right to sell toddy prohibited under S. 22 of the Madras Abkari Act is unenforceable as being for an illegal consideration. 27 I.C. 919=1915 M.W.N. 25. The provisions of the Abkari and Opium Acts are not merely intended to guard the Government revenue, but they are based on public policy. No suit will lie to enforce rights that are inconsistent with the spirit of the Acts. 35 M. 582=21 M.L.J. 425. An agreement in partnership to start a business for the sale of drugs the lease for which was obtained in the plaintiff's name is not illegal. 25 I.C. 146=17 O.C. 193.

TOLLS COLLECTION—LEASE OF—SUB-LETTING.—A term in a Government *kabuliyat* dealing with the assignment by the lessee of tolls was to the effect that the "contractor, his heirs, executors, administrators and assigns shall not sub-let, assign, transfer or mortgage the whole or any portion of the rights or property the subject of these presents without the written permission of the said Collector previously obtained." It was also provided that for breach of the conditions, the Collector could impose a fine. *Held*, that sub-letting or assignment was not absolutely prohibited and is not opposed to any provisions of law and since redress was provided by the imposition of a penalty under the *kabuliyat*, the clause against sub-letting or assignment except in a particular manner would not render an assignment void. I.L.R. (1941) Bom. 71=42 Bom.L.R. 750=1940 Bom. 369.

EXECUTION SALE.—An agreement between two persons not to bid against each other at an auction sale is perfectly lawful and cannot be considered to be opposed to public policy. Where however the transaction is entered into fraudulently in order to deprive a rival decree-holder of the fruits of his decree it is void because of S. 23. Fraud inferred on facts of the case. 8 Luck. 233

=1933 O. 124. An agreement providing that one of the parties should assist the other in carrying on a litigation commenced by the other and help him to evade or delay the execution of a decree passed against him is contrary to public policy. 145 I.C. 756=1933 A.L.J. 85=1933 A. 303.

EXPECTANT HEIRS.—Where an agreement entered into between expectant heirs in 1868 provided for the division of the property after the succession opened. *Held*, that the agreement was not hit at by S. 6, T.P. Act or S. 23, Contract Act and was enforceable. 14 Pat.L.T. 27=1933 P. 165. *See also* 39 Bom.L.R. 1233=1938 Bom. 97. A charge created by a Mahomedan on the uncertain and undefined share of property of one of his heirs defeats the provisions of Mahomedan law and hence it is illegal and invalid and cannot be enforced. 1933 A. 934.

FRAUDULENT LEASE BY MORTGAGOR.—The owner of 58 bighas of lands hypothecated the holding. It appeared that 47 bighas were cultivable and 11 bighas uncultivable waste land. The mortgagor subsequently gave a lease of the cultivable lands to another at a certain rate. The effect of the lease was that during the period of the lease the property was not only absolutely valueless to the owner but also involved a net liability of a few rupees the amount by which the land revenue exceeded the rent payable. *Held*, that the lease was a fraudulent transfer as it deprived the mortgagor of his security and the Court could order the ejectment of the lessee as a trespasser. 18 R. D. 367=15 L.R. 445 (Rev.). *See also* 1941 A.W.R. (Rev.) 858.

FORFEITURE.—Mortgage executed by accused in favour of surety for amount forfeited by latter not opposed to public policy. 1938 Lah. 732.

GOVERNMENT—CONTRACT WITH.—Where Government open a telegraph office at a particular place at the request of certain persons in that place, a contract with them for meeting the deficit in its working expenses is a contract relating to a matter of amenity, which a modern State generally provides for, for advancing the material welfare of its subjects, but which it is not bound to do as a part of its fundamental constitutional obligations. There can, therefore, be no objection to such a contract on the ground of public policy. I.L.R. (1938) 1 Cal. 463=42 C.W.N. 116=1938 Cal. 151.

INDEMNIFYING SURETY.—Where a bail bond is forfeited owing to the failure of the accused to appeal, the surety cannot sue a third person who had agreed to indemnify the surety for recovery of the amount forfeited, as such a contract is illegal. 56 I.C. 539=24 C.W.N. 368; 28 I.C. 560=19 C. W.N. 329; 65 I.C. 137; 1930 C. 546; 32 P.L.R. 739.

JURISDICTION OF COURT, OUSTING OF, BY AGREEMENT.—The jurisdiction of any Court is conferred by statute and it can only be

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taken away by statute. The parties can by mutual consent no more take away the jurisdiction vested by law in any Court than they can confer on it when it is not so vested by law. By a private agreement the parties cannot divest the Court of his inherent jurisdiction to try disputes arising out of the agreement. It would be against public policy if the parties by private agreement can oust the jurisdiction of the Courts. 1935 N. 48=157 I.C. 315. Where two Courts have jurisdiction to try a case, an agreement between the parties that it should be tried in one place rather than another is not opposed public policy. 20 N.L.J. 247=1937 Nag. 334.

MASTER AND SERVANT.—Agreement between parties that master may impose fine—Fine imposed—Suit claiming refund of fine is not barred. See 6 Pat.L.T. 762=87 I.C. 739.

MARRIAGE CONTRACT.—An ante-nuptial agreement whereby a suitable maintenance is provided for the wife in case the husband ill-treated or behaved improperly towards her, or capriciously turned her out, is not opposed to S. 23 and is enforceable. 19 A.L.J. 675=43 A. 650=63 I.C. 883. An agreement for separation and the payment of periodical maintenance to the wife is not contrary to public policy. 27 N.L.R. 281 (28 C. 751, Dist.) A contract that parent of either the boy or the girl who is a party to the marriage shall pay a certain sum of money if and when the marriage is celebrated is not void *ab initio* as being opposed to public policy. 51 I.C. 856. See also 5 P. 646=1926 P. 582. Section 23 is not a bar for recovery of money paid in consideration of a marriage where there has been a breach. Where the defendant admitted execution of the promissory note in favour of the plaintiff but pleaded that it was executed for money due as to the plaintiff and his sister in consideration of the latter's son marrying his daughter and it appeared that the agreement fell through, *held*, that the promissory note was all the same enforceable. 8 Mys.L.J. 247. See also 157 I.C. 736=1935 Pesh. 121. It is well-established that the power of the Court to decline to enforce contracts and other instruments on grounds of public policy is a power which should be confined within the limits laid down by authority. The Court would clearly not enforce a contract or a decree if the enforcement implied the approbation by the Court of an act which was contrary to law. But the Court should not refuse to enforce a payment under a decree because the object for which a payment is made is contrary to the law of British India, when that object was actually performed in a place or Native State where it was perfectly legal. When a decree has been passed against a person requiring him to pay a sum of money towards his share of the expenses of the marriage of his sister, which was perform-

ed in a Native State in order to evade the provisions of the Child Marriage Restraint Act, execution of the decree cannot be refused on the ground of public policy on the ground that the marriage if performed in British India would be opposed to the Child Marriage Restraint Act. 1940 Mad. 901=(1940) 2 M.L.J. 353. See also 41 C.W.N. 1176=65 C.L.J. 557. An agreement between a Mahomedan husband and his wife, providing for a certain maintenance to the wife in the event of a future separation between them, is void as being opposed to public policy. 37 B. 280=17 I. C. 946=14 Bom.L.R. 1178. See also 1939 Lah. 165. It is as much the policy of the Mahomedan Law as of the English Law that people who are married should live together and not apart. (*Ibid.*) Advancing money to compensate husband willing to divorce his wife—If legal. See 1925 N. 111. An agreement contemporaneous to marriage executed by husband providing that in case of strained relations between him and his wife, the wife would be entitled to her customary maintenance is not void under any provision of law. 184 I.C. 105=41 P.L.R. 711=1939 Lah. 165. See also 39 Bom. L.R. 458=1937 Bom. 358 (agreement between Hindu husband and wife to live separately and provision for wife's maintenance charged over specific property). A contract by a Hindu to maintain as wife a woman, who is not his lawfully wedded wife, is opposed to public policy and consequently unlawful. 16 I.C. 133=14 Bom. L.R. 547. An agreement whereby a guardian, natural or appointed, consents to give his ward in marriage for his own pecuniary benefit is void under S. 23 and the fact that no injury resulted thereby to the ward is irrelevant. 9 I.C. 652=13 C.W.N. 447. Marriage contract—Money paid under—Suit for recovery—Contract not performed. See 106 I.C. 803=1928 N. 89 (2); 53 I.C. 406=113 P.R. 1919; 16 I.C. 1004=10 A.L.J. 169. A breach of betrothal agreement gives rise to a claim for damages. 27 I.C. 1008=27 P.L.R. 1915. A contract of betrothal made in regard to a girl not born at the time of the contract is null and void and cannot form a basis for damages. 125 I.C. 369=1930 L. 561. An agreement, by which the father binds himself to place his daughter at the disposal of another to be given away in marriage by him to anyone whom he likes is invalid and cannot be recognized by the Courts of law. 125 I.C. 369=1930 L. 561. An agreement for the purchase of a bride for the son of a person who had given his daughter in exchange for finding a wife for that person is void being against public policy. 125 I.C. 369=1930 L. 561. A contract by A to give his daughter in marriage to D's son and in case of breach to pay a certain sum as damages is unenforceable. 37 M. 393=24 M.L.J. 310=18 I.C. 515. An ante-nuptial agreement by a Mahomedan husband not to con-

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tract a second marriage is not illegal or invalid or immoral or opposed to public policy or in restraint of marriage. 10 L.B.R. 194=59 I.C. 804=13 Bur.L.T. 89. An agreement to pay a sum of money for persuading a woman to marry the person paying the sum is opposed to public policy and unenforceable. 50 I.C. 551=(1918) 3 U.B.R. 119. Contract of betrothal in marriage between parents of Hindu bride and bridegroom is valid—It is not marriage brokerage contract. See 1937 M.W.N. 1274. The plaintiff was anxious to have his son married. The defendants offered to procure a Jat girl for the boy, provided the plaintiff paid them Rs. 2,000. The plaintiff agreed to pay the amount, and the defendants produced a girl who they represented was Jat. The plaintiff paid Rs. 2,000 in cash to the defendants and a date was fixed for the marriage by chadar andazi. Before the ceremony, the girl informed the plaintiff that she was not a Jat but was a sweeper by caste and that the defendants had falsely stated that she was a Jat. On this the contemplated marriage did not come off. Held, that the agreement having remained unfulfilled the plaintiff was entitled to a refund of the money, even though the original agreement was void under S. 23. 1933 L. 849 (2). Public policy—Husband's promise to pay money for wife's personal expenses is valid. 1929 L. 660=11 L. 85.

MONOPOLY, GRANT OF.—A contract by District Board granting a person a monopoly of lorry traffic on a particular road to the exclusion of all other members of the public is opposed to public policy and is therefore void. (28 M. 520, Foll.) 35 P.L.R. 511=1934 L. 474. See also 19 Mys.L.J. 262. A contract or licence under which the licensee is entitled exclusively to collect the hides of all dead animals within a particular area of the Zemindari or raj of the grantor of the license, and under which the chamars and owners of dead animals are bound to sell hides to the licensee and to none else, is one which purports to grant a monopoly and is unenforceable. 17 Pat. 255=1938 Pat. 473.

PARTITION.—See 39 C.W.N. 716.

PARTNERSHIP.—Where a person lends money to a partnership which is an illegal one or is forbidden by law, with the knowledge that it is going to be used for purposes forbidden by law, a suit by him to recover the amount so lent is not maintainable. 165 I.C. 765=1936 M. 603. See also 1937 R. 47.

PERJURY.—Where a litigant has agreed to give property to a certain person in consideration of latter's agreeing to give false evidence on behalf of the former the agreement is void as the consideration for it is opposed to public policy and is therefore illegal. 187 I.C. 269=1940 Rang. 73.

RESTRAINT OF TRADE.—See also Notes under S. 27. An agreement to form a com-

bination of ginning factories to fix rates and to divide the profits in a certain manner is not either in restraint of trade or opposed to public policy. 10 A.L.J. 117=16 I.C. 631=34 A. 587. A combination amongst the traders of a locality to do business only amongst their members to pay part of their profits to a common fund, and levying of certain penalty for the breach of the conditions is not actionable *per se* merely because it brings profits to them and indirectly hurts a rival in trade. 53 A. 316=1931 A.L.J. 84. The action of the Government restricting, by the issue of licences, admission of brokers into a market allowed to be held on Government land is neither illegal nor opposed to public policy. 18 C.W.N. 1194=24 I.C. 387=19 C.L.J. 313. A person purchasing goods for himself cannot claim commission the claim being opposed to public policy. 50 I.C. 975=16 P.W.R. 1919.

STIFLING PROSECUTION.—In order to render a transaction illegal on the ground that the object of the transaction was to stifle a criminal prosecution, it must be proved to the satisfaction of the Court that it was entered into or brought about in pursuance of an agreement to stifle a criminal prosecution. The mere possibility or a talk of criminal prosecution at some stage or another will not make the transaction illegal. The mere fact that the plaintiff did not prosecute the defendant as at one time he threatened to do will not warrant the Court in inferring an agreement to abstain from prosecuting, when there is very little basis for finding that the plaintiff could ever have thought seriously that the defendant had committed any criminal offence at all. If the fact of the actual commission of an offence is beyond doubt and the plaintiff knows of it, his abstaining from prosecuting would afford some foundation for the argument that the non-prosecution must have been the result of an agreement not to prosecute. Further a distinction must be made in the case of a transaction where there is a pre-existing civil liability, for that is not the case where the plaintiff wishes to gain some money not already due to him, as a result of an arrangement entered into on the threat of criminal proceedings. When what the plaintiff does is only by way of taking steps to secure payment of a portion of the money undoubtedly due to him from the defendant, the transaction cannot be rendered illegal, merely because there is a threat or talk of criminal prosecution. The circumstance that the defendant becomes the obligor under the contract to the plaintiff in respect of a pre-existing liability of another person will not detract from the validity of the contract, it is only a factor to be borne in mind in drawing the inference of fact as to whether the contract was entered into in pursuance of an agreement to stifle a prosecution. It is not a principle of law that wherever a third person undertakes the

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liability of another in circumstances in which there has at one time been a talk or threat of criminal prosecution, the third person's promise is either without consideration or vitiated by illegality. (1937) 1 M. L.J. 414=44 L.W. 572=1937 M. 223. See also 155 I.C. 341=1935 O.W.N. 553; 19 Pat. 715=1940 Pat. 683; 6 Cut.L.T. 70; 1939 Pat. 291; 19 Pat. 424=1940 Pat. 573; 1941 Pat. 349; 192 I.C. 187; 41 P.L.R. 144=1939 Lah. 187; 1937 O.W.N. 1123; 1941 O.W.N. 391=1941 Oudh 593; 1941 Pat. 349; 54 L.W. 571=(1941) 2 M.L.J. 827. A contract whereby a proposed or actual prosecutor agrees as part of the consideration received or to be received by him either not to bring or to discontinue criminal proceedings for some alleged offence is an agreement to stifle prosecution falling under S. 23 of the Contract Act. Proof that there has actually been a crime committed is obviously unnecessary. But it is of course necessary that each party should understand that the one is making his promise in exchange or part exchange for the promise of the other not to prosecute or continue prosecuting. Such agreements are from their very nature seldom set out on paper; like many other contracts they have to be inferred from the conduct of the parties after a survey of the whole circumstances. An agreement whereby a wife executes a mortgage bond of her property in discharge of debt due by her husband as part of the consideration for a promise by the husband's creditor to withdraw criminal proceedings against her husband is illegal and falls under S. 23 of the Contract Act, as there is an infringement of public policy. The fact that there was a debt really due by the husband is irrelevant when the agreement to abandon the prosecution is part of the consideration for payment of the debt. In most cases of this kind there is a debt or liability. Indeed if there were not a demand and receipt of money in consideration of refraining from or withholding a prosecution would apparently in itself be a crime. 46 C.W.N. 1=1941 P.C. 95=(1941) 2 M.L.J. 726 (P.C.). See also 19 Pat. 424=1940 P.W.N. 878=1940 Pat. 573. It is against public policy to make a trade of felony or attempt to secure benefit by stifling a prosecution or compounding an offence which is not compoundable in law. The principle is that no Court of law can countenance or give effect to an agreement which attempts to take the administration of law out of the hands of the Judges, and put it in the hands of private individuals. The test to be applied in all such cases is, as to whether it was an express or implied term of the bargain between the parties, that a non-compoundable criminal case should not be proceeded with. If the consideration for a bond in contract is the withdrawal of a criminal prosecution,

obviously it is hit by S. 23. But the fact that prosecution was actually withdrawn as a result of the execution of the bond by the accused in favour of the prosecution does not necessarily show that the object or consideration of the bond was the stifling of the criminal case. A distinction has always been drawn between the motive to a transaction and its object or consideration and it is not enough that the motive which impelled the party who executed the bond was that the criminal case against him might be dropped. To bring a case within the purview of S. 23, it is necessary to show that the object or consideration of the agreement is unlawful. When there is a just and *bona fide* debt owing by the accused, against whom a non-compoundable criminal case is proceeding, and he gives a security to his creditor, the entire consideration for which is the pre-existing debt, and no part of it is referable to the withdrawal of the criminal case, the transaction would be a perfectly good transaction. There, as between the debtor and the creditor there is no trading on felony, which public policy condemns and the law attempts at preventing. The creditor gets just what he was entitled to, and there is no advantage or emolument coming to him for withdrawing the prosecution against his debtor. When security is given by an outsider, who is under no existing obligation, the consideration could be nothing else but withdrawing of the criminal case, and as such the security is not entertainable in law. The position is that if the pre-existing liability of the debtor was the sole consideration for the security which he gives, the transaction will be protected, even if it were given under threat of criminal proceedings; but if the dropping of prosecution was also a matter of bargain between the parties, and constituted a part of the consideration apart from the pre-existing debt, the security cannot be enforced in law. 43 C.W.N. 147=1938 Cal. 840. An act may involve a person in a civil as well as a criminal liability for a non-compoundable offence, the liability depending on proof. The mere fact that an agreement may be made with regard to the civil liability while a possibility of prosecution criminally is existing will not render the agreement void, but if that agreement is made and part of the consideration for it on the side of the aggrieved party is an agreement not to prosecute criminally, then the agreement is void. If the agreement as to the civil liability changes the nature or the extent of the original civil liability, for example if the guarantee of a surety is introduced or if the liability is changed from a personal one to a mortgage security, this will be a strong indication that the agreement is not merely in settlement of the original civil liability, but that it is one made under pressure and in return for an agreement not to prosecute. The additional advantage so conferred by

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the agreement cannot be enforced in law, though it would be open to a party to fall back upon the original civil liability and enforce it. In considering the question as to whether the consideration of the agreement is the withdrawal of the criminal proceedings, the Court is not confined to the terms of the agreement. It is open to a party to give evidence from which the inference necessarily arises that part of the consideration is unlawful. I.L.R. (1940) 1 Cal. 372=44 C.W.N. 304=1940 Cal. 337. See also 39 P.L.R. 536=1937 Lah. 686. It is only in the cases of certain serious offences against the State that no composition is allowed and it is only in such cases that a compromise to withdraw the case is an illegal consideration. But where there is a criminal case in respect of offence which is compoundable with the permission of Court, a compromise during the pendency of the case to refer the dispute to arbitration and incidentally to withdraw the prosecution is perfectly lawful. 182 I.C. 490=1939 Lah. 98. Where there is an existing debt or an obligation, a creditor is not precluded from taking any security therefor by threat of a criminal prosecution and the security is not vitiated by the fact that he was induced to abstain from prosecuting the debtor. But if it is a part of the bargain that the creditor should not prosecute the debtor, the security taken for the debt will be invalid. It need not be the sole bargain. Hence where a promissory note is executed pending a criminal prosecution and it is proved that the withdrawal of such prosecution forms part of the consideration for the promissory note, the promissory note is unenforceable. 1936 M. 656=I.L.R. 1937 M. 471 (1937) 1 M.L.J. 489. See also 40 P.L.R. (J. & K.) 11; 19 Pat. 424=1940 Pat. 573. An agreement, the consideration of which is the dropping of a prosecution for a non-compoundable offence, falls under S. 23, Contract Act, being opposed to public policy, and cannot be enforced in a Court of law. But in order to determine it, the object of the agreement or the consideration is to be considered. If the consideration for it is something separate and the motive for the agreement is the hope that the prosecution will be dropped, S. 23 will not apply. Where the agreement is in effect an admission of a pre-existing liability, and the consideration for it has nothing to do with the criminal prosecution, the fact that the prosecution was an incentive for accelerating the settlement does not make the consideration for the agreement unlawful within the meaning of S. 23. 151 I.C. 1025=1934 Pesh. 105. See also 43 C.W.N. 147=1938 Cal. 840. An agreement to withdraw an application for sanction to prosecute under S. 195, Cr.P. Code, is opposed to public policy. 46 I.C. 424. See 2 O.W.N. 791; 90 I.C. 463=29 C.W.N. 1029; 29

C.W.N. 855=89 I.C. 200=42 C.L.J. 90; 1925 O. 120. An agreement to stifle a prosecution in respect of an offence of a public nature is against public policy and is illegal. 25 I.C. 409=17 O.C. 213. See also 150 I.C. 734=1934 S. 71. But where the offence involves harm to an injured party, he can settle or compromise his private damage though the offence is of a public nature. 25 I.C. 409. Where a criminal complaint is shown to be false and the complainant's act amounts to coercion, a compromise entered into under these circumstances is not enforceable as there is no good consideration for the same. 137 I.C. 790=33 P.L.R. 630. Where the consideration for a bond is the withdrawal of a non-compoundable case, the bond is unenforceable. See 150 I.C. 734=1934 S. 71; 57 B. 678=35 Bom.L.R. 850=1933 B. 413. See also 53 A. 130=1930 A.L.J. 1592; 1937 A.L.J. 333=1937 A. 370. But where no part of the consideration for the bond was the price for the withdrawal of the criminal prosecution the contract is not opposed to public policy. 35 C.W.N. 28. So also where there was a pre-existing civil liability based upon an adjustment of accounts between the parties and the withdrawal was merely the motive and not the consideration for the bond the transaction is not hit at by this section. 35 C.W.N. 26. See also 49 A. 540=1927 A. 318; 74 I.C. 843; 1 O.L.J. 553=25 I.C. 409; 17 O.C. 213; 16 I.C. 555=8 N.L.R. 97; 46 I.C. 424; 26 I.C. 181=37 M. 385; 92 I.C. 503=1926 A. 270; 7 R. 800=121 I.C. 803=1930 R. 140; 53 A. 130=1930 A.L.J. 1592; 112 I.C. 459. An agreement to drop a prosecution for criminal breach of trust in consideration of a mortgage for a portion of the embezzled money and cash is opposed to public policy. 53 C. 51=1926 C. 59. A contract arising out of the composition of a compoundable offence is not against public policy. 62 I.C. 70. See also 4 Luck. 669=7 O.W.N. 575=1930 O. 196. A promissory note executed by the defendant in consideration of the plaintiff withdrawing a complaint of a compoundable offence is valid. 4 A.W.R. 964=1934 A. 1068. See also 1941 Rang.L.R. 316=1941 Rang. 231. A bond otherwise supported by good consideration, but under which a criminal prosecution is also withdrawn is good in law and legally enforceable. 28 Punj.L.R. 388=1927 L. 530. In a suit for the recovery of money alleged to be due under a mortgage bond, held, that as the plaintiff was a party to a conspiracy for stifling prosecution he was not entitled to any relief. 56 C.L.J. 413. If it is an implied term of the reference to the arbitration of a civil dispute or an ekrarnama that the criminal complaint already filed would not be further proceeded with then the consideration of the reference or the ekrarnama as the case may be is unlawful and the award or the ekrarnama is invalid

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quite irrespective of the fact whether any prosecution in law had been started or not. 123 I.C. 187=1930 P.C. 100=59 M.L.J. 82 (P.C.). See also 117 I.C. 74=1929 L. 564. Reference by all partners of their dispute to arbitration, while a criminal complaint under S. 406, Penal Code, is pending against one of the partners and the prosecution is consequently dropped, the agreement to refer is not against public policy and is therefore enforceable. 101 I.C. 786=1927 L. 465. Agreement not to prosecute for non-compoundable offence is not enforceable. 41 I.C. 812=2 P.L.J. 630. A contract founded on the illegal consideration of compounding a non-compoundable offence is wholly void. 1 P.L.J. 48=33 I.C. 711=20 C.W.N. 760. A person standing bail for an accused in criminal case and forfeiting the bail bond on account of the laches of the accused is not entitled to recover from him the amount so paid on any express or implied contract, such an agreement being illegal as opposed to public policy. 1930 C. 596=57 C. 1093. Where a person in a position of trust embezzles sums of money belonging to his master, he exposes himself to the risk of a criminal prosecution, but he also remains under a civil liability to his master. The amount embezzled is a debt which he is responsible to pay, and if the man to whom such a civil debt is due, takes security for that amount from his debtor, even though the debt arises out of a criminal offence, the agreement to pay the amount is enforceable in law and is not obnoxious to the provisions of S. 23. 1930 A.L.J. 1297=1930 A. 826 (1). As to the case of sureties, see 1937 Lah. 686=39 P.L.R. 536; 1938 Cal. 840; 1940 Cal. 337.

INFLUENCING COURSE OF LITIGATION.—Agreement to perform puja for a consideration in order to help a person in obtaining success in a pending litigation is opposed to public policy and is unenforceable, as intended to exercise unauthorized influence on the proper course of litigation. 49 A. 705=25 A.L.J. 518=1927 A. 406. An agreement providing that one of the parties should assist the other in carrying on a litigation commenced by the other and help him to evade or delay the execution of a decree passed against him is contrary to public policy. 1933 A.L.J. 85=1933 A. 303. Clause in a Fire Insurance contract limiting liability of company to claims made within one year is valid and binding. 11 Rang. 475=149 I.C. 15=1934 Rang. 15.

ousting JURISDICTION OF COURT, by agreement of parties, not valid. 1935 N. 48. See also 1 A. 267; 42 B. 380=45 I.A. 61 (P.C.).

PROSTITUTION—PAST CO-HABITATION.—Where the past co-habitation is the consideration for a transfer of property, transfer, how far valid. 22 Bom.L.R. 762=57 I.C. 472=44 B. 542; 25 Bom.L.R. 252=1924 B. 135. See also 23 A.L.J. 376=47 A. 619=

1925 A. 437; 23 A.L.J. 201=1925 A. 358; 35 Bom.L.R. 345=1933 B. 209. Past co-habitation is a good consideration. (13 M.L.J. 7, Appr.; 25 Bom.L.R. 252; 44 B. 542 and 1925 M.W.N. 828, Diss. from.) 59 M.L.J. 596; I.L.R. (1940) A. 371=1940 All. 385. Agreement to pay maintenance to mistress not illegal or immoral. 12 O.L.J. 510=89 I.C. 573=1925 O. 536. An agreement by a person to pay to his past mistress a sum of money every month for her maintenance so long as she remained outcasted and unmarried, there being nothing in the agreement with reference to future association cannot be regarded as void as being immoral or opposed to public policy. An agreement to become a mistress, which is doubtless void as being immoral should not be confused with an agreement to compensate a woman afterwards for an injury done to her and for the loss which she has sustained owing to an association, be it immoral or otherwise, with her protector. Past consideration under the Indian Law is good consideration and the fact that the woman has rendered service in the past whether immoral or otherwise and has suffered an injury of a kind and continues to suffer from that injury forms a perfectly good consideration for the contract to compensate her. 17 Pat. 308=19 Pat.L.T. 893=1938 Pat. 502. Where the consideration for a bond was future adulterous co-habitation, the agreement is void under S. 23. 45 M.L.J. 551=76 I.C. 306=1924 M. 15; 153 I.C. 333=1935 Oudh 71. Money lent for assisting the borrower to visit brothels and bring in prostitutes cannot be legally recovered. 39 I.C. 767. Where it is no part of the contract between the lender and the borrower that the money lent should be utilised for immoral purposes and the lender has no control over the application of the money, he is not prevented from recovering the money. 69 I.C. 939=43 M.L.J. 695=45 M. 778. If the object of a transfer of property is immoral, for example, where the transfer is for future co-habitation and as a reward for past co-habitation, the transfer is void and the transferor retains the title in himself and would ordinarily be entitled to recover the property on the ground that the title has not passed from him. But the principle of equity enunciated in *Agent v. Jenkins*, L.R. 16 Eq. 275, would prevent the Court from giving aid to a person guilty of immoral conduct to recover the property on the ground of public policy. 35 Bom.L.R. 345=1933 B. 209.

RELIGIOUS PURPOSES.—An agreement between the panda and pariwal of a temple to participate in the offerings made by pilgrims is not contrary to public policy. 70 I.C. 124=45 A. 79=1923 A. 56; 24 I.C. 86. Sale of a share in the offerings made to a shrine and to a participant therein, is not opposed to public policy. 34 P.L.R. 254=141 I.C. 427=1933 L. 223. Agreement to perform puja for obtaining success

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in litigation being intended to exercise unauthorized influence on Court is opposed to public policy and unenforceable. 49 A. 705 = 25 A.L.J. 518 = 1927 A. 406. Contract to propitiate diety to avert malign influence is valid in law. 31 N.L.R. 229 = 1935 N. 119. An agreement to pay bribe to procure the adoption of a boy is one against public policy, and cannot be enforced. 26 I.C. 779 = 27 M.L.J. 416 = 1 L.W. 926. Religious purposes—Agreement by a Gayawal to pay part of his earnings from certain ceremonies to an Acharya—Validity of the agreement. 1 Pat.L.J. 539 = 38 I.C. 116. Agreement between two temples restricting and regulating each other's rights to take out procession is void. 24 L.W. 58 = 24 A.L.J. 801 = 1926 P.C. 64 (P.C.). The doctrine of public policy will not be extended beyond the classes of cases already covered by it and the Courts cannot invest new hands of public policy. The appointment of an officer, Mutwalli or Manager or Superintendent, by whatever name he may be called, for a term of three years and subject to dismissal on three months' notice is quite within the competence of the Committee appointed under S. 7 of the Religious Endowments Act, 1863, and such an agreement is not opposed to public policy merely on the ground that the terms of appointment are not in accord with the position and powers of mutwalli, properly so called, and appointed under the general Mahomedan law. 61 C. 80 = 38 C.W.N. 214 = 1934 C. 328.

PARTIAL ILLEGALITY.—It is settled that if one of the several distinct promises is illegal it will not prevent the rest from being enforced. 10 I.C. 465. In an illegal contract even though a part of the consideration may be legal yet if the legal part cannot be severed from the illegal, the whole contract is vitiated. 20 C.W.N. 760 = 1 Pat. L.J. 48 = 33 I.C. 711; 3 Pat.L.T. 386 = 67 I.C. 49; 15 I.C. 836. Where the law has imposed a personal disability of an absolute character, as in the case of a minor or a person of unsound mind, every contract made by him is void. Where the disability is partial, as in the case of a judgment-debtor to whom Sch. 3, C.P. Code, applies, an alienation made by him is invalid; but any agreement to pay money recoverable from his person and other property, movable or immovable, is unaffected by the partial disability imposed by para. 11. Such agreement is enforceable in law and is as valid as any other contract. The executant admitted in a deed that a sum of Rs. 20,000 had been advanced to him and he undertook to repay it on demand. This covenant was quite distinct and separate from the other part of the agreement under which the debtor gave security for the payment of the amount due from him. The debtor was incompetent to mortgage the property by virtue of Sch. 3, para. 11, C. P. Code.

Held, that the creditor was entitled to enforce his remedy under the first part of the agreement. 144 I.C. 373 = 1933 A.L.J. 1522 = 1933 A. 468.

Sec. 23, Ill. (j).—Plaintiff, who was acting as an agent of a lady A for the purpose of selling her lands and occupying a fiduciary position, entered into an agreement with the defendants, to the effect that the lands should be sold cheaply to the defendants at the then market price, and should not be sold to strangers even if better prices were offered by such strangers. The plaintiff was to be paid a commission of five per cent. on the sale price for the trouble he was taking for the defendants. The sale having been completed, the plaintiff sued the defendants for his commission. *Held*, that the consideration for the agreement or the object of the agreement between the plaintiff and the defendants was fraudulent and also immoral, and that contract was therefore obviously unenforceable in view of illustration (j) to S. 23. 1936 M. 541 = 70 M.L.J. 724.

MISCELLANEOUS.—A withdrawal of a suit by the landlord for rent against the tenant is a lawful consideration for a note executed by the tenant to the landlord. 25 I.C. 80 = 12 A.L.J. 331. An adjustment of an attached decree by an attaching decree-holder which involves serious injury to the rights of the original decree-holder is hit by S. 23. 41 C.W.N. 880 = 1937 Cal. 468. An agreement by a sub-overseer in the service of a Nawab contrary to the conditions of his service is illegal and opposed to public policy. 11 I.C. 2. A clause in an insurance policy cutting down limitation period for bringing suit for rejection of claim is enforceable. 27 C.W.N. 955 = 1924 C. 186. If the illegality of a transaction is brought to the notice of a Court, the Court will not assist the person invoking its aid, even though the defendant has not pleaded the illegality and does not wish to raise objection. 24 C. W.N. 306 = 53 I.C. 773 = 30 C.L.J. 241. *See also* 145 I.C. 599 = 1933 M. 187. The form of risk note exonerating Railway Company from liability except for loss of complete package is not contrary to public policy. 40 I.C. 626 = 21 C.W.N. 815. As to agreements opposed to public policy, *see* 43 Bom. L.R. 758; (1940) 2 M.L.J. 353; (1941) 1 M.L.J. 807. Agreement to pay remuneration for settlement of civil dispute is valid in law. 14 I.C. 31 = 16 C.W.N. 480. A contract to pay brokerage is neither immoral nor opposed to public policy. 60 I.C. 727; 1931 P. 22 (and cases referred to therein). A bargain to have a caveat discharged is not contrary to public policy. 1931 C. 587 = 58 C. 699. Bargaining about public office is against public policy. 1931 A.L.J. 397. Whether judgment-debtor's objection to transfer of decree can be enforced. *See* 18 L.W. 453 = 76 I.C. 845 = 1924 M. 189. Contract opposed to law or public policy is legal according to French Law, but not

Void Agreements.

Agreements void, if considerations and objects unlawful in part.

24. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

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according to law in British India. 45 M.L.J. 59=18 L.W. 314=1923 M. 708. An agreement to pay a vakil's clerk for special attention to his case is void being opposed to public policy. 41 M. 471=33 M.L.J. 724=42 I.C. 911 (F.B.). An illegal business may be prohibited lawfully and such prohibition gives no right of action. 39 M. 781=31 I.C. 224=29 M.L.J. 280. Right to do scavenging work exclusively in houses of others cannot be recognised—Contract of assignment for consideration not valid. 51 L.W. 662=1940 Mad. 558. Maha Brahmans' offerings—Validity of agreement as to right to resile from agreement. 42 I.C. 794=20 O.C. 265. Purchase of house by a Buddhist monk, the same being forbidden by Buddhist Law—Transaction is void and suit by monk for ejectment is not maintainable. 5 R. 626. Suit by a Mahomedan—Agreement with a Hindu to remunerate him for offering prayers to God Subramanya for his success in the suit is valid—Validity. 57 M.L.J. 154=53 M. 29.

Sec. 24: DISTINCT COVENANTS—SEVERABILITY OF.—If a contract contains distinct covenants some of which are legal and others illegal, the Court can enforce the legal ones; but if the covenants are not severable the whole contract is void for illegality; also if there is one promise made upon several considerations some of which are legal and others illegal. Again if several distinct promises are made for one and the same lawful consideration, and one or more of them be such as the law will not enforce that will not of itself prevent the rest from being enforced. The test will be whether a distinct consideration which is wholly lawful can be found for the promise called in question. 144 I.C. 373=1933 A.L.J. 1522=1933 A. 468. See also 57 B. 278=143 I.C. 331=35 Bom.L.R. 163=1933 B. 132; 167 I.C. 707=1937 R. 47. If there is one entire consideration for two several contracts and one of these contracts is for the performance of an illegal act the whole is void. Thus where one sum is to be paid for the doing of a legal and an illegal act, the whole contract is void. And if a contract or promise be founded upon a legal and an illegal consideration and the illegal consideration cannot be separated from the legal consideration and rejected, the illegality of part vitiates the whole. 1939 Rang.L. R. 711=1940 Rang. 45. S. 24 does not apply to transfers under T.P. Act. See 158 I.C. 267=1935 O.W.N. 1045=1935 O. 501. Section has no application to promises which are offered in the alternative. In such a case the rule applicable is contained in S. 58,

supra. 1931 A. 589 (2)=1931 A.L.J. 295. S. 24 has not been made applicable to transfers of immovable property and the language of S. 15, Tenancy Act, does not justify the inference that a relinquishment under S. 15 is forbidden by law. 1934 A.L.J. 1193=1934 A. 246. Where a usufructuary mortgage of an occupancy holding is void, a personal covenant to that effect is also void and unenforceable. 20 A.L.J. 318=44 A. 486=67 I.C. 792. But see 27 A.L.J. 479=116 I.C. 17, *contra*. See also 13 O.L.J. 449=1926 Oudh 270; 5 Bur.L.J. 86=1926 R. 186. Where the deeds are mortgages of occupancy land which is forbidden by the Tenancy Act they come under S. 23 as agreements where the consideration or object was forbidden by law. The deeds cannot be enforced in any manner, even as simple money bonds and therefore the plaintiff cannot sue for the promises of payment of principal and interest in the bond, nor can he rely on the covenant in the bonds that if possession is not given, then the plaintiff should receive back the money. But the plaintiff has a right under S. 65 to the return of any money which he has been able to prove that he has advanced to the defendant under these void bonds. 1935 A.L.J. 339=1935 A. 256. See also 39 Bom.L.R. 1124. Where the mortgage consideration constitutes an independent transaction of loan, the mortgagee would be entitled to the return of the money. 3 O.W.N. 217=93 I.C. 310=1926 O. 270. For a case where it was held that the entire agreement was invalid and that it was not permissible for the Court to split the consideration, see 34 Bom.L.R. 404. Section does not apply to an out-and-out transfer. 85 I.C. 459=1925 A. 474. S. 24 does not apply to a case where the plaintiff is seeking to enforce an equity in respect of a perfectly valid security. 39 A. 539=39 I.C. 785=15 A.L.J. 544. S. 24 has not been made applicable to transfer of immovable property. There is therefore no justification for stating broadly that even if the transfer of several items of properties can be split up and separated, the whole transaction is void because one part of it may be vitiated. Of course where the object of the consideration of the transfer is unlawful, as that word is defined in S. 23, the transfer is not effective. 1930 A.L.J. 45=122 I.C. 872=1930 A. 1 (F.B.). Contract may be invalidated either by the illegality of the object of the consideration itself or by the incapacity of the promisor to enter into such contract. In cases of inherent illegality, it is sometimes impossible to say whether the legal or the illegal portion of the consideration affected the mind of the promisor most. But in cases of contract only partly beyond the com-

Illustration.

A promises to superintend, on behalf of *B*, a legal manufacture of indigo, and an illegal traffic in other articles. *B* promises to pay to *A* a salary of 10,000 rupees a year. The agreement is void, the object of *A*'s promise and the consideration for *B*'s promise being in part unlawful.

Agreement without consideration void, unless it is in writing and registered,

25. An agreement made without consideration is void unless—

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petence of the promisor, there is no good ground why the promisee who has paid good consideration should not be allowed to enforce that part of the promise which the promisor was competent to make. 1930 A.L.J. 45=52 A. 338=1930 A. 1 (F.B.). For a case where the legal part of an agreement was upheld, see 15 B.L.R. App. 5; 1931 N. 6; 33 Bom.L.R. 260. See also 1933 L. 291. In a contract where one of several considerations is unlawful the whole agreement is void. 20 O.C. 155=39 I.C. 540=4 O.L.J. 380; 18 I.C. 9; 35 A. 558=21 I.C. 878=11 A.L.J. 854; 39 A. 539=39 I.C. 785=15 A.L.J. 544; 86 I.C. 515=1925 N. 302; 47 A. 780=23 A.L.J. 521=1925 A. 543. Where there was one single consideration for two objects, namely, the lease of the right of a Municipality to collect tolls and taxes, and the part that was legal, that is, the one relating to the collection of tolls could not be severed from the illegal, held, that the whole contract was void. 35 Bom. L.R. 163=1933 B. 132. Where a woman agrees to serve both as a house-keeper as also by living in adultery, suit cannot be maintained even for services rendered as house-keeper. 27 A. 266. Pronote by two persons—One executant foregoing signature of the other—Plaintiff consenting—No intention to cheat—Plaintiff can succeed against real executant. 21 L.W. 532=87 I.C. 48=1925 M. 929. If the various promises of the two parties are quite interdependent the fact that one large part of the contract is void must vitiate the whole. 70 I.C. 881. See also 145 I.C. 163=1933 L. 291. Contracts in violation of the personal laws of parties (as) the Hindu or Mahomedan laws are also void. 28 M. 413. Covenant opposed to law is illegal. 1924 A. 80=45 A. 621=21 A. L.J. 480.

Sec. 25.—To bring a case within this section it is necessary to show that there was an express promise to pay. A mere acknowledgment of liability even if it implies a promise would not be sufficient for purposes of the section. 131 I.C. 867=1931 A. 375; 1932 A. 279; 1930 A.L.J. 552=1930 A. 467; 141 I.C. 617; 1932 M. 219; 1933 A. 175=144 I.C. 1005=1933 A.L.J. 170; 12 Mys.L.J. 504; 18 L. 234; 1935 A.M.L.J. 14; 159 I.C. 447=1935 N. 221; 178 I.C. 259=1938 Lah. 264; see also 38 P.L.R. 85 (Son signing acknowledgment for father's debt is good consideration.) The word "debt" in S. 25 is used in its ordinary meaning of a sum payable in respect of a loan recoverable by action. 40 M. 31=32 M.L.J. 422=39 I.C. 220 (F.B.); 13 L. 448. Acknowledgment can form basis

of suit. 1925 N. 9. An unconditional acknowledgment imports a promise to pay and can form the basis of a suit but an acknowledgment of time-barred debts which does not contain distinct promise to pay does not fulfil the requirements of S. 25 (3) of the Contract Act and a suit is not maintainable thereon. 141 I.C. 617=1933 L. 209; 141 I.C. 425=1933 L. 47. See also 1934 L. 835. Mere implied promise to pay is not sufficient for the purposes of S. 25. More than three years from the last item of account the balance was struck and signed by the debtor. The entry however contained no words which could amount to a promise to pay. On a suit being brought on the basis of such entry, held, that the entry did not fulfil the requirements of S. 25. 178 I.C. 446=1938 Lah. 155. See also 40 Bom.L.R. 1010=1938 Bom. 460. A promise to pay the amount which might be found due by the arbitrator on taking the accounts is not a promise to pay a "debt" within S. 25 of the Act. 1925 N. 9. An account stated in the form of an acknowledgment of a debt amounts to a promise and implies the existence of a debt, but it may be rebutted by showing that there is no debt at all. But in the case of a "real account stated", with entries on both sides in which the parties agree that the items on one side may be set off against those on the other side, and that the balance only should be paid, there is a promise for good consideration to pay the balance arising from the fact that items on the smaller side are set off against those on the larger side and decreed to be paid in that way. 38 C.W.N. 813=1934 P.C. 144=67 M.L.J. 103 (P.C.). An agreement in respect of a barred debt is valid under S. 25 although the promisor did not at the time of the agreement know that it was barred. 25 I.C. 36. See also 53 A. 963=1932 A.L.J. 77. Adequacy of consideration is not a matter to be taken into consideration in deciding whether an agreement is valid. 45 A. 590=21 A.L.J. 446=1923 A. 590. An agreement to take less than what is really due and also to give time for payment is not valid unless supported by consideration. 6 R. 191. The forbearance to enforce in a Court of law a claim *bona fide* believed to exist and to be enforceable, would be a good consideration for a contract. 44 A. 424=20 A.L.J. 285=1922 A. 260; 26 N.L.R. 320; 118 I.C. 646=1922 L. 689. Promise to defend a suit would be good consideration. 99 I.C. 752. Simply acknowledging indebtedness without any promise to pay is not an agreement under S. 25. 17 I.C. 722=14 Bom.L.R. 1020. But see 1929 L. 59. There is a difference

(1) it is expressed in writing and registered under the law for the time being in force for the registration of ¹[documents], and is made on account of natural love and affection between parties standing in a near relation to each other, or unless

or is a promise to compensate for something done,

or is a promise to pay a debt, barred by limitation law.

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, or unless

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay

wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

LEG. REF.

¹ This word was substituted for the word "assurances" by S. 2 and Sch. II of Act XII of 1891.

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between acknowledgment sufficient for Limitation Act, S. 19 and Contract Act, S. 25. In order to create a new contract as required by the latter the promise to pay must be expressed. 6 Pat.L.J. 121=60 I.C. 514=2 Pat. L.T. 303. See also 124 I.C. 243=1930 N. 236; 1930 P. 604; 10 Pat.L.T. 169; 1929 L. 541; 132 I.C. 420=1932 A. 38. As to difference between English and Indian Law, see 10 Pat.L.T. 169. A letter constituting an acknowledgment of liability cannot amount to a new contract within the meaning of S. 25 (3) of the Contract Act unless it contains any definite promise to pay. 7 O.W.N. 420=1930 O. 287. See also 1935 L. 984. Pleader if authorised to admit liability under the section. 21 A.L.J. 713=75 I.C. 309=1924 A. 12. Agreement by a creditor with co-debtor not to sue him if he helps in realisation is not valid. 57 I.C. 844. In the absence of a contract by the promisee for rendering future services a promise to pay for services is without consideration and therefore void. 46 I.C. 282=23 C.W.N. 639. The promise of the vendee to defend a suit to be brought by a collateral of the vendors constitutes a legal consideration for the contract of sale. 2 L.L.J. 306. The withdrawal of proceedings under S. 523 of Act XIV of 1882 is a sufficient consideration for a compromise by the parties. 20 I.C. 817=20 P.R. 1914. A contract entered into by heirs of deceased to settle disputes and doubtful rights is valid and binds the minor members as adult members acted as *de facto* guardians for their benefit. 20 P.R. 1913=19 I.C. 411=185 P. L.R. 1913; 21 I.C. 768. Forbearance to litigate a legal claim is good consideration. 22 O.C. 163=6 O.L.J. 404=53 I.C. 104. Promissory note for barred debts is valid. 41 M.L.J. 567=45 M. 345=66 I.C. 155. A promise to pay something which the promisor is already under an obligation to pay is promise without consideration and cannot be enforced. Any separate promise made to pay the amount at any particular place must be

supported by a consideration. 9 L.B.R. 75=39 I.C. 132. A composition with the debtor on the assurance of the joint debtor for payment of the balance amount is unenforceable. 15 I.C. 363=5 Bur.L.T. 81. What is natural love and affection to support a promise, see 4 C.W.N. 488; nearness of relation does not necessarily mean that. 4 C. W.N. 488. An agreement to pay maintenance to a wife entered into after the marriage is not supported by any consideration the marriage not being affected thereby. 11 I.C. 833=245 P.L.R. 1911. Promise to contribute money to charity out of one's own pocket not enforceable. 18 Pat.L.T. 286=1937 Pat. 358.

Sec. 25, Cl. (1): "PARTIES STANDING IN NEAR RELATION" must not be narrowed down to mean only near relatives. Wife's parents of a Mahomedan would come under the expression. 100 I.C. 350=4 O.W.N. 195=1927 O. 146. Where a person settles an annuity upon his alleged wife the settlement cannot be construed to be a contract for consideration of love and affection, but is a gift pure and simple, and no consideration is necessary. 36 C.W.N. 392=1932 P.C. 34=62 M.L.J. 292 (P.C.).

BENAMI TRANSACTION.—Purchaser under a sham transaction gets no interest in the property. 1928 M. 541=111 I.C. 690.

Cl. (2).—An agreement by a person of full age to compensate a promisee for something voluntarily done for the promisor at the time when the promisor was a minor, falls within S. 25, Cl. (2) and is enforceable. But no interest can be recovered upon such an agreement. 2 L. 263=64 I.C. 121; 54 I.C. 436=20 P.L.R. 1920; 31 P.R. 1911=11 I.C. 321.

Cl. (3).—Unless a promise to pay is in writing it cannot fall within the purview of S. 25 (3). The implied promise to pay which is contained in all acknowledgments does not attract the provisions of S. 25 (3) because the promise to pay is not in writing. Consequently, the words "after taking old accounts into consideration there remains to be paid a balance of Rs. 3,200" in an acknowledgment do not amount to a promise to pay within the meaning of S. 25 (3). I.L.R. (1941) Nag. 144=1941 Nag. 100. See also

In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations.

- (a) A promises, for no consideration, to give to B Rs. 1,000. This is a void agreement.
- (b) A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract.
- (c) A finds B's purse and gives it to him. B promises to give A Rs. 50. This is a contract.
- (d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.
- (e) A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.
- (f) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.
- (g) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

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1937 Lah. 865. In order to keep alive a time-barred debt, the promise to pay must be expressed in unequivocal terms. 1939 Lah. 466. When a promise to pay falls under S. 25 (3) it constitutes a valid agreement for the purpose of suing, whether there is a fresh consideration for the promise or not, and it is immaterial whether the debts covered thereby are within limitation or not. 40 P.L.R. 689 = 1938 Lah. 757. See also 1940 N.L.J. 607; 1939 A.M.L.J. 147. S. 25 (3) requires that the person renewing a time-barred debt must be either the person himself or his agent generally or specially authorised in that behalf. A *de facto* guardian of a minor is not generally or specially authorised to renew a time-barred debt and has therefore no power to renew a time-barred debt. 41 Bom.L.R. 896 = 1939 Bom. 464. See also (1940) 1 M.L.J. 682. S. 25 (3) makes a debt recoverable only when a certain form of acknowledgment is made as regards a time expired debt. It does not allow the institution of a subsequent suit, where a debt was held irrecoverable in an earlier suit owing to the minority of the debtor. 1940 A.M.L.J. 72. See also 1937 O.W.N. 1034. S. 25 (3) applies only to a case in which there is an express promise to pay and has no application to a case where an implied promise is inferred from a mere acknowledgment. 1931 A.L.J. 56; 1932 A.L.J. 279. In order to comply with the terms of S. 25 (3) there must be an express promise to pay a time-barred debt. If there are two debts, one barred and the other not, the promise to pay the latter cannot be interpreted as a promise to pay the former. Nor can a promise to pay an imaginary debt be interpreted as a promise to pay a barred debt. Where in lieu of the time-barred remittances of money a mortgage is executed, a promise in writing in the mortgage-deed to repay the consideration money cannot be said to be a compliance with S. 25

(3). when there was in fact no consideration for the mortgage and the transaction is found to be benami. 1941 Cal. 449. The mere mention of a debt in the schedule of creditors cannot amount to anything more than a mere acknowledgment. It cannot by any stretch of language be held to contain in itself a promise to pay. 18 Lah. 562 = 39 P.L.R. 678 = 1937 Lah. 382. See also 1938 Bom. 460 = 40 Bom.L.R. 1010; 171 I.C. 96; 51 L.W. 520 = 1940 Mad. 678 = (1940) 1 M.L.J. 682. But see 1939 A.M.L.J. 137. The promise referred to in S. 25 (3) must be an express one and cannot be held to be sufficient if the intention to pay is unexpressed and has to be gathered from a number of circumstances. In other words there must be a distinct promise to pay before a document can be said to fall within the provisions of S. 25 (3). 51 L.W. 520 = 1940 Mad. 678 = (1940) 1 M.L.J. 682. But see 1939 A.M.L.J. 137; 1939 Lah. 486. Where the debtor proposes in a letter to pay a time-barred debt by monthly instalments and remits some of the instalments as proposed, the acceptance of the instalments by the creditor constitutes acceptance of the proposal by conduct so as to convert the proposal into a promise within the meaning of S. 25 (3). 1940 Rang.L.R. 377 = 1940 Rang. 159. Where a newly admitted partner, along with the existing partners, acknowledges that on a particular day a particular amount is due from the partnership to their creditors, but the acknowledgment does not contain a distinct promise to pay the amount, the partner cannot be said to be doing anything beyond merely acknowledging the correctness of the amounts which stand in the *khata* of the existing firm, and the acknowledgment does not create a new contract so as to bind him, there being no consideration for the same. 20 P.L.T. 825 = 1939 Pat. 323. Where a claim is barred by statute nothing short of an express promise can provide a fresh period of limitation. 161 I.C. 703 = 1936 L. 164.

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But for a promise to pay a time-barred debt to be a good consideration, it is not necessary that the debtor must expressly state that he was renewing a barred debt. 1936 L. 1016. See also 1937 Lah. 642. It is not necessary that an agreement to pay a debt barred by the law of limitation should refer in terms to the barred debt. 1938 Rang. L. R. 6=1938 Rang. 134. Unless a promise to pay is in writing it cannot fall within the purview of S. 25 (3). 174 I.C. 374=1938 Nag. 180. See also 18 Lah. 562=1937 Lah. 382; 1941 Nag. 100. Wherever there is a balance struck and interest has been fixed or agreed to be paid, the words have always been construed to mean a promise to pay within the meaning of S. 25 (3). I.L.R. 1938 Lah. 193=1938 Lah. 234 (F.B.). But see 1938 Bom. 460=40 Bom.L.R. 1010. Where a balance is struck in the account book of a creditor and is followed by the words "*baqi rahe iene*" signed by the debtor, the document is an "agreement" and not a mere "acknowledgment", as it contains a promise to pay. 41 P.L.R. 194=1939 Lah. 486. But see 40 Bom.L.R. 4; (1940) 1 M.L.J. 682. S. 25, Cl. (3) should be liberally construed. 129 I.C. 545=1931 A. 154. Construction of Cl. (3). 57 C. 394=33 C.W.N. 965=1929 C. 444; 112 I.C. 740. Scope of Cl. (3). See 27 A.L.J. 901=119 I.C. 109=1929 A. 586. An express promise to pay a portion of a debt is not sufficient and cannot provide a good cause of action in regard to the portion for which there is no express promise. If a person promises to pay a portion of a barred debt he can only be sued for that portion and not for the whole debt. 51 L.W. 520=1940 Mad. 678=(1940) 1 M.L.J. 682. The words "by the person to be charged therewith" in S. 25 (3) are wide enough to cover the case of a person who agrees to become liable for the payment of a debt due by another and need not be limited to the person who was indebted from the beginning. 51 L.W. 520=1940 Mad. 678=(1941) 1 M.L.J. 682. See also 40 Bom.L.R. 896. S. 25 (3) of the Contract Act requires that in the case of a time-barred debt there should be a promise in writing to pay the barred debt. An acknowledgment of the debt in a sale-deed is not sufficient for that purpose. 1930 L. 985. A contract entered into by a minor, being null and void, its subsequent ratification by the minor on attaining the age of majority cannot form a valid contract on which a suit can be maintained. The consideration which passed under the earlier contract cannot be imported into the contract into which the minor entered on attaining majority. S. 25 has no application to the contract of this kind. 177 I.C. 388=1938 Lah. 159. See also 1937 O.W.N. 341=1937 Oudh. 300. Where the debtor writes to the creditor acknowledging his liability to pay a debt which is time-barred but the letter does not contain promise to pay, the

writing cannot form the basis of a suit as it does not amount to a new contract. 124 I.C. 245=1930 N. 236. An acknowledgment even when it is not made to any creditor may if unconditional amount to a promise. It is however highly necessary to examine the circumstances of each case to see whether there is anything in conflict with such an inference. Where the debtor makes an arrangement for the payment of a debt by somebody else it cannot be held that the debtor promised to pay the debt himself and a fresh contract cannot be inferred. 1932 M.W.N. 52=1932 M. 219. "Limitation" in S. 25, Cl. (3) means limitation of time as prescribed by the law of limitation. 129 I.C. 545=1932 A. 154. A judgment-debt comes under the meaning of S. 25 (3). 50 C. 974=28 C.W.N. 322=79 I.C. 489. See also 4 C. 500; 3 A. 761; 26 A. 363; 14 B. 300. A promise in writing to pay a barred debt is valid even if the promisor is not aware that the debt is barred. 20 I.C. 809=18 C.L.J. 269; 21 I.C. 254=18 C.L.J. 329; 49 A. 496=25 A.L.J. 405=1927 A. 677. But where an acknowledgment is proved to have been made by inadvertence or mistake, it cannot be treated as implying a promise to pay even though it may be ostensibly unconditional. 1933 A.L.J. 170=1933 A. 175=144 I.C. 175. An unconditional acknowledgment imports a promise to pay and can form the basis of a suit but an acknowledgment of time-barred debts which does not contain distinct promise to pay does not fulfil the requirements of S. 25 (3) of the Contract Act and a suit is not maintainable thereon. 141 I.C. 617=1933 L. 209. See also 34 P.L.R. 252. Oral promise not sufficient. 86 I.C. 942=1925 M. 1147. Where the debtor promised to pay by a share of the profits of a business, held, that the plaintiff could not recover in any other way. 14 I.C. 133=16 C.W.N. 636. The promise may be absolute or conditional. The whole of the promise whether free or clogged with a condition gives the cause of action. 16 C.W.N. 636. The new promise is the measure of the creditor's right. 14 I.C. 133=16 C.W.N. 636. See also 38 C.W.N. 253=1934 C. 178, *infra*. A promissory note executed in renewal of a former note which is barred by limitation is a promise in writing to pay a debt of which the creditor might have enforced payment but for the law of limitation within the meaning of S. 25 (3) of the Contract Act. The maker's knowledge or want of knowledge that the claim under the prior note has become barred has nothing to do with the matter and does not affect his liability under the fresh note. To make the knowledge of the promisor a condition of his liability under S. 25 (3) would be to read into the words of the statute something which is not there. 40 C.W.N. 130. See also 167 I.C. 919=1937 O.W.N. 341; 1935 A.L.J. 1256. Where the defendants executed a hand-note in satisfaction of a decretal debt due from their father which was at that

Agreement in restraint of marriage void.

26. Every agreement in restraint of the marriage of any person, other than a minor, is void.

Agreement in restraint of trade void.

27. Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

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time barred, *held*, that the note contained a distinct promise to pay the amount in writing and signed by the defendants as contemplated by S. 25 (3) of the Act; but that they were not personally liable because under the law, their liability was limited to the assets which had come to their hands and a promise to pay the debt personally would be without consideration. (51 A. 983, Rel. on.) 148 I.C. 1305=38 C.W.N. 253=1934 C. 178. A suit lies on a written promise to pay a barred debt under S. 25 (3). 73 I.C. 652=1923 L. 481; 14 I.C. 133=16 C.W.N. 636; 20 I.C. 839=18 C. L.J. 269; 66 P.R. 1917=41 I.C. 915; 37 C.W.N. 326=1933 C. 658.

JOINT HINDU FAMILY AND MINORS.—Debt by manager—Promissory note by junior members, validity of. 41 M.L.J. 567=66 I.C. 155=45 M. 345. *See also* 6 Pat.L.J. 121=2 Pat.L.T. 203. A pro-note passed by a Hindu father or grandfather for a time-barred debt is enforceable against him and after his death against his sons or grandsons. 34 Bom.L.R. 1005. A promise to pay a barred debt by a manager of a Hindu family who is not the father of a junior member of a joint Hindu family, is not binding on such junior member. The question lies within the region of the Hindu Law and not of the Contract Act. S. 25 (3), Contract Act, does not apply to such a case. 1937 Nag. 327. Where the petitioner enters into a money bond not to raise personal loan but only to pay off his deceased father's time-barred debts, a decree on the bond can be passed only against the estate of the deceased in his hands, but no personal decree can be passed against the petitioner. 177 I.C. 388=1938 Lah. 159. Section 25 (3) applies to the case of a minor executing a promise in writing to pay a debt of his guardian. 65 I.C. 716=1922 N. 250. But *see* 1934 Pesh. 123 (Minor on attaining majority is not legally capable of ratifying contracts entered into by him during his minority). Guardian of minor cannot make a valid promise to pay time-barred debt. 1928 C. 850=115 I. C. 263. A barred debt is a good consideration for a sale. 21 I.C. 69. In order that a valid contract may be constituted under S. 25 (3) it is necessary that the statement should be in writing and should be signed by the person charged therewith or by the agent generally or specially authorized. 21 A. L.J. 713=75 I.C. 309=1924 A. 12; 61 P. R. 1893. Mortgage of partnership property by one partner—Binding character of mortgage disputed by the other partner—

Compromise—Subsequent declaration of invalidity of mortgage as regards the disputing mortgagor's share—Effect of. 19 C.W. N. 193=28 M.L.J. 448=26 I.C. 924 (P. C.). A mortgage was executed by a person after attaining majority and part of the consideration for the mortgage was the payment by the mortgagee to a creditor of the mortgagor, who had advanced money during the mortgagor's infancy. In a suit by the son of the mortgagor challenging the mortgage, *held*, that payment by the mortgagee to the creditor was a valid consideration. [49 A. 137 and 1928 A. 440 (F.B.), Dist.] 147 I.C. 224=1933 A.L.J. 1399=1933 A. 659. Bond of Hindu son to pay father's time-barred debt—To what extent valid. *See* 51 A. 983.

Sec. 26.—An agreement to pay a woman certain annual allowance only "until" death or re-marriage or "during widowhood" is not illegal. 16 I.C. 13=10 A.L.J. 185. A kabinnamah by which a Mahomedan husband authorizes his wife to divorce herself from him in the event of his marrying a second wife, is not void under S. 26. A Mahomedan husband may delegate to his wife power to divorce on certain conditions. 31 I.C. 562=19 C.W.N. 1226. A custom to pay a bride price, while marrying a major girl is immoral and in restraint of marriage and is therefore unenforceable. 58 I. C. 167=1 L. 574. An agreement for payment of money spent on the boy's education if he married another during the lifetime of his wife is void. 7 L.B.R. 304=24 I.C. 777. S. 26 is not restricted to the case of the first marriage only but also applies to a person already married. 7 L.B.R. 304=24 I.C. 777. Contract by husband to live with wife and not take another wife—Breach—Damages recoverable by suit. 15 I.C. 915= (1912) 1 U.B.R. 108. A condition in a wakf to the effect that if the widow of a sharer re-married, she would forfeit her right to the profits under the wakf is neither illegal nor improper. 9 O.W.N. 105=139 I.C. 292=1932 O. 108.

Sec. 27.—Construction of terms of a document relating to sale of goodwill. *See* 47 M.L.J. 657=26 C.W.N. 345=48 C. 1030=48 I.A. 508 (P.C.). *See also* 39 I. C. 177. S. 27 contemplates not only a total but a partial restraint also. A contract requiring the defendants to sell hides *only* to the plaintiff and to nobody else is a partial restraint on the defendant's exercise of their trade and as such void under that section. 1937 O.W.N. 879=1937 Oudh 445. Where a person enters into a covenant to the effect that "he will not directly or in-

Exception 1.—One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein: Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

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¹ Exceptions 2 and 3 were repealed by S. 73 and Sch. II of Act IX of 1932.

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directly engage in any other sardine business whatever in the Dominion of Canada," it cannot be said that a shareholder in a company carrying on such business or being a partner therein is necessarily a breach of the covenant. The phrase "directly or indirectly" is not void for uncertainty. It is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. In cases where the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him within bounds, which, having regard to the nature of the business, are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy, and is capable of being enforced. This principle is applicable even in the case of an important public company where the covenant is entered into by a managing director holding shares in the company. The same result may well follow in a case where, instead of selling the undertaking, the shares or stock of the company or a large interest therein is being sold, and one or more of the directors or managers of the company, being interested in the sale, are willing, in order to enable the transaction to go through, or to obtain a better price, to enter into restrictive covenants with the purchaser. Where there is a good will to be protected, a covenant in restraint of trade, even when imposed as a condition of employment, may be so framed as to give adequate protection not only to the covenantor himself but also to his successors in the business, although it may be necessary for that purpose to impose a restriction upon the covenantor for the remainder of his life. The onus of establishing that such a covenant is injurious to the public in the sense that it is calculated to produce a pernicious monopoly is upon the party who attacks the covenant. When the Court is satisfied that the restraint is reasonable as between the parties, and that there are no reasonable grounds for holding that the restriction is likely to produce a real monopoly, it is impossible to say that the public interest is affected. 196 I.C. 871 = 53 L.W. 266 = 1941 P.C. 75 (P. C.). Where the two branches of the profession, viz., barristers and solicitors, are amalgamated in a place, an agreement by a barrister not to practise for a reasonable time is

valid and its breach can be restrained by an injunction. 19 I.C. 822 = 17 C.W.N. 215 (P.C.). The right of free contract cannot be ignored by Courts of law without an express statutory prohibition. 34 I.C. 441. See also 130 I.C. 482 = 1931 A. 539. An agreement between the neighbouring landowners that market for sale of cattle shall not be held on the same day on the lands of both is not void under S. 27. 37 A. 212 = 27 I.C. 871 = 13 A.L.J. 281.

CONTRACT IN RESTRAINT OF TRADE—TEST OF VALIDITY—ONUS.—A contract which is in restraint of trade cannot be enforced unless (a) it is reasonable as between the parties; (b) it is consistent with the interests of the public. When a covenant in restraint of trade is called in question the burden of justifying it is laid on the party seeking to uphold it. 150 I.C. 232 = 1934 P.C. 101 = 66 M.L.J. 510 (P.C.).

AGREEMENT BETWEEN TRADERS FOR MUTUAL BENEFIT.—Two owners of factories entered into a partnership to avoid competition. It was mutually agreed that only one factory, namely, that of the defendant should be worked at first and that after deducting the cost of making, the balance should be distributed between the parties in certain proportions. It was also provided that, if there was a larger demand, the second factory should also be worked by mutual agreement. One of the parties having instituted a suit for account. *Held*, that the agreement satisfied the definition of partnership and *held*, that it was not void under S. 27 of the Contract Act as being in restraint of trade. 146 I.C. 1030 = 1934 L. 110.

PURCHASE OF PROTECTION AGAINST MERE COMPETITION—LEGALITY OF.—Covenants restrictive of competition are sustained when they are ancillary to some main transaction, contract or arrangement and necessary to render it effective. But a bare covenant not to compete cannot be upheld. Where the agreement between the parties was, in substance, nothing more or less than a contract whereby in consideration of a sum of money the appellants undertook for a period of fifteen years not to engage in the business of brewing beer and to confine themselves solely to the business of brewing sake. *Held*, that the agreement was open to the objection that it constituted a purchase of protection "against mere competition"; further, the restrictions on manufacture not being confined to any particular place, the covenants could not be held to be reasonable. [(1919) A.C. 548, Ref.] 1934 P.C. 101 = 66 M.L.J. 510 (P.C.).

28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Agreements in restraint of legal proceedings void.

NOTES.

EXCEPTION (1).—Good will, what is—Restraint of trade, what amounts to. 39 I.C. 177=21 C.W.N. 979. A contract by a theatrical party with the plaintiff not to play anywhere else or in any other theatre in any town till the termination of the period in question, is void as being one in restraint of trade and no injunction can be issued against the company restraining performance in any other place. 14 I.C. 215=16 C.W.N. 534. Where one of two rival cooly-suppliers agreed not to supply coolies in consideration of the latter paying Rs. 50 monthly to the former, the agreement was void as being in restraint of trade. 21 I.C. 768=1914 M.W.N. 108; 70 I.C. 881=1 Bur.L.J. 72; 33 I.C. 238. Where a claim is found on tort, Ss. 23 and 27 do not apply. A combination amongst the traders of a particular locality to do business only amongst their members to pay part of the profits to a common fund, etc., and levying of certain penalty for the breach of the conditions does not offend against the provisions of Ss. 23 and 27 and is not actionable *per se* merely because it brings profits to them and indirectly hurts a rival in trade. 1931 A. 83=53 A. 316=1931 A.L.J. 84.

CONTRACT OF PERSONAL SERVICE.—Provision against service elsewhere valid. 64 I.C. 794=11 L.B.R. 26. The agreement of a plaintiff not to set up a business in consideration of which the defendant promised to pay a certain sum for life was held to be void as in restraint of trade. 33 I.C. 238=8 L.B.R. 389.

Sec. 28.—Agreements ousting jurisdiction of Courts are not valid. 1 A. 267. See also 1935 Nag. 48. No man can exclude himself from the protection of Courts by a contract entered into with another. 42 B. 380=22 C.W.N. 601=35 M.L.J. 262=45 I.A. 61 (P.C.). See also 1935 N. 48. Compromise of doubtful rights arising out of a previous contract is valid. 94 I.C. 371=1926 S. 202. Contract for purchasing and sending goods from one place to another—Clause treating all legal disputes as having arisen at one place only—Not an agreement in restraint of legal proceedings. 49 M.L.J. 189=90 I.C. 1019=1925 M. 1145. Clause cutting down period of limitation for suit is enforceable. 27 C.W.N. 955=1924 C. 186; 16 I.C. 1001=14 Bom.L.R. 741; 38 B. 344=15 Bom.L.R. 948; 11 R. 475=1934 R. 15. But see 11 I.C. 756; 32 I.C. 937. See also 91 I.C. 622=1926 R. 3; 138 I.C. 793=34 Bom.L.R. 634=1932 B. 330; 1931 S. 124; 1931 A. 273. Agreement to refer to arbitration before going to Court may be given effect to by stay of proceedings in Civil Court. See 34 B. 13; see also 1937 A.

L.J. 823=1937 All. 650; 120 I.C. 826; 156 I.C. 277=37 Bom.L.R. 157=1935 B. 198. (Agreement to select one of two competent tribunals for disposal of disputes is valid). But an agreement referring a criminal matter with a view to stifle prosecution. 37 C.W.N. 749=1933 C. 817. Where a dispute arose between a contractor and a Railway Company over rates charged by the former for the construction work done by him and the contractor's claim was disposed of by the Chief Engineer of the Railway, who was also the person whose decision on disputed claims was agreed to by the parties as final, the Court, before it can be called upon to hold any expression of opinion by such an Engineer as final and conclusive between the parties, must at least be satisfied that the person was conscious of the fact that he was called upon to exercise that power, and was exercising that power with the sense of responsibility and judicial independence required for the purpose. 1935 M. 356=41 L.W. 130. See also 1933 S. 347; 139 I.C. 362=1932 O. 265. An agreement with the Secretary of State by which the plaintiff undertook to abide by the decision of the Deputy Commissioner in all matters relating to the contract is valid; the Deputy Commissioner is not the agent of the Government and it cannot be regarded as a reference to a party to the contract. 139 I.C. 362=9 O.W.N. 563=1932 O. 265. Where in spite of the fact, that, under the ordinary provisions of law, a particular Court would have jurisdiction, the parties provide by their agreement that another Court to the exclusion of the former Court shall have jurisdiction to adjudicate upon the disputes arising under the agreement of the parties, such an agreement is illegal. But, if such an agreement specifies the place where the terms of the contract have to be carried out, in other words where, according to the facts stated in the agreement, the cause of action is deemed to arise, the agreement is legal. 122 I.C. 488 (2)=1930 L. 611. See also 32 Bom.L.R. 43. But see 11 C. 282. Where two Courts have jurisdiction to try a case, there is nothing contrary to public policy in an agreement between parties that disputes between them should be tried at one place rather than at another. It is not unnatural that a big company which has agents all over the country should enter into agreements with its agents that disputes should be tried in a place where it has its head office, and if the agents agree that disputes should be tried by one out of two competent tribunals, they should be held to this agreement. Nor does S. 28, Contract Act, prohibit an agreement which restricts a litigant to one Court out of two. 20 N.L.J.

Exception 1.—This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

¹[When such a contract has been made, a suit may be brought for its specific performance, and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.]

Exception 2.—Nor shall this section render illegal any contract in writing,

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¹ The second clause of *Exception 1* to S. 28 is repealed by Act I of 1877, throughout British India. The clause is, however, printed here in italics, because the Contract Act is in force in certain Scheduled Districts to which the Specific Relief Act does not apply.

NOTES.

247=1937 Nag. 334. An agreement that the parties to an arbitration will not raise any objections whatever to the award is opposed to the spirit of S. 28. 117 P.R. 1916=34 I.C. 192; 32 Bom.L.R. 43. See also 6 M. 368. Agreement to be bound by award beyond the scope of the dispute, whether on a private reference or one made through the Court in a pending suit would be void. 102 I.C. 183 (11 S.L.R. 43; 13 S.L.R. 75, Foll.; 1925 P.C. 293, Rel. on). A barrister-at-law practising as an advocate in the High Court is not disentitled to sue his client for recovery of fees due. 1933 A.L.J. 451 (F.B.) (25 A. 509, overruled). 55 A. 570=143 I.C. 727=1933 A. 417. Agreement not to appeal, when valid. See 8 C. 455; 1 A. 267; 6 M. 368; 6 B. 528; 33 C. 1169; 1 C. 466. An agreement not to appeal against a decree is not void and is not prohibited by S. 28. Where in a suit by the lessor for ejectment and recovery of rent and cess the lessor obtained a decree for the latter relief while ejectment of the lessee was refused and both the lessor and the lessee subsequently drew up an agreement by which the lessee accepted the decree and paid the decretal amount. Held, that as the parties had agreed to treat the decision as final it must also be held that they had agreed by implication that neither party should prefer an appeal against that decision and the decree being partly in favour of both, each party gave up something in favour of the other under the agreement which was therefore valid for consideration. 1934 P. 644. Restraint on execution of decree is void. 44 M. 919=41 M.L.J. 316=69 I.C. 337 (F. B.). But see 7 A. 124. Clause in bill of lading providing suits for loss to be brought within one year valid. 34 Bom.L.R. 634=1932 B. 330. Also 133 I.C. 77=1931 S. 124. But see also 54 A. 573 (F.B.). So also condition

in a maintenance deed restraining suit for more than one year's arrears at a time is valid. 36 C. W. N. 555=1932 C. 720. A condition in a Life Insurance Policy that no suit shall be brought on the policy after one year from the death of the assured, if void. See 11 I.C. 756=4 Bur.L.T. 173; 38 B. 344=21 I.C. 694=15 Bom.L.R. 948; 91 I.C. 622=1926 R. 3. But see also 14 Bom.L.R. 741; 38 B. 353; 3 R. 383. No one can contract himself out of the statute of limitation and consequently where the result of a compromise is that the limitation provided by law is extended it is open to the judgment-debtor to plead that the decree-holder's application was barred by limitation. 54 A. 573=1932 A. 273 (F.B.).

EXCEPTION 1.—See 1929 S. 55; 1932 O. 265; 1937 A.L.J. 823=1937 All. 650. Agreement to select one of two competent tribunals for disposal of disputes. The parties to a contract one of whom resided in Bombay and the other in Jalgaon agreed between themselves that if any dispute arose between them in respect of their business under the contract, the same should be referred to the Bombay High Court or such Courts in the Town and Island of Bombay as had jurisdiction in the matter. The contract having been broken, a suit for damages was filed in the sub-Court at Jalgaon. The defendant objected and pleaded that under the agreement the suit could only be tried in Bombay. Held, that the agreement was not void under S. 28, Contract Act, but perfectly valid and consequently the suit could be tried only in Bombay. 37 Bom.L.R. 157. If either of the parties to a cause desires to substitute another mode for the trial of the suit than the one provided for in the Code, and if in pursuance of it an offer is made by one party and accepted by the other, with knowledge and consent of the Court, that is a binding contract between the parties, and they cannot be permitted to withdraw or resile from it, unless it is alleged and proved that there has been fraud or collusion or non-performance of the act by which decision of the Court was agreed to be arrived at. 10 Mys.L.J. 269 (47 A. 456, Ref. to).

EXCEPTION 2.—An agreement that award will not be opposed or objected to is void

Saving of contract to refer questions that have already arisen.

by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Agreements void for uncertainty.

29. Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Illustrations.

(a) *A* agrees to sell to *B* "a hundred tons of oil." There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) *A* agrees to sell to *B* one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) *A*, who is a dealer in cocoanut-oil only, agrees to sell to *B* "one hundred tons of oil." The nature of *A*'s trade affords an indication of the meaning of the words, and *A* has entered into a contract for the sale of one hundred tons of cocoanut-oil.

(d) *A* agrees to sell to *B* "all the grain in my granary at Ramnagar." There is no uncertainty here to make the agreement void.

(e) *A* agrees to sell to *B* "one thousand maunds of rice at a price to be fixed by *C*". As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) *A* agrees to sell to *B* "my white horse for rupees five hundred or rupees one thousand." There is nothing to show which of the two prices was to be given. The agreement is void.

30. Agreements by way of wager are void ; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Agreements by way of wager void.

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being a contract not to enforce rights conferred by the Arbitration Act in respect of the contract to refer. 42 I.C. 706=11 S. L.R. 43.

Sec. 29.—A contract is not indefinite by reason of the omission to fix maximum limit of purchase, and the Court will reject the dishonest claim for damages on the alleged failure to comply with large and unreasonable orders. Where there is a continuing contract to supply goods as orders are received, the obligor can withdraw from the transaction before any particular order is received after giving notice to the other party. 34 I.C. 520=18 Bom.L.R. 217. See also 1937 M.W.N. 760. Terms for renewal of lease—Vague and uncertain—Inoperative in law. 33 I.C. 448=20 C.W.N. 948; 1 Pat.L.J. 238=34 I.C. 482. See also 25 N.L.R. 131=1929 N. 194. A covenant of partnership giving one party the right of specifying the share of profits to be assigned to the other and affording not the slightest indication as to the proportion of losses which one party is to bear in the partnership is void for uncertainty. 31 I.C. 632=185 P.W.R. 1915. An instrument is not void if it is capable of being made certain. 305 P.L.R. 1913=20 I.C. 812. Letter to creditor holding oneself liable to sums to be advanced to another is not void for uncertainty simply because no limit is mentioned as to time or amount. 1937 M. W.N. 760. A contract to execute a deed (*kobala*) "containing the necessary stipulations" is not void for uncertainty. 105 I.C. 527=1927 C. 889. Such a contract only means that the deed should contain the stipulations for sale implied by law and enu-

merated in the Transfer of Property Act. 1927 C. 889. An agreement to pay rent in cash without the rate being definitely fixed, is void for uncertainty. 55 I.C. 78=1920 M.W.N. 15. Agreement to pay something for collection of old debts without specifying amount—Whether enforceable. 31 I.C. 783=29 M.L.J. 749. Where a document is capable of two contrary interpretations or practically incapable of interpretation at all, and therefore it is not possible for the Court to allow the document to be enforced, it is void for uncertainty. 63 I.C. 48=4 N.L.J. 67. A personal covenant to convey land which is too vague and indefinite in its nature is invalid and inoperative in law. 1 Pat.L.J. 238=34 I.C. 482. For other illustrative cases, see 22 M. 96; 11 M. 206; 5 C. 175; 31 C. 667.

Sec. 30.—Section applies only to prevent a case based on contract. See 1928 M. 434 and cases referred to therein. "Wager" means what is indicated by the words "gaming and wagering" in English law. 29 C. 461 (P.C.). The essence of gaming and wagering consists in the agreement that one party is to win and the other party is to lose upon a future event, which at the time of the agreement is of an uncertain nature, that is, that if the future event turns out one way the plaintiff is to win, and if it turns out the other way he is to lose. In order to constitute a wagering contract, neither party should intend to perform the contract itself, but only to pay the differences. The common intention of both parties at the time of entering into the contract must be not call for or give delivery from or to each other. But mere speculation is quite different from wager and there

This section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

Exception in favour of certain prizes for horse-racing.

Section 294-A of the Indian Penal Code not affected.

Nothing in this section shall be deemed to legalize any transaction connected with horse-racing to which the provisions of section 294 of the Indian Penal Code apply.

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is no law against speculation as there is against gambling or wager. Speculative transactions have therefore to be carefully distinguished from agreements by way of wager. 39 Bom.L.R. 1083. To make a contract a wagering contract, there must be, from the outset, a common intention of the parties to the contract to make and accept no delivery and to deal only in differences. A subsequent agreement to the effect that buyer has no longer right to demand delivery and the seller is no longer obliged to give delivery does not make the contract a wagering one. 26 N.L.R. 125=1930 N. 111. See also 60 C. 856=1933 C. 759; 27 A.L.J. 1140=1929 A. 890=51 A. 1027; 1929 R. 241; 1940 A.L.J. 48=1940 All. 182; (1940) 2 M.L.J. 997; 1929 A. 134=1929 A.L.J. 262; 7 R. 200; 138 I.C. 543=1932 L. 273; 39 Bom.L.R. 1083; 13 L. 766=1932 L. 356; 1934 L. 85 (*Nazarana* contracts, being in the nature of *Tejmandi* transactions are wagering contracts). See also 1936 L. 215. 'Mandi' contracts cannot be held to be wagers merely on their apparent nature and characteristic, without proof of the facts that the common intention of the contracting parties at the time of entering into the particular contract in question was to deal only in differences and in no circumstances to call for, or give, delivery. 1938 Lah. 825. Whether a contract is a wagering one depends upon the intention of the parties at the time when the contract is entered into. The mere fact that contracts are highly speculative is insufficient to render them void as wagering contracts. 124 I.C. 453. As to the meaning of the word, see also 9 B. 358; 7 Bom. L.R. 154; 94 I.C. 371=1926 S. 202; 51 A. 1027=1929 A. 890. Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential. Even if one party to a contract were a speculator who never intended to give delivery, and that fact was known to the other party, yet in the absence of any bargain or understanding, express or implied, that the goods were not to be delivered, that would not convert a contract, otherwise innocent, into a wager; nor would the mere fact that as to the greater part of the goods there was no delivery but an adjustment of claims, vitiate the transaction. 1938 Lah. 781. The distinction between contracts which are

legitimate and genuine trading transactions of a speculative character and contracts which are simply gaming and wagering transactions is frequently a narrow one and difficult of determination even after the examination of the parties concerned, the course of the business and the nature of the contracts. It certainly is not a question which can safely be left to the decision of a local Commissioner. 58 I.A. 173=1931 P.C. 136=61 M.L.J. 665 (P.C.).

WAGERING CONTRACTS AND SPECULATION—
DIFFERENCE BETWEEN.—There is nothing illegal in speculating. It is a common place of the Stock Exchange. This method of doing business is by no means confined to stocks and shares, but is of every day occurrence in almost all commodities. As far as the distinction between speculation and gaming is concerned, it makes but little difference whether the commodities are actually paid for, and held with a view of selling again at a profit, or whether the matter is arranged by a re-sale before the time for delivery. Such dealings are perfectly legitimate. Gaming and wagering contracts, on the other hand, are not real dealings at all; they may take the form of purchases and sales, but they are, in fact, mere bets on the market price on commodities at a future date. For a contract to be gaming and wagering contract there must not only be no intention on the part of either party to deliver, or take delivery of the commodities, but also no obligation on either to do so; there must be an agreement or understanding that all that the buyer has to do is to receive from, or pay to, the seller the difference between the price of the bargain and the price at some future date. The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature. Thus the difference between the two is to be found in seeing whether the transaction in question is a real transaction or whether it is merely a peg to hang a bet upon. Whether it is a real transaction depends upon whether in law the parties could be compelled to carry out the contract of sale. And it is often necessary to look behind the contracts for its proper understanding, but in so doing, one must always bear in mind the fact that there is nothing wrong in different contracts so long as the parties are not absolved in any event from delivering the commodity or

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paying if the other party calls for delivery or payment. 1937 Nag. 345. *See also* 58 I.A. 173=53 A. 190; 1927 B. 125; 1924 O. 186.

FORWARD CONTRACTS, for the purchase and sale of goods are recognised forms of commercial transaction. They may be perfectly legitimate and genuine transactions though of a speculative character, or simply gambling or wagering contracts. To be a wagering contract there must be a bargain for differences. It would be still regarded a wagering contract and so void, even if a party thereto had an option under the terms of the contract to demand delivery. Where a contract on the face of it appears to be a contract for the sale of goods for a price, extrinsic evidence may establish that there was a common intention to wager, that is, the intention of both the parties to the contract was that the title to the goods would not pass (*i.e.*) there is to be no delivery, but the intention was only to take differences according to the rise and fall of the market on the date of delivery, mentioned in the contract. If such an intention is established, the contract is a wagering one and so void. If such an intention on the part of one of the contracting parties is established and it is further established that the other party, though intending a trading transaction, was aware of the other's intention at the time of the formation of the questioned contract, possibly it would be regarded as a wagering contract. The common intention to wager can be established either by direct evidence or from surrounding circumstances. But when it is found that all or a substantial part of goods were actually taken delivery of, such a forward contract must necessarily be taken to represent a genuine commercial transaction, as the fact of delivery destroys the inference of a common intention to wager. 45 C.W.N. 478=1941 Cal. 341. As to forward contracts, *see also* 39 Bom. 1=16 Bom.L.R. 213. Wagering contract—Suit upon—Defendant admitting liability—Court can yet dismiss suit all the same. 30 P.L.R. 596=120 I.C. 429 (1). Speculation does not necessarily involve a contract by way of wager. To constitute such a contract, a common intention to wager is essential. 42 B. 373=34 M.L.J. 305=45 I.A. 29 (P.C.); 4 Bur.L.J. 131=1925 R. 284; 64 I.C. 809=34 C.L.J. 533. As to ascertaining intention of parties with reference to surrounding circumstances, and the admissibility of oral evidence, *see* 39 Bom.L.R. 1083=1938 Bom. 44. The transaction must wholly depend upon the risk in contemplation. 9 B. 358. If one of the parties has the event in his hands it is not wager. 9 B. 358. Betting transaction—Legality of. *See* 52 C. 677=1925 C. 1037. Joint betting at horse race by two persons—Receipt of winnings by one—Suit by other for recovery of share of winnings not barred as wager. 163 I.C. 251=43 L.W. 514=1936 M. 486=70

M.L.J. 433. When there is a perfectly lawful contest in a game of skill between two persons the prize for success in that contest should be recoverable if it is subscribed by outside persons but not recoverable if it was subscribed for by the competitors themselves. 133 I.C. 254=33 B.L.R. 260=1931 B. 264. Chit fund whether and when amounts to lottery. *See* conflict of rulings in 48 M. 661=90 I.C. 420=1925 M. 870; 1925 M. 281=47 M.L.J. 876; 49 M. L.J. 791=92 I.C. 968=1926 M. 168; 50 M. 696=1927 M. 583=52 M.L.J. 687 (F.B.). Even in the case of wagering contracts, S. 30 does not prevent a person who is employed as agent in connection with the same, from recovering sums due to him by his principal. 73 I.C. 477=45 A. 503=1923 A. 585. The question whether the contract between the parties is of a wagering nature is really a question of fact, that is to say, the party disputing that he was liable under the contracts would have to show that at the time the contracts were entered into, the parties did not intend to carry on the contracts but agreed to abide by the prices at the due dates, when difference would be received. 25 Bom.L.R. 520=1923 B. 458; 36 A. 426=12 A.L.J. 817; 43 A. 585=19 A.L.J. 522; 21 A.L.J. 153=1923 A. 273. There must be proof that the contract was entered into upon the terms that the performance of the contract should not be demanded, but that differences only should become payable. It is not enough that the parties contemplated that delivery would not be likely to be demanded. 47 C.L.J. 144=1928 P.C. 30=54 M.L.J. 130 (P.C.). In order to determine whether a contract is a wagering contract, the Court will not only look at the terms of the written contract, but also probe among the surrounding circumstance to find out the true intention of the parties. These surrounding circumstances could only be proved by evidence outside the written contract. Courts will have to look behind the form of the contract to the real intention of the parties, which may be gathered from the oral evidence and actual transactions between them. 161 I.C. 713=1936 L. 215. Common intention of both parties neither to give nor receive delivery but merely to pay or receive differences must be proved. Such common intention can be inferred from the surrounding circumstances. 37 B. 347=14 Bom.L.R. 807. *See also* 138 I.C. 542=1932 L. 273; 7 L. 442=94 I.C. 304=1926 L. 318; 23 L.W. 105=93 I.C. 169=1926 M. 326; I.L.R. (1940) 2 Cal. 385. If a wagering contract is entered into directly between two persons and no relationship of principal and agent existed between them, the fact that it is by way of wager would disentitle one to recover any losses in respect of the contract. But if the contracts were entered into by one not directly with another, but through that person's agency, then that person would be entitled to recover the losses on those con-

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tracts provided he proves that either he paid those losses to the persons with whom those contracts were entered into or incurred a pecuniary liability to make good those losses and that liability is still enforceable against him. 1940 A. 95=1939 A.L.J. 1073. See also 1932 Lah. 356; 1922 Lah. 408. A Court should scrutinize the evidence of the defendant when he accepts payments when the dealings are successful but pleads wagering contract when the transaction ends in loss. 64 I.C. 809=33 C.L.J. 533. Contract to pay difference when a wagering contract. 20 I.C. 882=15 Bom.L.R. 750; 38 B. 204=15 Bom.L.R. 716; 19 I.C. 29=15 Bom.L.R. 85; 37 B. 347=14 Bom.L.R. 807; 25 I.C. 747; 64 I.C. 809=33 C.L.J. 533; 37 B. 264=14 Bom.L.R. 617; 45 M.L.J. 716=76 I.C. 893=1924 M. 378. Oral evidence if admissible to prove that transaction is wager. See 17 M. 480; 24 B. 227. Burden of proof, as to whether transaction is wager or not, see 9 B. 355; 23 A. 165; 24 Bom.L.R. 115=1922 B. 81. Defence of wager—*Onus* on defendant to prove that both parties agreed neither to ask for nor to give delivery—*Tejimandi* transactions. 65 I.C. 682=24 Bom.L.R. 60. *Tejimandi* contracts when void as a wager. 24 Bom.L.R. 812=1922 B. 408; 138 I.C. 241=1932 L. 356. The transactions known as *tejimandi*, *teji* and *mandi* explained and discussed. 65 I.C. 682=24 Bom.L.R. 60. See also 24 I.C. 441=7 Bur.L.T. 54; 51 B. 1=44 C.L.J. 509=26 L.W. 844 (P.C.); 11 L.L.J. 522. *Pakka adatia* contracts when wagering contracts. 57 I.C. 129=22 Bom.L.R. 406. See also 39 B. 1=16 Bom.L.R. 203; 105 I.C. 739=1927 A. 617; 1940 A.L.J. 48=1940 All. 182; 29 Bom.L.R. 147=100 I.C. 993=1927 B. 125. Contract of *Cutch* *adatia* agency is not a wagering one. 98 I.C. 338=1926 P.C. 119=51 M.L.J. 809 (P.C.). Re-sale before completion of first transaction—Transaction, if amounts to wagering contract. 14 R. 347=1936 R. 319. An agreement by way of wager though sanctioned by Government is void. 42 B. 676=19 Bom.L.R. 697. The effect of the sanction of the Government of the lottery is that no prosecution would lie in respect thereof but that sanction did not affect the Civil Law on the subject of lotteries, as the Government had no power to overrule an Act of the legislature by correspondence. 42 B. 676=19 Bom.L.R. 697. No injunction could be granted in support of a void contract. 42 B. 676. Forward contracts—No passing of goods—Dealing in difference in prices alone—*Pakka adatia*—If enforceable. 39 B. 1=16 Bom. L. R. 213. See also 85 I.C. 177=1925 B. 115; 27 Bom.L.R. 941=49 B. 689; 85 I.C. 613=1925 B. 79; 1927 B. 125; 41 Bom.L.R. 308=1939 Bom. 225; 1937 Lah. 581; 43 Bom.L.R. 269=1941 Bom. 211=I.L.R. (1941) Bom. 441; I.L.R. (1940) All. 136=1940 A.L.J. 48=1940 All. 182. Insur-

ance on the life of another when wager. 28 B. 616; 30 B. 83. See also 37 C. 342. In transactions where a broker intervenes, especially in stock exchange transactions, it is extremely difficult to prove that the two parties to the contract, namely, the buyer and the seller, have got any agreement that the transaction in question is in the nature of a gamble. It is essential that in these transactions in order to make a gamble there should be two; that one side is attempting to gamble and the other side is not, is not enough. The common intention of both parties at the time of entering into the contract must be not to call for or give delivery from or to each other. Such intention is a question of fact. (1940) 2 M.L.J. 997. See also 1941 Cal. 125. Where an agent enters into a wagering contract he cannot claim to be indemnified by the principal for losses incurred thereby. In the case of a commission agent the *onus* is on him to show that he entered into the contract as agent and not principal. 67 I.C. 959=1922 L. 408; 138 I.C. 241=1932 L. 356. See also 156 I.C. 539=1935 L. 761; 1940 All. 95; 39 Bom.L.R. 1083. There can be no doubt that where a broker acts on behalf of his customer and the customer gambles, the customer cannot set up a plea of gaming and wagering against the broker's claim. Where the plaintiff acting as a broker on behalf of the defendant entered into contracts for the sale and purchase of jute, and the defendant never intended to give or take delivery and was simply gambling in differences but the plaintiff was not a party to those gambling transactions. Held, that the defendant could not set up a plea of gaming and wagering against the plaintiff's claim for brokerage. I.L.R. (1940) 2 Cal. 385=1941 Cal. 125. See also (1940) 2 M.L.J. 997. *Kuri* as such in Malabar is not wagering contract. 37 M.L.J. 209=52 I.C. 989. Chit-fund is lottery—Provision for payment of prize by lot to some of the subscribers and for payment of actual sums subscribed to others—Legality—Suit by non-winner for subscriptions paid—Maintainability. See 59 M. 562=1936 M. 225=70 M.L.J. 36 (F.B.). Agent appointed to carry on wagering contracts with other persons—Contract between principal and agent is not necessarily wagering. 50 A. 115=103 I.C. 218=25 A.L.J. 736 (1926 P. C. 119, Foll.; 1926 A. 238, Ref.) See also 138 I.C. 241=1932 L. 356; 1928 L. 420; 79 P. R. 1908; 49 A. 438=25 A.L.J. 223=1927 A. 238; 49 A. 926=102 I.C. 605=25 A.L.J. 693. Money paid as security for performance of wagering contract—Suit for recovery, if maintainable. 34 M.L.J. 561=44 I.C. 319=7 L.W. 518. The essence of gaming and wagering is that one party is to win and the other to lose on a future event which at the time of the contract, is of an uncertain nature. 19 N.L.R. 21=1923 N. 291. See also 69 I.C. 769=1922 P. 220. The sale of growing crop for cash

CHAPTER III.

OF CONTINGENT CONTRACTS.

"Contingent contract" defined.

31. A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

Illustration.

A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.

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is not gaming or wagering though the consideration is to be paid in kind out of the proceeds of the harvest. 19 N.L.R. 21=1923 N. 291. S. 30 does not affect agreements or transactions collateral to wagers. 69 I.C. 186=1923 N. 48; 38 I.C. 566=9 Bur.L.T. 228. Wagering contract and speculative contract—Distinction between. 73 I.C. 309=1924 O. 186; 53 A. 190=58 I.A. 173=1931 P.C. 136=61 M.L.J. 665 (P.C.); 29 Bom.L.R. 147=100 I.C. 993=1927 B. 125. A suit to recover money by the defendant as agent for plaintiff on account of plaintiff's winnings in a lottery is not prohibited by S. 30. 51 I.C. 530=12 Bur.L.T. 9; 38 I.C. 566=9 Bur.L.T. 228. Wager—Sweepstake—Ticket obtained by member for outsider—Prize money won by—Suit by third party for declaration of right to prize money on the ground that the ticket was obtained for him and with his money—Not barred—Principal and agent. 63 C. 1234=1937 C. 297. Lottery is a game of chance. See 19 Bom.L.R. 697; 42 B. 676. Money paid under an illegal contract may be recovered before the contract is carried out but not afterwards. 46 I.C. 755. Money deposited with a stakeholder to abide the result of a race may be recovered if demanded before payment over to the winner. 3 R. 543=93 I.C. 105=1926 R. 48.

BURDEN OF PROOF.—Where a plea of wager is set up in defence the *onus* of proof is on defendant. The question of common intention is one of fact in every case. 66 I.C. 489=15 S.L.R. 193; 70 I.C. 864=15 S.L.R. 5; 60 I.C. 944=14 S.L.R. 227. The burden is incumbent on a party to prove that the contracts are otherwise than what they profess to be. The burden is on him who alleges turpitude. The Court must look to the surrounding circumstances and see if a common intention to wager is established. If the contract never intended actual transfer of goods but only to pay or receive money between one another according to market price there is wager. Speculative contracts are not necessarily wagering agreements. 151 I.C. 63=1934 N. 129. See also 39 Bom.L.R. 1083. Where both parties are members of stock exchange *onus* of proving transaction to be wager is on defendant. 85 I.C. 410=1925 M. 330. A claim for recovery of loss in consequence of a contract of the nature of a wager is not legally enforceable and if such contract be by one person with another, who is partner

of a firm and the contract is as between principal and principal, the person is not entitled to be recouped for his loss, by suit against the other partners of the firm. 1930 A. 525.

ALLOTMENT OF PRICES TO SUBSCRIBERS—BENEFIT TO EVERY SUBSCRIBER—VALIDITY OF TRANSACTION.—Where a gramophone dealer got a list of persons who were to subscribe one Rupee each every week and at the end of the week prizes were to be drawn and one of them was to get a gramophone and go out of the transaction and it was arranged that the subscription should go on increasing till the 20th week when all the non-prize winners were to get a gramophone each, and some of the subscribers having defaulted in paying subscriptions the dealer sued to recover the same. It was *held*, that the transaction did not offend against S. 294-A, I. P. Code or S. 30 of the Contract Act and the plaintiff was entitled to recover. 149 I.C. 489=1934 M. 136=66 M.L.J. 76.

Secs. 30 and 31: WAGERING CONTRACT AND CONTINGENT OR CONDITIONAL CONTRACT—DISTINCTION.—Plaintiff and defendant were co-defendants in a prior suit and plaintiff had in his possession certain documents which were of real value in defending the said suit. Plaintiff was persuaded to hand over the documents to the defendant to enable him and the other defendants in that suit to prepare their defence, and an agreement was entered into under which plaintiff was to hand over the documents to the defendant. Defendant in return promised to pay the plaintiff Rs. 750 if the suit ended in a compromise and Rs. 3,000, if he was successful in the suit. The suit having been decided in favour of the defendant, plaintiff sued the defendant for recovery of Rs. 3,000 and interest, basing his claim on the agreement. The defendant pleaded that the agreement was by way of wager and was consequently invalid and unenforceable under S. 30. *Held*, that the contract was not void as a wagering contract under S. 30, but was in the nature of a contingent or conditional contract and was therefore valid and enforceable. 1935 M. 135=41 L. W. 57.

Sec. 31.—See 34 M. 453 (P.C.) (A contract with a condition precedent to acceptance of goods, on examination and approval by a servant or subordinate is good as a contingent contract). On this section, see also 12 C. 152; 23 A.L.J. 608=89 I.C. 438=1925 A. 658.

Enforcement of contracts contingent on an event happening.

32. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible such contracts become void.

Illustrations.

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.

(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

Enforcement of contracts contingent on an event not happening.

33. Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

Illustration.

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

34. If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

Illustration.

A agrees to pay B a sum of money if B marries C.

C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

When contracts become void which are contingent on happening of specified event within fixed time.

35. Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.

Illustrations.

(a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

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Sec. 32.—Contingent contract—Co-sharer in undivided land contracting to sell 800 acres adjoining vendee's land—Promise in sale-deed to get specified land measured out and to hand it over to purchaser as and when the joint owners agree to partition—Purchaser's suit for specific performance not maintainable—No right to compensation. 162 I.C. 639=1936 S. 26.

Secs. 32-34.—A contingent contract is dependent for its performance on a future event and falls through if the future event

on which it was dependent becomes impossible. 34 I.C. 46=12 N.L.R. 69. On this section, see also 23 A.L.J. 608=1925 A. 658.

Sec. 35.—Death of judgment-debtor before date fixed for payment—Surety not discharged. 8 I.C. 985. When the liability of a surety is only to come into being upon the happening of a condition he is not discharged by time having been given where it has expired before his liability arose. 8 Mys. L.J. 240.

36. Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.
- Agreement contingent on impossible events void.

Illustrations.

- (a) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.
- (b) A agrees to pay B 1,000 rupees if B will marry A's daughter, C. C was dead at the time of the agreement. The agreement is void.

CHAPTER IV.

OF THE PERFORMANCE OF CONTRACTS.

Contracts which must be performed.

37. The parties to a contract must either perform, or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.
- Obligation of parties to contracts.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations.

- (a) A promises to deliver goods to B on a certain day on payment of Rs. 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs. 1,000 to A's representatives.
- (b) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

38. Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.
- Effect of refusal to accept offer of performance.

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Sec. 37.—It is clear that there is no obligation laid down by the legislature in S. 37 to make a decree in terms of the contract and of no other terms. The section itself provides for a possible dispensation to the parties to the contract, as appears from the latter part of the section. For example, in cases in which the facts come within the provisions of the Usurious Loans Act, the strict performance is excused. 18 Pat. 13=20 P. L.T. 1=1939 Pat. 55 (F.B.). Where there is a contract to deliver goods in instalments spread over a number of months, the sellers cannot postpone the delivery of the whole until the last month as the buyers have the right to demand delivery in instalments. 42 C. 305=23 C.L.J. 62=20 C.W.N. 240. If a person reaps the benefit of a contract without being party to it he must pay the money due under it. The doctrine that no stranger can enforce a contract though made for his benefit does not universally apply in India. 41 M. 488=34 M.L.J. 193. See also 121 I.C. 337; 141 I.C. 490=1933 L. 178; 138 I.C. 263=1932 L. 566; 131 I.C. 210; 131 I.C. 1011; 131 I.C. 575; 134 I.C. 100; 55 M. 436=62 M. L.J. 533. A tender of performance must satisfy all the requirements of the contract. 46 I.C. 497=11 Bur.L.T. 9. Vendor is not bound to see that purchaser takes delivery within time. Where it is necessary for vendee to take samples before delivery, the vendor is bound to deliver goods some time

before the specified date so as to give him time to satisfy himself. 32 I.C. 720=9 S. L.R. 160. In the absence of evidence of contrary intention of parties, legal representatives can require specific performance of the contract. 49 B. 862=91 I.C. 360=1926 B. 97. A universal legatee is liable for debts of testator to the extent of testator's property in his hands. 157 I.C. 956=1935 O.W. N. 1031. Stock exchange transactions—Stockbroker need not retain for his client specific shares purchased. 47 L.W. 73=1938 P.C. 23 (P.C.).

Sec. 38.—Section applies to an offer which has been accepted as well as to an offer which has been refused. 73 I.C. 682. As to obligation of the other party after breach of contract, see 3 M.L.J. 197. Seller must give buyer opportunity to examine goods. 1927 M. 62. S. 38 only requires a reasonable opportunity to be given to the buyer to examine the goods sold. 42 I.C. 382; 97 I.C. 866 (M.). As to proper place of inspection of goods, see 59 C. 928=1932 C. 879. A valid tender improperly refused stops further interest. 12 I.C. 502=34 M. 320; 34 L.W. 843=55 M. 458=62 M.L.J. 266. In the case of ordinary money claims not based on mortgage, a tender before suit of the amount due must be followed by payment into Court in order to stop the running of interest. 1932 M. 109=55 M. 458=62 M.L.J. 266; (38 M. 959; 16 B. 141; 34 C. 305. Rel.) In the case of mortgages, the rule is

Every such offer must fulfil the following conditions :—

- (1) it must be unconditional :
- (2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do :
- (3) if the offer is an offer to deliver anything to the promisee the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

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different and a tender alone has the effect, under S. 84, T. P. Act, of stopping interest from the date of tender. 1932 M. 109=55 M. 458=62 M.L.J. 266. An assignee of a promise may be able to claim what his transferor could claim, but he would not become a promisee by reason of the assignment so far as the original promisor is concerned. The power of a co-mortgagee for giving a valid discharge of the whole mortgage debt is based largely on a consideration of S. 38, but that section is confined to promisees as defined by the Act and not to the heirs or assignees of a promisee. On a devolution of a mortgagee's interest either on his legal representatives or on his assignees, the latter would be, at least amongst themselves, entitled to recover their own shares and be able to give an acquittance to that extent only and not for the shares of the others. If a co-assignee therefore is found to have realised his own share of the mortgage debt, he cannot be said to have been acting in the capacity of an agent, much less of a constructive trustee, and any receipt by him cannot be considered to be a receipt on behalf of the others. 50 L.W. 183=1939 Mad. 818=(1939) 2 M.L.J. 214. Person pleading tender must always be ready and willing to pay the amount. Plea of tender before suit must be followed by payment into Court after suit. 16 B. 141. See also 39 M. 959. A tender to be valid must be a tender of the whole amount due and not of a part only and there is nothing to prevent this general law as to tenders applying to payments decreed in respect of a mortgage. 26 O.C. 59=1923 O. 241; 130 I.C. 817=1931 N. 91. An offer which a promisor must make to the legal representatives or heirs of a deceased promisee in order to take the benefit of S. 38, should be subject to exactly the same conditions as those which it would have had to fulfil, had it been made to the original promisee. I.L.R. (1938) 2 Cal. 337=42 C.W.N. 1023. The heirs of a single promisee are for the purpose of an unaccepted tender in the same position as joint promisees, that is, a tender to one of them is a valid tender. 43 C.W.N. 423. Tender with condition is not valid. 27 C.W.N. 299=44 M.L.J. 728=1922 P.C. 347; 41 C. 493=40 I.A. 223=26 M.L.J. 25 (P.C.). Tender of a portion of the debt with conditions attached to tender vitiates tender. 25 Bom.L.R. 830=1924 B.

264; 130 I.C. 817=1931 N. 91. A conditional tender of rent demanding a receipt that the tenant paying the rent was a *kaimi raiyat* is not a good tender. 51 I.C. 793. Where a bond recited that if three instalments fall in arrears the whole principal becomes payable, a tender by the debtor of principal only without interest on overdue instalments when the latter is stipulated expressly in the bond, is not a proper tender and interest on overdue instalments is recoverable. 31 I.C. 304. A tender is not valid *pro tanto* if a large sum is in fact due and if the tender is accompanied by a demand for cancellation, and delivery of the mortgage deed. 20 I.C. 184=16 M.L.T. 365. A mere offer by postal letter is not a legal tender. 26 I.C. 121=27 M.L.J. 482. The mere expression by a registered posted letter of a willingness to execute a release deed without having a document ready to be delivered is not valid tender. 38 M. 959=26 M.L.J. 331=23 I.C. 581. Tender of money locked up in a box or of goods enclosed in a case which the other party is not allowed to open is not sufficient tender, and the tender as a plea in an action is incomplete unless accompanied by a tender in Court. 38 M. 959. Contract of sale with condition of repurchase—Actual production of cash only is strict compliance, but conduct of vendee may dispense with strict compliance. 89 I.C. 484=1925 O. 533. On this section, see also 48 M.L.J. 522=90 I.C. 206=1925 M. 888. The section seems to treat each joint promisee as a partner or agent of the other joint promisee to accept tender and payment. So payment to one has the legal effect of payment to all. 36 M. 544=24 M.L.J. 333=19 I.C. 12 (F.B.). The section does not deal with the legal consequences of an accepted tender. 36 M. 544. A valid tender must be an unconditional offer to pay a specific and ascertained sum. An offer to pay the amount found due on a settlement of accounts if the payee undertook to execute an indemnity bond, is not valid tender. 12 I.C. 502=34 M. 320; 35 M. 685=21 M.L.J. 508=10 I.C. 874. An offer made by a promisor through his solicitor to pay a debt with interest due thereon at the date of the offer, does not of itself afford a reasonable opportunity to the promisee of ascertaining that the promisor is able and willing there and then to perform his promise, and does not, therefore, fulfil the conditions laid down by S. 38 of

Illustration.

A contracts to deliver to B at his warehouse, on the first March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of a performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

39. When a party to a contract has refused to perform, or disabled himself

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the Contract Act. I.L.R. (1938) 2 Cal. 337=42 C.W.N. 1023. Where there is an obligation to pay a foreign unit of account, the form in which such payment is to be made must be regulated by the Municipal law of the country whose unit of account is in question. What would or would not be a legal tender or currency must depend upon the law on that subject at the time when the tender should have been made. [(1923) 2 Ch. 466, Rel. on.] 1939 A.C. 145=180 I.C. 985=1939 P.C. 74 (P.C.). The currency in any particular country must be determined by the law of that country and that law is naturally in terms limited to defining what is legal tender in that country. But when that is fixed by the local law, it determines what is the legal tender of that country for purposes of transactions in any other country, so that a foreign Court will, when such questions come before it, give effect to the proper law of legal tender so determined. 172 I.C. 786=1938 P.C. 26 (P.C.). See also 47 L.W. 596=1938 P.C. 136 (P.C.). In a contract of sale physical possession of goods is unnecessary for seller to be held ready to deliver. See 86 I.C. 299=1925 M. 971=49 M.L.J. 300; 1925 M. 1168=49 M.L.J. 530; 90 I.C. 206=1925 M. 888=41 M.L.J. 522; 1925 M.W.N. 592=1925 M. 1290. As to proper place of inspection in case of sale of goods, see 59 C. 928=1932 C. 879. Mortgage—Tender of mortgage amount by purchaser of equity of redemption—Offer to give cheque or cash by cashing cheque—Refusal—Legality. See 29 L.W. 220=56 M.L.J. 255. In the absence of fraud or an intention to defeat the rights of other mortgagees, payment to a single mortgagee discharges the mortgagor. 73 I.C. 682; 44 I.C. 627=(1917) 3 U.B.R. 42. See also 34 M. 320; 48 M. 693=47 M.L.J. 840. But see *contra* 23 I.C. 8; 41 I.C. 921=68 P. R. 1917. Where a shop is owned by several co-owners payment of entire rent to one cannot operate as valid discharge. 168 I.C. 198=1937 A.W.R. 390=1937 A.L.J. 395. Where in respect of a transaction representing a sale with a condition of repurchase, the vendor deposits money in Court within the stipulated time under S. 83 of the T.P. Act proceeding on the footing that the transaction represents a mortgage by way of conditional sale, and the Court serves notices on all the vendees, there is a valid tender of the money by the vendor who is entitled to a reconveyance. 43 C.W.N. 423.

Sec. 39.—English law same as Indian law. 4 C. 252; 104 I.C. 587=1927 O. 265. For a review of English case-law as to repudiation of contract, see 85 I.C. 118=1925 L. 217; 1930 L. 979. Application of section. 1930 A. 506. Section is an enabling one. 9 M. L.T. 479; 29 B. 46; 10 C.W.N. 932. Under

S. 39, there must be a refusal to perform or disablement from performing before a promisee may put an end to the contract; suspicion is not enough and one party cannot insist that one action shall precede another in time merely because he happens to be suspicious. If the plaintiff (buyer) knows and can prove that he will not get immediate possession and if under his contract he is entitled to such immediate possession he may put an end to the contract even before he has completed the purchase by paying the full consideration. 1932 M.W.N. 122. It is not open to a party to repudiate a contract and then change his mind and insist on its performance. 12 Mys.L.J. 81=39 Mys.H.C. R. 263. As to contract for performance of personal service, see 19 M. 18. Performance accepted after time fixed—No right to compensation. 14 I.C. 129. See also 1925 L. 217. Anticipatory breach—Facts amounting to. See 8 L. 301. See also 1938 Rang. 353. Anticipatory breach—Contract kept open—Suit for damages—Plaintiff's conditional willingness to perform not sufficient. 1930 L. 979. Where a person has by his own conduct made it impossible for himself to perform his contract in its entirety within the stipulated time, the other party is legally entitled to put an end to the contract and no question of damages will arise. 134 I.C. 779=32 P.L. R. 593. See also 149 I.C. 304=1934 A. 617; 38 L.W. 533=145 I.C. 476=1933 M. 704; 44 C.W.N. 11. Where as per terms of the contract of affreightment a demand for space is made by the shipper, the fact that the shipper had no goods to ship and was attempting to obtain an advantage due to the rise in freight does not entitle the shipowner to refuse to consider the demand and repudiate the contract though the aforesaid fact can be taken into account when considering the question of damages. 196 I.C. 529=1941 Sind 146.

CONTRACT AND CONVEYANCE.—Distinction. 9 A.L.J. 198=34 A. 273. As to implied repudiation of contract, see 1925 M.W.N. 592=1925 M. 1290. To be relieved from future performance by the conduct of the other, the conduct must amount to a renunciation or absolute refusal to perform the contract, such as would amount to rescission if he had the power to rescind. 28 C.W.N. 104=1924 C. 427; 3 Mys.L.J. 197. See also 2 Luck. 279=1927 O. 12.

SALE OF IMMOVABLE PROPERTY.—Postponement of performance—Rescission by vendor—Damages. 40 M.L.J. 13=61 I.C. 457; 23 L. C. 91=63 P.R. 1914; 29 I.C. 989=19 C.W. N. 933. A purchaser under a contract of sale is entitled to a good and a marketable title. If the title is doubtful, e.g., it requires investigation, the purchaser cannot be compelled to rescind the contract or to accept

Effect of refusal of party to perform promise wholly.

from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance.

Illustrations.

(a) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract.

(b) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her at the rate of 100 rupees for each night. On the sixth night *A* wilfully absents herself. With the assent of *B*, *A* sings on the seventh night. *B* has signified his acquiescence in the continuance of the contract, and cannot now put an end to it but is entitled to compensation for the damage sustained by him through *A*'s failure to sing on the sixth night.

By whom Contracts must be performed.

40. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In

Person by whom promise is to be performed.

NOTES.

without investigation the doubtful title. 52 I.C. 971 (M.) [9 A. 705 (P.C.), Dist.] See also 51 B. 247=29 Bom.L.R. 19=1927 B. 195; 1926 C. 339. Ss. 39 and 64 and justice, equity and good conscience require that a servant who quits his master's service in India before the expiry of the contract period, should be ordinarily paid for the full period he worked under the master deducting the damages caused by the breach. 23 M.L.J. 680=17 I.C. 894. Under S. 39 a party to a contract can put an end to it when the other party to it fails to perform his promise in its entirety. But if he does not choose to do so the contract holds good. 10 I.C. 258=9 M.L.T. 479; 10 I.C. 18; 38 I.C. 877=2 P.L.J. 168. See also 22 M.L.J. 207=10 I.C. 320. Where the seller did not elect to treat the refusal by the buyer to take delivery of one instalment of the goods as a repudiation of the entire contract, the contract is kept alive for the benefit of both parties. The seller remains subject to all his own obligations and liabilities on it and enables the buyer not merely to complete the contract, if so advised, notwithstanding his previous repudiation but also to take advantage of any supervening circumstances, e.g., the failure of the seller to make a tender, to justify his declining to complete it. 56 M. 304=1933 M. 176=64 M.L.J. 199. Where a buyer refuses to take delivery of goods when tendered to him on the ground they were out of time, he cannot afterwards justify the refusal on the ground that the goods offered were not in accordance with the contract and he is liable for damages for his justifiable refusal, because he gave a wrong reason for it. 49 M. 781=93 I.C. 673=1926 M. 778. See also 113 I.C. 747=1929 A. 62. Where agent had suffered losses on contracts made for principal, and the principal failed to indemnify the agent after demand was made, and failed to honour the hundy drawn on him and as the promise to indemnify is an implied term of the contract of

agency, the default of the principal and his conduct afterwards justify a rescission of the contract of agency under S. 39. 31 I.C. 450=9 S.L.R. 77. A mortgagee although he has not paid the amount due on a prior mortgage can sue on his own mortgage in respect of amounts he has paid. 105 I.C. 12=1927 O. 527.

RESCISSION OF CONTRACT.—Notice of insolvency—Sale of goods. 27 I.C. 102=8 S.L.R. 95. The right of rescission arises only when the other party fails to perform the contract in its entirety. 17 I.C. 37=6 S.L.R. 103; 19 I.C. 653=6 S.L.R. 187. See also 2 Luck. 279=1927 O. 12.

SECS. 39 AND 62.—Parties to hand-note agreeing to enter into new contract—Debtor not carrying out in entirety his part of agreement—Right of creditor to sue on hand-note. See 184 I.C. 705.

SECS. 39, 64 AND 65.—Under S. 39 of the Contract Act, a contract which is wrongfully repudiated by one of the parties to it does not thereby become voidable at the option of the other party so as to attract the operation of S. 64 of the Act. If the other party does not act upon the repudiation, the contract is enforceable by both the parties and continues to be so enforceable until the repudiation is acted upon by him. 44 C.W.N. 11. Per *Nasim Ali, J.*—Mere repudiation of a contract by a party is nothing but an offer to rescind. The party not in default must act upon the repudiation so as to accept this offer. Otherwise the contract remains in force and continues to be enforceable by both the parties. Termination of the contract by the promisee is the acceptance of the repudiation. On such acceptance the contract is at an end. At no stage, therefore, the contract is voidable as defined in the Contract Act. In the absence of any clear indication in S. 39, it cannot be held that the legislature intended to include cases under S. 39, within S. 64 of the Contract Act. 44 C.W.N. 11.

other cases, the promisor or his representatives may employ a competent person to perform it.

Illustrations.

(a) *A* promises to pay *B* a sum of money. *A* may perform this promise, either by personally paying the money to *B* or by causing it to be paid to *B* by another; and, if *A* dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) *A* promises to paint a picture for *B*. *A* must perform this promise personally.

Effect of accepting performance from third person.

41. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

42. When two or more persons have made a joint promise, then unless a contrary intention appears by the contract, all such persons, during their joint lives, and after the death of any of them, his representative jointly with the survivor, or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

Devolution of joint liabilities.

43. When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any ¹[one or more] of such joint promisors to perform the whole of the promise.

Any one of joint promisors may be compelled to perform.

LEG. REF.

¹ These words were substituted for the word "one" by S. 2 and Sch. II of Act XII of 1891.

NOTES.

Sec. 41.—S. 41 which provides for the discharge of a contract by the acceptance of performance by a third party, applies only when the contract has in fact been performed. 39 A. 178=32 M.L.J. 244=14 A.L.J. 223 (P.C.); 39 I.C. 43=44 I.A. 60 (P.C.). See also 112 I.C. 491=1928 M. 972; 1933 L. 335=34 P.L.R. 440.

Sec. 42.—ENGLISH LAW, how differs from Indian law, see 6 B. 700. Section accords with mercantile usage. 17 B. 1. *Prima facie* defendants *inter se* are liable for contribution where a joint decree for costs has been passed against them. But the defendants who did not defend the suit or took no interest therein are equitably entitled to exemption. 1929 A. 654=122 I.C. 661.

Sec. 43: SCOPE.—S. 43 takes away the right of a joint-debtor to be sued jointly. 27 I.C. 94=107 P.R. 1914. Right of contribution can only arise when there was admittedly a joint liability which has been discharged by one of the two persons jointly liable. 43 P.W.R. (J. & K.). 149. Under the English Law accord and satisfaction made by one of several parties jointly liable or jointly and severally liable to the same creditor for the same debt discharges the claim of the creditor against all. There is no reason why this principle would not apply to cases of joint and several liability under S. 43. I.L.R. (1941) 2 Cal. 237=45 C.W.N. 830. On this subject, see also 85 I.C. 788=1925 A. 425; 15 Mys.L.J. 292; 89 I.C. 977. As to when payment to a joint mortgagee operates as discharge, see 48 M. 693=47 M.L.J. 840.

APPLICABILITY.—S. 43 applies only where two or more persons have made a joint pro-

mise and not where two or more persons have become jointly interested by inheritance in a contract made by a single person. 119 I.C. 419 (2)=1929 L. 783. See also 1932 M.W.N. 1111; 1934 P. 411 (2)=148 I. C. 434; 48 L.W. 383=(1938) 2 M.L.J. 287. There is nothing in the Contract Act which says that before contribution can be claimed there must be a compulsory payment. S. 43 permits any joint promisor performing the promise to claim contribution. It makes no distinction between voluntary or compulsory performance. 45 C.W.N. 357. It is not necessary that in order to apply the provisions of S. 43 of the Contract Act, the contract must arise out of a negotiable instrument. S. 43 applies to all actions on contract express or implied, enables a creditor to sue one of several joint promisors, without impleading the others and operates to convert a joint contract into a joint and several contract to which O. 1, R. 6, C. P. Code, must apply. 1934 Pesh. 94. Contract by one partner on behalf of partnership—Right of promisee to sue one of the partners. See 30 Punj.L.R. 149. Under S. 43, each joint promisor is entitled to insist upon an equal performance by all the joint promisors of the promise. If the promisee remits the performance of part of the promise in favour of one or some of the joint promisors, such remission cannot destroy the right of the other joint promisors to demand that all the joint promisors should contribute equally to the performance of the remaining portion of the promise. 45 C.W.N. 357. A joint promisor is entitled to claim contribution from the others regarding the costs paid by him to the promisee, when the payment of such costs is part of the joint promise. 45 C.W.N. 357. A joint promisor cannot claim contribution from the others regarding the costs incurred by him in the legal proceedings between him

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Each promisor may compel contribution.

Sharing of loss by default in contribution.

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.—Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

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and the promisee (i.e.), the costs which he has had to pay to his own attorney. There is no joint promise regarding these costs and S. 43, would not apply. 45 C.W.N. 357. Joint promisor is bound to contribute debt kept alive by acknowledgment—Cause of action arises from date of payment—Contribution. 116 I.C. 129=1929 M. 309. Under S. 43 a suit to recover the balance on an account can be maintained against some of the partners because their liability is joint and several. 53 B. 652=31 Bom.L.R. 1187. See also (1938) 2 M.L.J. 287.

EFFECT OF SECTION is to make liability of each of the co-promisors, joint and several. 33 M. 317; 17 B. 6. See also 1932 M.W.N. 1111. Decree for whole rent can be passed against one of several tenants. 8 Pat.L.T. 201=1927 P. 2=97 I.C. 373. See also 17 Pat. 662=20 Pat.L.T. 282=1939 P.W.N. 141; 17 Mys.L.J. 257. But in execution of the decree, the right, title and interest of the judgment-debtors only can be sold. 5 P. 233=94 I.C. 28=1926 P. 504. A judgment with two joint debtors is not a bar to an action out satisfaction recovered against one of against the other, where the debt is joint and several. 147 I.C. 702 (2)=1934 P. 52 (2). Contract by one partner on behalf of the partnership—Promisee can sue any one of the partners for performance of the whole promise. 104 I.C. 700. One of two joint promisors cannot plead the minority and the consequent immunity of the other from liability as a bar to the promisee's claim against himself. 39 M. 409=43 I.A. 99=31 M.L.J. 18 (P.C.). A contract of sale entered into by a major and minor vendee is a joint one and can be enforced against the major vendee. 4 L. 334=1924 L. 146. Where joint-debtors (who were joint tort-feasors in the suit) have under a compromise in Court contracted to pay a sum of money to the plaintiff and some of them pay the sum and sue the rest for contribution, their claim cannot be resisted on the ground that all of them were joint tort-feasors before the compromise. 38 A. 237=33 I.C. 165. See also 11 Beng.L.R. 76. The right to contribution as between partners is not essentially different from the right to contribution as between persons who are jointly liable in respect of a debt. But a partner's action for contribution is conditioned by the special law of partnership. So

long as the partnership continues or subsists, no separate action for contribution will lie, because the right of contribution is subject to the special rights and obligations created by the contract of partnership and the right to contribution can be enforced only as a part of the general suit for accounts of the partnership. Where, however, the partnership relation no longer exists and there is no likelihood of any restitution being necessary, there is no reason to apply the rule prohibiting actions for contribution as between persons who were once partners but have ceased to be such. The right to sue for contribution as between co-judgment-debtors arises out of equity, an equity all the more stringent in view of the provisions of S. 43 of the Contract Act. That is part of the general equity which requires that one shall not bear the whole burden in case of the rest and it comes into existence only when the common burden is discharged and not before. 48 L.W. 383=1938 M.W.N. 1041=(1938) 2 M.L.J. 287. The doctrine of English Law that there is no contribution between joint tort-feasors cannot safely be extended to India. 38 A. 237=33 I.C. 165. See also 7 C. 702; 25 M. 599. A suit against the firm in the firm's name bars a separate suit against the representatives of a deceased partner. 42 I.C. 815=19 Bom.L.R. 837. The effect of S. 43 is to entitle plaintiff to get a decree against any of the co-contractors though plaintiff cannot get a decree against both. 40 I.C. 194=19 Bom.L.R. 370. A release granted to one of several judgment-debtors without any intention to release the others will discharge the others only *pro tanto* and not in respect of the entire mesne profits decreed. 51 I.C. 98=29 C.L.J. 245. A release of one of two mortgagors does not release the other. 50 C. 18=74 I.C. 1021=1924 C. 209. Where one of several joint tenants is liable for the whole rent, on his death leaving several heirs, all the coparceners constitute in law one heir. 50 C. 737=1924 C. 165. A suit for cesses is maintainable against all the heirs of one of the original lessees although the heirs of the other original lessees are not properly made parties. 27 C.W.N. 521=1923 C. 615. It is no answer to a claim for rent against three tenants that if one of them becomes an insolvent, the other persons are not liable to pay the rent. 53 I.C. 973=30 C. LaA. 515. See also 1927 P. 2. S. 43 is not

Illustrations.

- (a) *A, B and C jointly promise to pay D 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.*
- (b) *A, B and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate, and 1,250 rupees from B.*
- (c) *A, B and C are under a joint promise to pay D 3,000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 rupees from B.*
- (d) *A, B and C are under a joint promise to pay D 3,000 rupees. A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.*

NOTES.

applicable to a suit for arrears of rent against one of several heirs of a deceased tenant. A landlord cannot maintain such a suit without joining the other heirs. 45 I.C. 732; 27 C.W.N. 521=1923 C. 615; 36 I.C. 243. In order that one co-promisor can resist a suit on the ground that the co-promisors have not been impleaded, he must show that there was a definite contract that each promisor should not be separately liable. 105 I.C. 484. When the contract is by a single person as a tenant and he dies, the liability of his heirs is a joint liability, for co-heirs form a single person. The liability of joint tenants for rent is a joint and several liability. 44 I.C. 80=22 C.W.N. 289. Suit for arrears of rent not falling due, in the lifetime of the deceased tenant can be maintained against some of his heirs. The suit is not bad though all heirs are not joined. 36 I.C. 243. Where the parties are interested jointly by law in a contract by a single person, S. 43 cannot be applied. 35 I.C. 563=24 C.L.J. 371. Joint contract is not terminated by the death of one of the joint contractors. 16 I.C. 852=17 C.L.J. 201. S. 43 does not enable a person suing one of two partners, in their private capacity, and failing to establish his claim, to continue the suit against them as against the firm. 31 I.C. 209=76 P.R. 1915; 4 L. 239=77 I.C. 338=1924 L. 148. Registered pattadar with limited interest in land paying Government Revenue can recover from other persons having interest. 12 L.W. 180=59 I.C. 262. Loan by partner to the partnership—Suit for recovery of—Maintainability. 64 I.C. 183. A partner in a firm can have a dual capacity, that of creditor of the firm as well as that of partner in it. 64 I.C. 183. A suit for contribution in respect of costs is not maintainable. 33 I.C. 357=18 O.C. 340. A suit on hand note executed by several persons is not bad simply because one only of the joint promisors has been sued. 76 I.C. 988=2 P. 466. Where a decree creates a joint and several liability, the judgment-debtors cannot in execution claim an apportionment. If executed for the whole against any one, his remedy is to sue for contribution. 2 P. 796=74 I.C. 867=1924 P. 262; 76 I.C. 905=1924 M. 279. A person in wrongful possession cannot bring a suit for contribution of payment made in support of his own title. 15 C.W.N. 332=13 C.L.J. 646. Joint promisors—Dismissal of suit against—Appeal. 34 I.C. 138.

A person having a claim against two co-

promisors alternatively, if he elects to proceed and obtain a judgment against one of them, cannot proceed against the other; by pursuing his claims against the former to judgment he abandons his claim against the latter. 165 I.C. 338=38 Bom.L.R. 610=1936 Bom. 344. On this section, see also 62 C. 612=39 C.W.N. 461.

Sec. 43, III. (a).—Where in a suit on a promissory note jointly executed by three members of a joint Hindu family, one of them having been adjudicated insolvent, the creditor discharged him from the suit. *Held*, that the suit was maintainable as against the other two executants. 144 I.C. 117=1933 N. 324; 2 P. 466; 17 B. 6; 7 P. 353. Co-heirs—Liability for rent—Claim barred against some of them—Others cannot be made liable for entire rent. 48 I.C. 536. Under the Indian Law a release by the creditor of one of the mortgagors, jointly and severally liable without expressly reserving his remedies against the other mortgagors, has not the effect of releasing the others. 44 C. 162=21 C.W.N. 740. See also 4 C. 336; 39 M. 548; 6 C.L.R. 212; 13 Pat. L.T. 619 (Joint decree for costs). The position as regards joint judgment-debtors is the same in principle as that as regards joint promisors under S. 44, Contract Act. Hence a release granted to one of them without the consent of others does not absolve the latter from liability. 144 I.C. 981=1933 L. 505. (39 M. 548, Rel. on.) The English Law doctrine that the release of one of several joint debtors releases all from liability, has no application to India as evidenced by S. 44. 44 C. 162. The release of a joint judgment-debtor does not operate as a release of the others but they can claim the benefit of the amount actually paid by the released judgment-debtor. 39 M. 548=29 I.C. 303. Where on the insolvency of a firm, the creditor brought a suit against the members of a joint family firm alleged to be a partner in the insolvent firm and by the terms of a compromise arrived at in the course of the suit, the creditor received a smaller amount than due and released one of the partners and the whole of the assets, the release operates as an absolute release in favour of the whole firm insolvent and the creditor is not entitled to prove in the insolvency for the balance. 129 I.C. 890=32 Bom.L.R. 1656=1931 B. 123.

Secs. 43 and 44.—Construction of sections—Liability of joint contractors under English and Indian Law. See 62 C. 612=39 C.W.N. 461.

44. Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

Effect of release of one joint promisor.

45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

Devolution of joint rights.

NOTES.

Sec. 45.—For an exception to S. 45 in case of Government securities, see the Indian Securities Act (XIII of 1886), S. 5.

APPLICABILITY.—Section applies to all joint promisors (as) partners, co-heirs, etc. 10 B. 32. See also 17 B. 6; 17 B. 29; 21 B. 12; as also joint family members carrying on partnership business. 6 C. 815; 7 B. 217; 18 M. 33; 18 C. 86; 33 A. 382 (P.C.). It is doubtful whether S. 45 applies to a claim for possession of land. Where, however, the suit is really for specific performance of a contract, the defendant may plead S. 45 as a bar. 57 P.R. 1911=12 I.C. 850. See also 155 I.C. 610=1935 L. 478. Distinction between action of pure tort and action of wrong arising out of contract pointed out (135 E. R. 561, Ref. to.) 1932 M. 583=62 M.L.J. 154.

EFFECT OF SECTION is to extend English law as to trading partnership to all partnership cases. 9 A. 486.

SPECIAL CASES—CO-HEIRS.—One debt creates a single and indivisible liability which gives rise to one single cause of action. One of several heirs of a deceased obligee cannot sue for his share in the money due under the bond. 33 A. 327=9 I.C. 127. (7 A. 313, Foll.) See also 1941 Cal. 595. Payment to one of the co-heirs of a promisee under a bond would not discharge the promisor from his liability. So also are payments made to a junior member of a Hindu family during the lifetime of its manager in whose favour bond was executed. 41 M. 637=34 M.L.J. 315=45 I.C. 419; 29 I.C. 586. See also 30 I.C. 371; 7 Mys.L.J. 379. Where there are several mortgagees and there is no specification in the mortgage deed in regard to who advanced the money, the presumption is that the money was advanced in equal shares and payment whether by bond or otherwise to one of them without consent of or reference to the others does not discharge the mortgage debt due to others. 1930 A.L.J. 290=1930 A. 98=126 I.C. 364.

CO-MORTGAGEES.—Where property is mortgaged to two persons as tenants in common and there is no covenant to repay each separately a moiety of the amount, the right of either mortgagee, who desires to realize failing the consent of his co-mortgagee, is to sue making co-mortgagee a defendant. 46 I. A. 272=37 M.L.J. 483=24 C.W.N. 297 (P.C.). See also 31 C.W.N. 374. Where on

the death of one of two joint mortgagees, the survivor alone sued on the mortgage. Held, that the suit was defective owing to the non-joinder of the legal representatives of the joint promisee. 1937 A.M.L.J. 118. Where there are two mortgagees and a suit is filed on the mortgage by only one of them, the absence of the other as a party becomes immaterial when during the course of the suit he dies. The person suing though he had no right to sue alone on the day on which he sued, acquired that right during the course of the suit by the death of the other. I.L.R. (1939) Nag. 515=1939 Nag. 242. As to whether one of several joint promisees can sue for his share of the debt only, see 51 M. L.J. 648=1927 M. 84; 105 I.C. 544 (suit by one broker for his share of brokerage fees). A mortgagor who paid the whole to one of the mortgagees in disregard of a notice by the other not to pay and who is compelled to pay again, the share of the other cannot claim a refund from the mortgagee whom he has paid in full. 24 I.C. 88. One of several co-mortgagees cannot maintain a suit for sale of the entire mortgaged property to recover his share of the debt only. 24 I.C. 88. So also one of the joint promisees cannot sue for his share of the debt. 51 M.L.J. 648. Co-mortgagees are presumed in equity to be tenants-in-common of the mortgage debt and their interests are severable or partible among themselves. Each of them can sue joining the unwilling co-obligors as defendants. 27 C.L.J. 453=45 I.C. 986; 46 I.A. 272=37 M.L.J. 483 (P.C.). Similarly if some of the co-mortgagees are estopped from suing, the Court can sever the debt and give decree to the others for their share. 27 C.L.J. 453=22 C.W.N. 641. A payment of the mortgage debt by the mortgagor to one of the several mortgagees is not a valid payment as against the other mortgagees. 29 I.C. 956=21 C.L.J. 570; 29 I.C. 139; 4 Lah.L.J. 23=1922 L. 64=63 I.C. 744; 3 Lah.L.J. 502. But it operates as a valid discharge of the entire mortgage if the person to whom payment is made was the manager and the agent of all the mortgagees. 105 I.C. 751. Co-mortgagees—Suit by one for his share on allegation that others had received their shares is maintainable. 25 I.C. 440=19 C.L.J. 327. Co-mortgagees—Payment to one if discharge of debt. 5 Pat.L.J. 376=56 I.C. 403; 5 Pat.L.J. 151=55 I.C. 841; 31 L.W. 723=112 I.C. 501.

Illustration.

A, in consideration of 5,000 rupees lent to him by C and B, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

Time and place for performance.

Time for performance of promise where no application is to be made and no time is specified.

46. Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.—The question "what is a reasonable time" is, in each particular case, a question of fact.

47. When a promise is to be performed on a certain day, and the promisor

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CO-PARCENER.—The manager of a joint Hindu family can enforce a contract made with the family, and the junior members are not necessary parties. 33 A. 272=38 I.A. 45=21 M.L.J. 378 (P.C.); 14 I.C. 35=9 A.L.J. 410. One of the co-promisees in respect of a promissory note is not entitled to bring a suit without making the other party to it. Under S. 45, Contract Act, the right to claim performance of the promise rests with them jointly. Where, therefore, a promissory note is executed in favour of two brothers forming a joint Hindu family, only one of them who is not the *karta* of the family is not entitled to bring a suit on basis of the note without joining the other. (1932 P. 346 and 1934 P. 85, Disting.) 17 Pat.L.T. 879=1936 P. 274. Co-parcener—Tender to manager of Hindu family is valid. 19 A.L.J. 852=14 A. 64.

CO-SHARER.—A co-sharer in whose sole name the title-deed stands is not entitled to object to the tenants paying to his co-sharers their shares. He is not bound by payments beyond their share unless they were made *bona fide* in which case he is entitled to maintain a suit for his own share of the rent without making his co-sharers parties. 28 I.C. 141=28 M.L.J. 197.

FIRM.—O. 30, R. 4, C. P. Code, contains a modification of S. 45 of the Contract Act and a suit by firm could continue without the legal representative of a deceased partner being brought on record as co-plaintiff. 21 I.C. 509=17 C.L.J. 648. The rule of law is firmly established that debt due to trading partnerships stand on a different footing from debts due under ordinary contracts and that when one of the partners in a firm dies, the surviving partners can sue for the recovery of the debts due to the firm without making the legal representatives of the deceased partner parties to the suit. 4 L. 122=1923 L. 197; 24 I.C. 268. All partners living at the time of the institution of the suit liability. 54 I.C. 273=10 P.W.R. 1926. S. 81. A payment to one of two partners constituting a firm operates as discharge of liability. 54 I.C. 273=10 P.W.R. 1926. Section 45 does not prohibit the action where a partner of a dissolved firm collects his share of debt impleading the other partners

as defendants. It is open to the latter to sue again for their share of the debt. 53 I.C. 416=128 P.R. 1919. See also 1926 S. 78=90 I.C. 111. One partner cannot sue alone to recover a partnership debt. He can, however, use the name of the firm and names of his co-partners so as to enable him to sue. 40 I.C. 108. One of several promisees in a contract for specific performance cannot claim specific performance. 13 I.C. 315=1912 M.W.N. 415. A payment to one of several joint promisees does not operate as a complete discharge of the debt. 40 I.C. 405. See also 2 Pat.L.J. 520=42 I.C. 408; 29 Bom.L.R. 147=100 I.C. 993=1927 B. 125; 13 I.C. 315=1912 M.W.N. 415; 36 M. 544=24 M.L.J. 333 (F.B.); 19 I.C. 865=17 C.L.J. 372; 49 I.C. 63=22 C.W. N. 1021.

Sec. 46.—In a contract where the dates of delivery in instalments are not indicated, the instalments must be deemed to have been distributed rateably over the period appointed for delivery of the whole quantity of goods. It is unreasonable for a person who has borrowed ornaments for use in a ceremony to detain them after the ceremony has been completed and the owner has demanded their return. 126 I.C. 682=1930 O. 395; 43 C. 305=20 C.W.N. 240. Agreement by puisne mortgagee to pay off prior encumbrances—Default—Damages recoverable by mortgagor. 48 I.C. 550; 1925 O. 132. Mining lease—Time for payment of royalty not mentioned—Royalty becomes payable within a reasonable time—Limitation. See 21 Pat.L.T. 442=1940 Pat. 609.

Sec. 47.—Sale—Vendor's duty to tender goods at the time specified—Delivery of Railway receipt not sufficient. 40 B. 517=32 I.C. 948. The nature of the property is one of the matters which has to be taken into consideration in determining whether time should be treated as of the essence of the contract. 57 B. 292=1933 B. 71=34 Bom. L.R. 1629. Where a compromise decree provides for payment of instalment on several dates it cannot be said as a proposition of law that time is not essence of the contract. 132 I.C. 580=1931 L. 696.

EXPLANATION.—To determine what is rea-

Time and place for performance of promise, where time is specified and no application to be made.

has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Illustration.

A promises to deliver goods at B's warehouse on the first January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.

48. When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Application for performance on certain day to be at proper time and place.

Explanation.—The question "what is a proper time and place" is, in each particular case, a question of fact.

49. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Place for performance of promise where no application to be made and no place fixed for performance.

NOTES.

sonable time, usage of the business is also to be considered. 24 B. 97; 23 M. 441. Where the day for performance is fixed, the promisor would have to perform it at any time during the usual business hours on the day and place fixed, even if it be a Sunday. 15 B. 399.

Sec. 48.—See 40 B. 517 under S. 47.

Sec. 49.—Section does not apply where the money is payable on demand and not without application by the promisee. 15 I.C. 885=16 C.L.J. 279. There is no warrant for holding that S. 49 gets rid of inferences that should justly be drawn from the terms of the contract itself or from the necessities of the case, involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him. 63 C. 726=40 C.W.N. 392=1936 C. 97. See also 163 I.C. 397=1936 R. 25. The rule contained in S. 49 applies to promises for payment of money as well as to promises for delivery of goods. In the case of a lease, it is the duty of the lessee to apply to the lessor for a reasonable place being named for the payment of the premium. When this is not done there is an implied promise on the part of the lessee to make the payment at the place where the lessor resides according to the rule that the debtor must pay where the creditor is. 1933 A. 147. S. 49 has no application to a case where, by manifest implication or necessary import, a place is fixed by the contract for the performance of the obligation. The rule in S. 49 accordingly does not apply where there is an obligation to pay the creditor, and an inference can legitimately be drawn, either from the terms of the contract itself or from the necessities of the case, that there is a further obligation on the debtor of finding

the creditor so as to pay him. *Quære.*—Whether the English Common Law rule that, if no place is named, it is the duty of the debtor to make the payment where the creditor is, has been superseded by S. 49. (7 Bom.L.R. 993, Dist. 53 I.A. 58=49 M.L.J. 806 (P.C.) and 30 B. 167, Ref.) 54 I.A. 265=5 R. 451=1927 P.C. 156=53 M.L.J. 25 (P.C.). See also 142 I.C. 844=1933 S. 62; 163 I.C. 397=1936 R. 251. S. 49 has no application to a promissory note payable on demand in which no place is fixed for payment. In such a case the Common Law rule applies and it is necessary for the debtor to seek out his creditor and pay him. I.L.R. (1940) 1 Cal. 323=44 C.W.N. 609=1940 Cal. 443. S. 49 does not preclude the Court from finding out what the implied intention of the parties was in regard to the performance of the contract. 22 Pat.L.T. 282. Where there is an obligation to pay money and either from the terms of the contract or from the necessities of the case a further obligation is implied to find the creditor so as to pay him, S. 49 does not apply. (5 Rang. 451 (P.C.), Reld. on.) 1940 Lah. 85. The question as to what is reasonable time, is a question of fact in each case. 22 M.L.J. 207=10 I.C. 320. Choice of reasonable place lies with the buyer. 24 C. 8. Ordinarily the debtor is to see the creditor to ascertain the amount of the debt and pay it. 31 I.C. 880=11 N.L.R. 189; 121 I.C. 668=1930 N. 207. S. 49 is in accordance with the rule of English Law, that in the absence of any specification of the place of payment, the debtor must seek out the creditor. The section leaves it to the creditor to appoint a reasonable place of payment. 20 I.C. 683=5 Bur.L.T. 143. See also 59 B. 365=37 Bom.L.R. 357=1935 B. 283. *Quære.*—Whether it is good law in

Illustration.

A undertakes to deliver a thousand maunds of jute to *B* on a fixed day. *A* must apply to *B* to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

Performance in manner or at time prescribed or sanctioned by promise.

50. The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Illustrations.

(a) *B* owes *A* 2,000 rupees. *A* desires *B* to pay the amount to *A*'s account with *C*, a banker. *B* who also banks with *C*, orders the amount to be transferred from his account to *A*'s credit, and this is done by *C*. Afterwards, and before *A* knows of the transfer, *C* fails. There has been a good payment by *B*.

(b) *A* and *B* are mutually indebted. *A* and *B* settle an account by setting off one item against another, and *B* pays *A* the balance found to be due from him upon such settlement. This amounts to a payment by *A* and *B* respectively, of the sums which they owed to each other.

(c) *A* owes *B* 2,000 rupees. *B* accepts some of *A*'s goods in deduction of the debt. The delivery of the goods operates as a part payment.

(d) *A* desires *B*, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as *B* puts into the post a letter containing the note duly addressed to *A*.

Performance of Reciprocal Promises.

Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.

51. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

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face of. 54 I.A. 265=53 M.L.J. 25 (P.C.). See also 30 B. 167; 31 M. 223. In case *Pakki Adat* agency payment of money must be made where the constituent resides. 33 B. 364.

PLACE OF PERFORMANCE—BREACH OF CONTRACT—JURISDICTION.—Where the plaintiff residing in a place *T* gave orders to the defendant firm in *M* to send certain goods for which he sent an advance and instructed them not to send the goods per V.P.P., and when the goods were sent by V.P.P. in contravention of his order he refused to receive them and claimed the refund of the advance paid by him by a suit in the Court at *T*. *Held*; that owing to breach of contract, the amount which the plaintiff was seeking to recover became a debt, and that under S. 49 of the Contract Act where no place was fixed for the performance of the promise, it was the duty of the debtor to apply to the creditor to appoint a reasonable place and if the debtor failed to apply, the principle that the debtor must find his creditor would be applicable and that applying that section, the place of performance was in *T* and therefore the Court at *T* had jurisdiction. 40 L.W. 498=1934 M. 581=67 M.L.J. 296. Where no application has been made by the debtor to appoint a place for the performance of the promise the place of performance is to be determined with reference to the intention of the parties, and that in doing so regard should be had to the fact that the obligation to pay the creditor involves the further obligation of finding the creditor so as to pay him. On an urgent request of defendant for a loan the plaintiff deposited Rs. 500 with the Kothi at Hyderabad to be paid to the defendant through the branch of that Kothi in

Karachi. The plaintiff in his plaint averred that the loan had to be returned at Hyderabad. The plaintiff brought the present suit at Hyderabad. *Held*, that even if there was no promise to return the money at Hyderabad and the agreement between the parties was silent on that point the defendant who had promised to return the loan must be presumed to have promised to return it at Hyderabad. [5 R. 451 (P.C.), Foll.] 142 I.C. 844=1933 S. 62.

Sec. 50.—Payment to unauthorised agent is not payment to principal. 12 Beng.L.R. 360. Payment not by cash but by transfer of figures in account is valid. 1925 S. 144=20 S.L.R. 335. Where a subscriber to a chit fund conducted by a company deposits with the Bank a certain amount in the manner sanctioned by the company (in a special Savings Bank Account in a Bank) for the performance of his contract, viz., the payment of future subscriptions to the chit fund in respect of the chit held by him, he having won the prize, the performance is good under S. 50. The promisee company has to take the risk, and if the Bank goes into liquidation the subscriber cannot be held liable. (1941) 2 M.L.J. 908.

Sec. 51.—Repudiation, what is—Sufficiently definite statement as to. 43 C. 305=20 C.W.N. 240. On this section, see also 49 M.L.J. 300=1925 M. 971; 88 I.C. 569=1925 S. 220. Where the consideration for a contract consists of a promise, the party who is bound to do the act promised, fully performs his part of the contract if he is ready to do the act when required. 20 I.C. 47 (1)=20 C.L.J. 424. In a suit by the buyer for damages for breach of a contract for sale of goods, it is incumbent upon

Illustrations.

- (a) *A* and *B* contract that *A* shall deliver goods to *B* to be paid for by *B* on delivery. *A* need not deliver the goods, unless *B* is ready and willing to pay for the goods on delivery. *B* need not pay for the goods, unless *A* is ready and willing to deliver them on payment.
- (b) *A* and *B* contract that *A* shall deliver goods to *B* at a price to be paid by instalments, the first instalment to be paid on delivery. *A* need not deliver, unless *B* is ready and willing to pay the first instalment on delivery. *B* need not pay the first instalment, unless *A* is ready and willing to deliver the goods on payment of the first instalment.

52. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations.

- (a) *A* and *B* contract that *A* shall build a house for *B* at a fixed price. *A*'s promise to build the house must be performed before *B*'s promise to pay for it.
- (b) *A* and *B* contract that *A* shall make over his stock-in-trade to *B* at a fixed price, and *B* promises to give security for the payment of the money. *A*'s promise need not be performed until the security is given, for the nature of the transaction requires that *A* should have security before he delivers up his stock.

NOTES.

him to satisfy the Court that he was ready and willing with the money or had the capacity to pay for the goods, or that he had at all events made proper and reasonable preparations and arrangements for securing the purchase money. Readiness and willingness to perform includes ability to perform. 1940 Rang.L.R. 593=1940 Rang. 284. As to what constitutes readiness and willingness, see 9 C. 791; 2 Bom.H.C.R. 246; 2 Bom. H. C. R. 258; 8 L. 198=1927 L. 176; 7 L. 318=1926 L. 318; 1928 L. 20 (2). Vendor is not bound to tender the purchase price unless the purchaser is ready and willing to perform his part of the promise. 16 S.L.R. 278=1923 S. 50. See also 9 Mys.L.J. 38. In a suit for specific performance the strict law as to tender is not applicable. 16 S.L.R. 278=1923 S. 50. In the case of reciprocal agreements one of them cannot be enforced if the other is void and unenforceable. 106 I.C. 823 (1). Suit by pledgor to redeem—Pledgee obviously unable to return goods—Tender by pledgor if necessary. See 30 L.W. 898. See also 130 I.C. 482=1931 A. 539. A party is absolved from the duty of delivering if the person to whom the goods are to be delivered is absconding. In order to support an allegation of readiness and willingness to deliver actual tender is not in all cases necessary, e.g., tender will be dispensed with where the defendant has refused to perform the contract, or where, on the day fixed for performance of it, he has absconded and having closed his place of business, has left no agent or other persons to represent him. 139 I.C. 114=1932 S. 9.

Secs. 51 and 52.—FAILURE TO FULFIL CONDITIONS—EFFECT.—The respondent had invested money in debentures in a company in which the appellant was interested. The ven-

ture having proved a failure the respondent instituted a debenture action against the company asking for accounts and appointment of receiver. During these proceedings the respondents made various allegations against the appellant and threatened legal proceedings against him. At that time the appellant wrote a letter to the agent of the respondent in the following terms: "If *S* (respondent) will pay costs in connection with the appointment of the receiver..... and write letters to his solicitor and to the receiver that he is satisfied with the management of the company I will pay him the amount invested by him." The respondent did not pay any costs nor did he write letters. Held, that the respondent could not sue to recover the amount mentioned in the letter because his claim was dependent on and postponed to performing the promises mentioned in the letter. It was not a case of simultaneous promise under S. 51 but one under S. 52. 60 I.A. 368=38 C.W.N. 145=1933 P.C. 233=65 M.L.J. 813 (P. C.).

Sec. 52.—If delay in the payment of the purchase money is due to the vendor's own default, in showing a good title, he will not be entitled to take advantage of his own fault and claim interest. 42 I.C. 509=6 L. W. 233. See also 26 A.L.J. 492.

A WRONGFUL REPUDIATION cannot, except by the election of the other party so to treat it, put an end to an obligation. If the other party still insists on performance of the contract, the repudiation is what is called "*brutum fulmen*". A wrongful repudiation by one party does not itself absolve the other party if he sues on the contract, from establishing his right to recover by proving performance by him of conditions precedent. 60 I.A. 368=1933 P.C. 233=65 M.L.J. 813 (P.C.).

53. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration.

A and *B* contract that *B* shall execute certain work for *A* for a thousand rupees. *B* is ready and willing to execute the work accordingly, but *A* prevents him from doing so. The contract is voidable at the option of *B*; and, if he elects to rescind it, he is entitled to recover from *A* compensation for any loss which he has incurred by its non-performance.

54. When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the nonperformance of the contract.

Illustrations.

(a) *A* hires *B*'s ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by *A*, *B* receiving a certain freight for its conveyance. *A* does not provide any cargo for the ship. *A* cannot claim the performance of *B*'s promise, and must make compensation to *B* for the loss which *B* sustains by the non-performance of the contract.

(b) *A* contracts with *B* to execute certain builder's work for a fixed price, *B* supplying the scaffolding and timber necessary for the work. *B* refuses to furnish any scaffolding or timber, and the work cannot be executed. *A* need not execute the work, and *B* is bound to make compensation to *A* for any loss caused to him by the non-performance of the contract.

(c) *A* contracts with *B* to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and *B* engages to pay for the merchandise within a week from the date of the contract. *B* does not pay within the week. *A*'s promise to deliver need not be performed, and *B* must make compensation.

NOTES.

Sec. 53.—*See* 39 Mys.H.C.R. 601=12 Mys.L.J. 422.

Sec. 54.—A party cancelling a contract without any justification is precluded from making any defence which would have been open to him in an action for damages by the other party. 59 I.C. 515=22 Bom.L.R. 1165; 49 I.C. 811=1918 M.W.N. 772. *See also* 88 I.C. 697=6 P.L.T. 830=1925 P. 496. Failure of promisor to perform his part of the promise. Promisee, if can rescind whole contract. *See* 23 A.L.J. 806=30 C.W.N. 145 (P.C.); 2 Luck. 279=1927 O. 12; 1929 P. 395; 25 N.L.R. 110=116 I.C. 651=1929 N. 164. Where a contract consisted of twelve parts, non-performance of one does not necessarily indicate an intention to put an end to the contract. 24 I.C. 758=16 Bom.L.R. 178. As soon as the contract for the sale of goods within a specified date is broken, the obligation of the purchaser to accept delivery of the goods vanishes; he is not bound to take the goods when delivered later. 20 C.L.J. 133=27 I.C. 7=20 C.W.N. 159. Engagement to ship goods and to keep space for goods shipped must be ready with cargo before he can enforce the obligation and the shipowner to call at the port of shipment and take action against him in damages for its breach. 34 I.C. 843. Reciprocal promises—Breach by

act of both parties—Suit for specific performance, whether lies—Compensation—Claim for. 38 M. 959=26 M.L.J. 331. *See also* 86 I.C. 436=1925 M. 1029. In the case of anticipatory breach if the party who suffers by the default does not put an end to the contract but prefers to keep it open, he does so for the benefit of both parties and he remains subject to all the obligations and liabilities under it. Where under the contract, the performance of the defendant's promise to deliver the goods could not be claimed till the plaintiff had paid the balance of the purchase money and the plaintiff having sued to recover damages for breach of contract expressed his readiness to deposit the price and at the same time imposed a condition that he should be permitted to deduct therefrom the price of the goods sold by defendant. *Held*, that the plaintiff cannot be said to be willing to make full payment and that the suit was not maintainable. 1930 L. 979. In case of a contract of loan for a consolidated sum of money to be paid from time to time if the lender refuses to lend a small portion remaining due to the borrower, it has the effect of the lender putting an end to the contract and he is not entitled to claim interest at the contract rates. 1 L.W. 136=22 I.C. 627. On this section, *see also* 37 C. 334; 4 C. 237; 15 B. 389.

(d) *A* promises *B* to sell him one hundred bales of merchandise, to be delivered next day, and *B* promises *A* to pay for them within a month. *A* does not deliver according to his promise. *B*'s promise to pay need not be performed, and *A* must make compensation.

55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

NOTES.

Sec. 55.—Compare Ss. 62 and 63, *infra*.

PRINCIPLE OF SECTION.—See 1927 S. 49. As to when time is essence of contract, see 88 I.C. 890; 39 Bom.L.R. 835. Time is not ordinarily of the essence of the contract for sale of land, but the parties can make it so by express agreement in the contract itself or subsequently by giving reasonable notice to complete on a certain day, or if the nature of the property intended to be sold requires it, as for instance, if the contract is for the sale of a life-interest or a mining lease given for a fixed period of time. Time is not of the essence of contract simply because a period of completion is mentioned in the contract. 63 C. 804=1936 C. 51. See also 1937 Bom. 417; 16 Luck. 357. In cases other than commercial contracts the ordinary presumption is that time is not of the essence of the contract; there is no such presumption in the case of commercial contracts. If time is originally the essence of the contract, it does not cease to be so because one of the parties had agreed to grant a short extension. 190 I. C. 554=1940 Oudh 443. The question whether or not time is of the essence of a contract is a question of the intention of the parties to be gathered from the terms of the contract. Where there is an express provision that time is of the essence of the contract and at the same time provision for extension of time in certain contingencies, and for the payment of a fine or penalty for every day or week the work undertaken under the contract remains unfinished on the expiry of the time provided in the contract, such provision is inconsistent with time being of the essence of a contract, and would be calculated to render ineffective an express provision in a contract to that effect. In such a case it cannot be said that it was intended that time should be of the essence of the contract. This principle applies to P.W.D. contracts. 189 I.C. 785=1940 Sind. 1.

CONTRACT TO SELL.—Even where time is not of the essence of contract, the purchaser must show his readiness and willingness to perform his part of the contract within a reasonable time after the agreed date. 37 I.C. 776; 69 I.C. 41=1922 M.W.N. 47. See also 2 I.C. 460 (P.C.). Effect of failure—Contract—Construction.—Sale of goods—Delivery to be taken within a speci-

fied period—Default—Delivery of part of goods after expiry of time fixed—Refusal to take delivery of the rest—Damages. 69 I.C. 9=24 Bom.L.R. 142. Effect of failure—Time for performance—A holiday—Custom as to right to perform on day following to be strictly proved. 58 I.C. 396=32 C.L.J. 140. Where in a contract for sale, the entire purchase price was to be paid within one month after the receipt of earnest money, and the vendor during that month accepted various instalments towards the purchase money, the vendor should be regarded to have waived his right for entire payment within one month and could not plead time as essence of contract. 1938 Rang. 367. In a contract by which an agent agreed to procure his principal a loan within a certain time and time was definitely known to be of the essence of the contract, the agent will not, where the loan is not secured within the stipulated time, be entitled to any commission. 15 C.L.J. 40=16 C.W.N. 753; 30 C.L.J. 224=24 C.W.N. 330. The rule in Kuri transactions being that the amount which is payable to the bidder is to be paid to him only on his furnishing security for future instalments, time is of the very essence of the contract and unless the security is furnished within the prescribed period the bidder loses his right to the amount payable to him. 52 I.C. 938; 1919 M.W.N. 805. Where time is the essence of the contract, claim for *quantum meruit* is unsustainable when work is delayed. 19 I.C. 48=6 Bur.L.T. 53; 69 I.C. 894=1923 N. 140. The question whether time was of the essence of the contract embodied in the consent decree would depend on the facts and circumstances of each case. Where a consent decree in a suit for specific performance directed the plaintiff to execute a conveyance within a week from the date thereof and the defendant to pay the price within four months therefrom, *held*, the term did not make time of the essence of the agreement and that the defendant was bound to pay even though the conveyance was executed only two weeks later. 1930 P. 234; 11 L. 699=131 I.C. 371=1931 L. 205; see 49 B. 289 (P.C.). Where time is of the essence of the contract, failure to comply by specified time entitles a promisee to immediately rescind. Where time is not of the essence of the contract, he has a right to

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time ; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

If, in case of a contract voidable on account of the promisors' failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

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damages only. But whether time is of the essence of a contract or not, in any case a contract must be performed within a reasonable time. 33 I.C. 668=9 S.L.R. 137; 50 I.C. 41=12 S.L.R. 144; 19 I.C. 48=6 Bur.L.T. 53. See also 25 N.L.R. 110=1929 N. 164. Where time is of the essence of the contract it is the business of the contracting party to see that money payable to the other reaches the latter in time before the due date. It is not open to him to send money by registered post with a possibility of payment being delayed when payment by telegraphic transfer without any possible delay is possible. 11 L. 699=1931 L. 205. Where a contract of sale falls through owing to the default of the vendor the latter cannot claim specific performance and the purchaser can sue to recover such portion of the price as he has already paid. 34 Bom.L.R. 1629.

MERCANTILE CONTRACTS.—In spite of S. 55 in England as well as in India time is of the essence of the contract in mercantile contracts. 36 I.C. 96=10 S.L.R. 4 (2 A.C. 455 at 463, Ref.). See also 4 I.C. 945; 19 I.C. 93=80 P.R. 1913; 48 M. 538; 1925 M. 626=48 M.L.J. 374; 83 I.C. 260=1924 C. 427; 1925 M. 1232=49 M.L.J. 200; 31 N.L.R. 250=1935 N. 111.

"MONTH" in Indian contracts means lunar month, not calendar month. 36 C. 576.

CONDONATION.—Where the contract was for the delivery of a certain quantity of goods every month and though there was non-performance of the contract within the specified time limit the other party extended the time for performance. Held, that there was a condonation of the breach and that the party in default cannot be proceeded against for damages for breach of contract. 7 O.W.N. 668=1930 O. 417.

SALE.—Consideration to be paid by the vendee to a creditor of the vendor—Vendee's default—Vendor entitled to recover by suit. 36 M. 348=12 I.C. 353=21 M.L.J. 983. See also 17 Pat.L.T. 940 (F.B.). (Execution sale).

SALE OF LAND.—S. 55 does not lay down any principle which differs from the law of England as to contracts for sale of land. In

such cases, equity looks at the substance and not at the letter of the agreement in order to ascertain whether the properties notwithstanding that they named a specific time within which the sale was to be completed, really and in substance intended more than that it should take place within a reasonable time. *Prima facie* equity treats the importance of such time limits as being subordinate to the main purpose of the parties. 40 B. 289=43 I.A. 26=30 M. L.J. 186 (P.C.) (38 B. 77, Reversed); 69 I. C. 13=1922 Bom. 14; 38 I. I.C. 123; 97 I.C. 269=19 S.L.R. 41. See also 63 C. 804=161 I.C. 166=1936 C. 51. Specific performance of a contract to sell land will be granted although there has been a failure to keep the dates assigned to it, if justice can be done between the parties and if nothing in the express stipulations of the parties, the nature of the property or the surrounding circumstances, make it inequitable to grant relief. 40 B. 289. An intention to make time of the essence of the contract must be expressed in unmistakable language; it may be inferred from what passed between the parties before but not after the contract is made. 40 B. 289; 40 M.L.J. 13=61 I.C. 457; 42 M. 802=34 M.L.J. 109; 52 I.C. 590=10 L.W. 376; 70 I.C. 126=1923 R. 42; 33 I.C. 668=9 S.L.R. 137. The presumption that time is not of the essence of a contract to sell land, is rebuttable when the sale is arranged to meet the expenses of a marriage taking place on a certain date. 26 I.C. 121=27 M.L.J. 482.

TEST OF TIME BEING ESSENCE OF CONTRACT.—The question whether time is of the essence of the contract depends on the intention of the parties. 47 B. 607=25 Bom.L.R. 328; 38 B. 77=15 Bom.L.R. 405; 28 C.W.N. 104=1924 C. 427; 33 I. C. 347=22 C.L.J. 566; see also 39 Bom. L. R. 835; 11 L. 699=131 I. C. 371=1931 L. 205. The question whether time is or is not of the essence of the contract has to be decided on the facts of each case. The Court has to look at the substance and not merely at the letter of the contract and ascertain whether the parties really and in substance intended more than that the act should be performed within a reasonable time. 11 L. 699. Where time.

Agreement to do impossible act.

56. An agreement to do an act impossible in itself is void.

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party must see that money payable reaches the other party in time. Mere remittance when time essence of contract is not sufficient. 11 L. 699.

WAIVER.—Consent decree—Time not always essence of contract—Waiver may be inferred from conduct. 36 I.C. 598=18 Bom.L.R. 803; 2 Pat.L.J. 520=42 I.C. 408. Acceptance of payment after the expiry of the time fixed operates as a waiver of the limitation as to time in the contract. 2 Pat.L.J. 520=42 I.C. 408.

Sec. 56: SCOPE.—The question whether compensation is payable or not depends not merely on (i) whether it can, in an abstract manner, be said that the act agreed to be done is impossible in itself or unlawful, but upon, (ii) the knowledge as to the act being impossible or unlawful, as well as the promisor using reasonable diligence in obtaining that knowledge; but this knowledge, or absence of diligence must be coupled with, (iii) the want of knowledge on the part of the promisee, and finally it depends also upon, (iv) whether the promisor could have prevented that event which renders the act unlawful. 105 I.C. 319. See also 130 I.C. 772=1931 L. 347.

CONSTRUCTION OF SECTION.—There are two matters which are dealt with by paragraph 2 of S. 56 of the Contract Act, viz., an act which becomes impossible and an act which becomes unlawful. In the case of an act which has become unlawful the promisor is exonerated from performing if he is not responsible for the act having become unlawful. The first part of the paragraph does not speak of the act having become impossible by reason of the act of the promisor. Though it is not clear what exactly is meant by speaking of an act having become impossible in the sense referred in the section, there is no reason to hold that the Legislature intended to depart from the general common law rule which is that where a party has not qualified his obligation, he is liable to make compensation in damages for non-performance although the performance has been rendered impracticable by some unforeseen cause over which he has no control. 192 I.C. 768=1941 Pat. 429.

"BECOMES IMPOSSIBLE."—Whether absolute impossibility is meant, as applied to a contract for supply of coal, see 50 I.A. 142=47 B. 563=45 M.L.J. 630 (P.C.). A clear line of distinction must be made between physical impossibility and mere difficulty in carrying out a contract. 130 I.C. 772=1931 L. 347. As to what amounts to impossibility of performance, see 86 I.C. 362=1925 M. 907; 48 M. 538=48 M.L.J. 374. See also 1936 S. 26. Loss of ship before it reached the place of loading—Right

to recover advance freight. See 123 I.C. 332. Becomes impossible—Contract of service—Wrongful dismissal—Broker employing under-broker—Termination of broker's appointment—Dependent contract. 47 C. 290=46 I.A. 314=24 C.W.N. 577 (P.C.). Where, in a contract to lease lands, the performance becomes impossible by acquisition of land by Government the promisee is entitled to compensation for loss. 44 A. 229=20 A.L.J. 41=65 I.C. 253. Mere difficulty or the need to pay exorbitant prices is not such physical impossibility as is contemplated under S. 56. 40 B. 301=33 I.C. 205; 47 B. 563=27 C.W.N. 974=45 M.L.J. 630 (P.C.). Where lands held under a lease are silted by floods but it was possible to put them right by means of a certain expenditure, the tenant cannot refuse to pay rent. 118 I.C. 79=1929 M. 575. Sale turning up impossible for want of sanction of Cantonment authorities—Contract of sale if becomes void. 27 A.L.J. 1122=1929 A. 837. "Becomes impossible" by a rule of the Government—Effect. 36 B. 139=12 I.C. 693. See also 58 I.C. 761=24 C.W.N. 703, e.g., wagon restrictions by Government. See 99 I.C. 459=1927 M. 89=51 M.L.J. 663. Government requisitioning all steamers available for carriage of goods. See 105 I.C. 319. Strike among local workmen as defence. See 30 Bom.L.R. 49. S. 56 is applicable only to the physical impossibility and therefore does not cover every case of frustration. 70 I.C. 379=26 C.W.N. 573; 36 B. 139=12 I.C. 693. See also 47 B. 563 (P.C.). Impossibility as an excuse for non-performance of a contract must be a physical or legal impossibility. A rise in freights may be equivalent to such a scarcity of ships as to amount to physical impossibility. 63 I.C. 267=33 C.L.J. 151. See also 47 B. 563 (P.C.). "Become impossible"—Owing to war—Effect. 45 C. 28=21 C.W.N. 670; 58 I.C. 761=24 C.W.N. 703; 33 I.C. 540. "Becomes impossible" owing to exorbitant rise in price. 62 I.C. 815. Where the contract does not expressly or by necessary implication fix any time for the performance, the law implies that it shall be performed within a reasonable time. 53 I.C. 125=26 M.L.T. 24. If the delay in transit is attributable to causes beyond the control of the defendant, he has acted neither negligently nor unreasonably. 53 I.C. 125. As to what is reasonable time, see 53 I.C. 125. Where a sub-lease is entered into in the belief that the original contract will be subsisting during the period during which the sub-contract is to be worked, the cancellation of the contract terminates the sub-contract as well. 29 I.C. 151=2 L.W. 411; 37 I.C. 761. A contract is not

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Where, one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations.

- (a) *A* agrees with *B* to discover treasure by magic. The agreement is void.
- (b) *A* and *B* contract to marry each other. Before the time fixed for the marriage, *A* goes mad. The contract becomes void.
- (c) *A* contracts to marry *B*, being already married to *C*, and being forbidden by the law to which he is subject to practise polygamy. *A* must make compensation to *B* for the loss caused to her by the non-performance of his promise.

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rendered impossible of performance merely on account of a difficulty in performing it or a need to pay high prices. 57 I. C. 636=17 N.L.R. 1. Where a person stands surety to produce a person on a certain day in Court but by that time the person had been convicted and lodged in jail, the promise becomes impossible to perform. The agreement is not one falling under the second part of S. 35. 70 I.C. 870=1923 R. 26. Where an employee binds himself to indemnify his employer if theft occurred of the property for which he was responsible, no question of impossibility of performance arises and the stipulation could be enforced and the employee made liable for loss occasioned by theft. 1941 A.M.L.J. 98.

TEST OF IMPOSSIBILITY.—Test of impossibility is whether it was practically impossible for the defendant to get the quality contracted for within the specified time. 35 I.C. 625=(1916) 2 M.W.N. 131. See also 11 Mys.L.J. 81. If after a contract is entered into, it becomes illegal owing to declaration of war, etc., it cannot be enforced. 33 I.C. 96=9 Bur.L.T. 99; 48 I.C. 310=11 Bur.L.T. 84; 40 I.C. 526=32 M.L.J. 146; 40 I.C. 851=41 M. 225. See also 40 B. 570=33 I.C. 353; 42 B. 473=37 I.C. 644; 33 I.C. 540; 43 I.C. 673=33 M.L.J. 410.

ASSIGNMENT OF CONTRACTUAL RIGHTS—BREACH OF THIRD PARTY—LIABILITY OF ASSIGNOR.—It is too broad a statement to assert that whenever a person enters into a contract, he must get his money or its equivalent in goods irrespective of the terms agreed upon. Where a person transfers his right under a contract for purchase of goods from a third person in favour of the plaintiff without in any way undertaking to procure delivery, the breach by the vendor of his contract to deliver does not make the contract void or impossible for failure of consideration. In such a case, the

consideration for the contract is not the delivery of the goods but the right to call for delivery. That was what the plaintiff bargained for and that he has obtained. 8 Mys.L.J. 361.

SUIT FOR RENTALS OF TOLL—DEFENCE OF FRUSTRATION.—In a suit by the District Board to recover the balance of the annual rentals from toll-gate contractors, the defendants pleaded that the contracts came to an end because they became impossible to be performed by reason of an unforeseen accident. The monsoon that year was very severe; the bridges adjoining the toll-gates had been washed away and for nearly 3½ months traffic had to be suspended to a greater or smaller extent. Cl. 6 of the sale (of tolls) provided: "sales subject to all risks. Claims for compensation will not be entertained." Held, (i) that the doctrine of impossibility of performance or "frustration" proceeded on the assumption that the parties at the time of contract did not have a contingency in their mind; if they had it they would have provided for it; in a particular way that doctrine was inapplicable to the present case for the reason that the destruction of bridges by floods was one of the risks contemplated by the parties; (ii) that the interruption to the traffic for 3½ months was nothing exceptional or unreasonable; (iii) as the defendants in spite of the monsoon continued to discharge the functions and collect as much as they could, the contract did not in fact cease to be executable. The defence therefore failed. 1934 M. 85=66 M.L.J. 108.

NON-LIABILITY FOR ACCIDENT.—Clause in the contract—The accident caused by the promisor's own negligence. See 25 I.C. 924=7 L.B.R. 105.

CONTRACT TO THE CONTRARY.—Section applies only when there is no contract to the contrary between the parties. Section must be read as an implied term in contracts. 105 I.C. 319.

(d) *A* contracts to take in cargo for *B* at a foreign port. *A*'s Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) *A* contracts to act at a theatre for six months in consideration of a sum paid in advance by *B*. On several occasions *A* is too ill to act. The contract to act on those occasions becomes void.

57. Where persons reciprocally promise, firstly, to do certain things, which are legal, and, secondly, under specified circumstances to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Reciprocal promises to do things legal and also other things illegal.

Illustration.

A and *B* agree that *A* shall sell *B* a house for 10,000 rupees, but that, if *B* uses it as a gambling house, he shall pay *A* 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that *B* may use the house as a gambling house, and is a void agreement.

Alternative promise, one branch being illegal.

58. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration.

A and *B* agree that *A* shall pay *B* 1,000 rupees, for which *B* shall afterwards deliver to *A* either rice or smuggled opium.

This is a valid contract to deliver rice and void agreement as to the opium.

Appropriation of Payments.

59. Where a debtor owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Application of payment where debt to be discharged is indicated.

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Sec. 57.—If the parties have treated the legal and illegal parts of a contract as inseparable and as an integral whole, the entire contract is void. 9 B. 176. On the section, see also 167 I.C. 707=1937 R. 47.

Sec. 58.—S. 58 does not apply where there is no alternative promise separable from the illegal portion of the agreement. A covenant for indemnity for failure to do an illegal act is unenforceable. 18 I.C. 9. Where a contract is only partly unenforceable, the whole contract goes unless it is severable. 30 M.L.J. 62=32 I.C. 486 (F. B.). Suit to enforce alternative promise, when lies. 132 I.C. 321=1931 A. 589.

Secs. 59 to 61.—Ss. 59 to 61 embody the general rules as to appropriation of payments in cases where a debtor owes several distinct debts to one person and voluntarily makes payment to him. They do not deal with cases in which principal and interest are due on a single debt, or where a decree has been passed on such a debt, carrying interest on the sum adjudged to be due on the decree. 196 I.C. 625=1941 Lah. 386 (F. B.). Appropriation—Principles of. 26 C. W.N. 153=63 I.C. 904 (P.C.). See also 37 A. 469; 38 C. 537 (P.C.); 35 C. 636; 2 Bom.L.R. 706; 26 C. 39; 19 C.W.N. 237; 29 C.W.N. 496=1925 C. 937; 84 I.C. 672=1924 S. 137; 29 Bom.L.R. 950=1927 B. 479.

Where there is a running account between the parties, in the course of which accounts had been taken and a balance struck and the debtor makes certain payment, the natural inference is that all payments made subsequently are to be allocated first to discharge of the balance. 1936 Pesh. 143.

APPROPRIATION OF PAYMENTS—RULE AS TO.—Reading Ss. 59, 60 and 61 together it is clear that so far as the right of the debtor to make the appropriation under S. 59 is concerned, it can be exercised only when a debtor makes the payment with the express or implied intimation that the payment is to be applied to the discharge of a particular debt. It would follow that this intimation, express or implied, must be made at the time when the payment is made. On the other hand, under S. 60 it is only when the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied that the creditor may apply it at his discretion to any lawful debt. The creditor need not exercise this right at once, but he can at his discretion exercise it even later. There is nothing in the section, particularly as a past perfect tense "has omitted" has been used, to indicate that the creditor loses this right if he does not exercise it at the very time when the payment is received. In many cases it may be impossible to make the ap-

Illustrations.

(a) *A* owes *B*, among other debts, 1000 rupees upon a promissory note which falls due on the first June. He owes *B* no other debt of that amount. On the first June *A* pays to *B* 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) *A* owes to *B* among other debts, the sum of 567 rupees. *B* writes to *A* and demands payment of this sum. *A* sends to *B* 567 rupees. This payment is to be applied to the discharge of the debt of which *B* had demanded payment.

60. Where the debtor has omitted to intimate and there are no other cir-

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appropriation there and then, for instance, when the payment is made at a time when the amounts due under the various heads are not known and the account books are not easily accessible. When neither the debtor nor the creditor has made any appropriation, then under S. 61, it is a duty of the Court to apply the payment in discharge of the debts in order of time, and if the debts are of equal standing, in discharge of each proportionately. 57 A. 605=1935 A. 221=1935 A.L.J. 177 (F.B.). On paying money to his creditor the debtor may at the time of payment, appropriate it to any particular debt, even though the creditor says he takes it in payment of another debt. If the debtor makes no appropriation to particular items, the creditor has the right of appropriation. If no express appropriation be made by either the debtor or the creditor, it may be implied or presumed that payments to and drawings against a running account are to be attributed to the earliest items on the opposite side of the account. 61 C. 711. Decree debt, payable by instalments—S. 59 not applicable. 29 Bom.L.R. 950. As to appropriation in case of payment by joint-debtor, see 1925 R. 4; 95 I.C. 175=1926 O. 514. If a series of separate debts exist between a creditor and a debtor, the debtor may pay any one of them as he may deem fit and if he specifically appropriates the payment to a later debt, the creditor is not entitled to accept the payment otherwise than in respect of the debt to which it is so appropriated by the debtor. This doctrine, however, has no application when the parties enter into an agreement regulating the order of payment of instalments in respect of a debt. 173 I.C. 133=1938 Pat. 8. Where money is paid to satisfy the kist and received and acknowledged on that account it is not in the power of one of the parties to the transaction to vary the effect of the transaction by altering the appropriation in which both originally concurred. 38 C. 537=38 I.A. 80=21 M.L.J. 1148 (P.C.). A surety has no right to control the appropriation by customer or banker of moneys paid in by the principal debtor in the absence of special agreement. 23 C.L.J. 256=20 C.W.N. 562. When the debtor has failed to intimate to the creditor as regards appropriation, the creditor can appropriate a payment to any lawful debt due. 7 L. 17=92 I.C. 947=1926 L. 183; 82 P.R. 1914=25 I.C. 560; 24 P.R. 1915=29 I.C. 346; 9 L.W. 198=49 I.C. 273. The debtor's intimation must synchronise with the payment but the

creditor is entitled to make the appropriation at all times up to the time of the trial. 7 L. 17=1926 L. 183. But see *contra* 1926 M. 792=50 M.L.J. 242, in which it is held that priority of communication of appropriation must be looked to and in which the case-law on the subject is fully discussed. So long as notice has not been given to debtor (or to the surety for the debtor) as to the appropriation of any amount to any particular account, it is open to the creditor to alter it and make reappropriation. 1930 M. 874=59 M.L.J. 513. As to how long the creditor's right of appropriation continues, see 5 P. 326=1926 P. 330. Where there is the definite stipulation in the mortgage-deed that the money paid is to be appropriated, in the first instance towards payment of interest and the balance set-off against the principal due, the mortgagee must in such a case apply the money received in accordance with the provisions of the mortgage-deed. He cannot appropriate such payments towards principal. 173 I.C. 898 (2)=1938 Cal. 20. In the absence of any agreement to the contrary, payments made by a judgment-debtor have first to be appropriated towards the interest. 67 I.C. 606=4 P.L.T. 58; 55 M.L.J. 612. In the absence of any appropriation either by debtor or by creditor, the payment must be applied to the earliest debt. 37 A. 649=30 I.C. 92. Where payments are made in liquidation of a debt and amount due on account of interest largely exceeds the amount paid, the creditor may properly appropriate such payments towards interest. 23 C.W.N. 534=51 I.C. 88; 7 Mys.L.J. 274.

APPROPRIATION TO INTEREST, ETC.—Applicability of section to decree debts. 41 I.C. 348=21 C.W.N. 1055. See also 29 Bom. L.R. 950=104 I.C. 673=1927 B. 479. A creditor is entitled to appropriate payments made by his debtor to the discharge of prior dues then outstanding and not barred by limitation. 19 I.C. 6; 58 I.C. 797=36 M. L.J. 296. Creditor may appropriate payments towards interest. 50 M. 614=1927 M. 620=103 I.C. 394=52 M.L.J. 612. A creditor's right of appropriation is preserved to him until the moment of his filing the plaint in Court. He should not be deprived of his right so long as it was not inequitable to do so. 37 M.L.J. 367=52 I.C. 950.

APPROPRIATION OF REVENUES.—Payment of revenue with direction to Collector to appropriate for one kist if can be taken for another. See 53 C. 886=30 C.W.N. 618=1926 C. 866.

Sec. 60.—When a debtor, from whom several debts are due to the creditor, makes

Application of payment where debt to be discharged is not indicated.

circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

61. Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the

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a payment without any intention or under circumstances implying that it is in respect of a particular debt, the creditor is entitled to apply it at his discretion to any debt due to him. 152 I.C. 786=11 O.W.N. 1397. See also 39 P.L.R. (J. & K.) 117. Where there is an absence of express stipulation to appropriate the payment to a certain debt, the Court has got a further duty to see whether there was any intention of the parties to appropriate it to a particular debt. 1937 Pat. 432=170 I.C. 480. As between a creditor and debtor the debtor in making payments may appropriate the payments in whatever manner he likes and failing such appropriation the creditor may appropriate. In addition he may appropriate payments towards debts which would otherwise be barred by limitation at any time, even to the last moment before bringing the suit. 14 Pat.L.T. 654=1933 P. 267. Or even during the pendency of litigation and before judgment. 58 A. 791=166 I.C. 423=1937 A. 1 (F.B.). See also 1936 A.M.L.J. 34; 168 I.C. 714=1937 Nag. 94. Where a portion of the joint family debt arising on a single transaction is taken for a future immoral purpose and so not binding on the family, the creditor is not entitled to appropriate a sum realized out of the sale of joint family property towards the whole debt but only towards the portion for lawful purpose. 1938 A.L.J. 644=1938 All. 437; 1937 N. 94. Mortgage by manager of joint family—Portion of debt not for necessity—Payment by mortgagor—Mortgagee's power of appropriation. 58 A. 791=166 I.C. 423=1937 A. 1 (F.B.). The appropriation by the plaintiff towards the simple money decree and not to the mortgage debt was right and could not be questioned. 37 M.L.J. 367=52 I.C. 950. Where a deposit of money is made by a debtor with a creditor for a special purpose, the former cannot subsequently claim to have appropriated the same to any other debt due by him. 59 I.C. 121; 8 Mys.L.J. 278. See also S. 230 and 42 C.W.N. 1263. Where the creditor exercises his option under S. 60 and appropriates the repayments in the account which he had with the principal debtor independently of the contract of guarantee the surety cannot in law raise any objection to the appropriation and is not entitled to the benefits thereof. I.L.R. (1941) Lah. 323=1941 Lah. 16.

RUNNING ACCOUNT—QUESTION OF APPROPRIATION.—In the case of running accounts, there is no question of appropriation. It is assumed as a matter of law that the payment would go towards the earlier items in the account. 14 Pat.L.T. 654=1933 P. 267. See also 1936 Pesh. 143.

LAWFUL DEBT.—As to what would be lawful debt, see 104 I.C. 799=1927 C. 906. See also 61 C. 711. When an advance amount is paid by the tenant to the landlord under a stipulation that the same is to be applied towards the last year's rent due under the tenancy the landlord is entitled to appropriate the same towards the rent due for the instalments due for the final year, though a suit for rent due in respect of such instalments might be barred by limitation. 124 I.C. 51=1930 M. 594. The debts to which sums are applied must be proved to have lawfully existed. 1928 C. 229. Floating account contemplating a maximum which has been reached—Effect of subsequent payments. 51 M. 711=1928 M. 566=55 M. L.J. 471.

Secs. 60 and 61: RIGHT OF APPROPRIATION.—If the debtor does not make any appropriation at the time when he makes the payment, the right of appropriation devolves on the creditor and he may exercise that right until the very last moment and need not declare his intention in express terms. 60 C. 1265. A creditor is entitled under S. 60 to apply a payment at his discretion to any lawful debt actually due and payable to him from the debtor where the debtor has omitted to intimate and where there are no other circumstances indicating to which debt the payment is to be applied; and the creditor may exercise his option at any time. 171 I.C. 781=1937 Nag. 198. Where there has been a payment by a debtor to a creditor and no appropriation has been proved either by the debtor or the creditor, till the date of suit it is open to the creditor to appropriate the amount or any part of it towards the payment of any debt even during the pendency of litigation concerning the payment but only until the judgment is pronounced by the trial Court and not thereafter. 58 All. 791=1937 All. 1 (F.B.).

Sec. 61.—Where moneys are received by the creditor without any definite appropriation on either side, the money so received must first be applied in payment of

debts are of equal standing, the payment shall be applied in discharge of each proportionably.

Contracts which need not be performed.

Effect of novation, rescission, and alteration of contract.

62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations.

(a) *A* owes money to *B* under a contract. It is agreed between *A*, *B* and *C* that *B* shall thenceforth accept *C* as his debtor, instead of *A*. The old debt of *A* to *B* is at an end, a new debt from *C* to *B* has been contracted.

(b) *A* owes *B* 10,000 rupees. *A* enters into an arrangement with *B*, and gives *B* a mortgage of his (*A*'s) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) *A* owes *B* 1000 rupees under a contract. *B* owes *C* 1,000 rupees. *B* orders *A* to credit *C* with 1,000 rupees in his books, but *C* does not assent to the arrangement. *B* still owes *C* 1,000 rupees, and no new contract has been entered into.

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interest and then in payment of the capital. 44 M. 570=48 I.A. 150=40 M.L.J. 549 (P.C.). See also 29 I.C. 718; 35 I.C. 375 =1 Pat.L.J. 474; 40 I.C. 809=1 Pat.L.W. 777. See also 6 M.H.C.R. 32. Where there had been successive advances by the creditor and successive payments by the debtor, the legal position is that each item of debt if unpaid becomes time barred on the expiry of three years from the date on which it is incurred; but the balance outstanding in favour of a creditor is not generally considered to consist of the oldest items of debt. Under S. 61, each payment ought to be appropriated to the satisfaction of the oldest then outstanding debt. 186 I.C. 855=1940 Pat. 52. Where the creditor has not appropriated in taking accounts, a debt which did not carry interest should rank last. 18 I.C. 535=17 C.W.N. 25 (P.C.). The application of S. 61 is always subject to the conditions that the parties had indicated no intention inconsistent with its application. 38 B. 255=21 I.C. 343. Payments by some of the debtors who were jointly and severally liable for the debt could be appropriated in order of time towards barred items even though all debtors did not concur in making payments. 41 I.C. 421. See also 1935 A. 221=1935 A.L.J. 177 (F.B.) cited under S. 59 *supra*. If a creditor has credited certain payments towards arrears of rents it is for him to show that arrears were due and what they amounted to, and in the absence of evidence on these points, it must be held that he was not entitled to do so. 1922 P. 446.

Sec. 62: ESSENTIALS OF NOVATION AND EFFECT.—It is doubtful how far the provisions of S. 62 will apply to cases of transfer of property. I.L.R. (1938) All. 714=1938 A.L.J. 746=1938 All. 418 (F.B.). Under S. 62 there must be a present substitution of another contract for the original contract and not a mere agreement to substitute one in future. (51 A. 799 and 1928 N. 289, followed.) 163 I.C. 123=38 P.L.R. 155=1936 L. 476. See also 1937

Lah. 816; 64 C.L.J. 62=1937 Cal. 57=I.L.R. (1937) Nag. 353=1937 Nag. 104; 1939 Pat. 323=20 Pat.L.T. 825. S. 62 presupposes that the original contract is still capable of performance. 1939 Rang. 413. Where the debtors execute a promote in favour of the creditors and subsequently they execute a bond for the same consideration, but there is a condition precedent to the validity of the bond which is not fulfilled, there is no novation of contract and the suit on the promote is maintainable. 162 I.C. 882=1936 L. 51. See also 1935 L. 897. "Agree to substitute", meaning of. See 27 A.L.J. 526=1929 A. 503=51 A. 799; 1931 O. 97=8 O.W.N. 126. See also 1923 N. 213. If there is a proposal to discharge a debt by executing a mortgage but the right of reverting to original position is reserved unless the new transaction is complete, there is no true novation and there is no bar to a suit on the original cause of action. 40 P.L.R. 689=1938 Lah. 757. Whatever difficulties there might be in applying the provisions of S. 62, where the agreement to substitute a new contract for the original one is made after the breach of the original contract, it is beyond all controversy that where a breach of contract has taken place, the cause of action that arises from the breach may be discharged by accord and satisfaction. I.L.R. (1941) 2 Cal. 237=45 C.W.N. 830. If the parties to a handnote agree to substitute for the liability under it a new contract under which the debtor has to pay a certain amount down and to execute and register a mortgage-deed for the balance, but subsequently neither the debtor carries out his part of the promise relating to the payment of cash nor the creditor accepts the mortgage-bond the execution of which is a unilateral act of the debtor, there is no novation of contract within the meaning of S. 62 and the creditor is therefore entitled to sue on the original handnote. 184 I.C. 705=1940 Pat. 121. See also 1937 Lah. 816. "Parties to contract", meaning of. See 63 C. 194. Parties to a contract

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may stipulate that one or both of them shall have the power to rescind the contract on the happening of some specified contingency. Such a stipulation is to be construed according to its natural meaning, subject to the principle of law that a party shall not take advantage of his own wrong. 24 Bom. L.R. 877=75 I.C. 233 [(1919) A.C. 1, Ref.]. See also 5 Bom. L.R. 617; 41 C. 137; 1925 M. 919; 1925 N. 66; 1925 N. 26; 1925 P. 228. A contract need not be rescinded by an express agreement. If the parties make a new and independent agreement concerning the same matter, the latter may be said to discharge the former especially when the latter is very inconsistent with the former. 38 I.C. 278=20 C.W.N. 708; 46 C. 534=23 C.W.N. 704; 43 C. 790=20 C.W.N. 370; 41 C. 35=21 I.C. 217; 17 I.C. 227=16 C.L.J. 271. The expression "*parties to a contract*" ordinarily signifies parties to an existing contract rather than parties to a contract that has already been discharged by breach. It has no doubt been held that the provisions of S. 62 of the Contract Act do not apply after there has been a breach of the original contract and that if the promisor does not satisfy the promisee under the terms of the new agreement, the promisee is relegated to his rights under the old contract and is entitled to sue on the basis of the old obligation. But it is difficult to apply this principle to a debt, for it is strange if the mere failure to pay an outstanding debt on demand brings the case out of the scope of S. 62. Release from an existing obligation is unquestionably good consideration for a promise to undertake a fresh obligation; and it makes no difference whether the original obligation is an obligation to do something *in futuro*, or is an obligation to pay a debt already due, or is an obligation to pay compensation for the breach of a contract. Whether the failure to carry out the substituted promise revives the original promise depends on the intention of the parties. It is always open to the parties to make an express stipulation of this nature. The law, however, does not imply any such term. 63 C. 194=40 C.W.N. 808. A composition between a debtor and his creditors operates as satisfaction of the debts and affords an answer to an action by the creditors upon the original liability. 114 I.C. 109=1929 S. 49. A party who relies on a new contract in substitution for the old must prove that it was supported by consideration. 19 I.C. 981=4 P.R. 1914. Creditor taking renewed bill for old debt does not necessarily wipe off the old debt. See 31 C.W.N. 773=102 I.C. 871=1927 C. 538. An agreement to give time for the payment of money due under a pro-note is operative in India; this principle is recognised in Art. 73, Limitation Act. 39 M. 129=30 M.L.J. 51 (F.B.). See also 145 I.C. 476=38 L.W. 533=1933 M. 704; 49 A. 599=1927 A. 451.

This is a departure from the English law. 39 M. 129=30 M.L.J. 51 (F.B.). In the case of mere contracts, a repudiation by one party assented by the other might put an end to the contract. But this principle is not applicable to rights of property. 20 I.C. 908=1914 M.W.N. 144. Where the contract subsisted and had failed, the cause of action would be the failure of the contract. The settlement that a certain amount of money was payable for the failure is not a new contract. 75 I.C. 440=1923 N. 332. Essentials of novation—Mortgage—Sale with a view to discharge mortgage—Nature of the transaction. 72 I.C. 422=1923 N. 213. In case of cross-contracts, the second contract does not operate to extinguish the first contract completely, nor is it effective as a novation. 1925 S. 144=20 S.L.R. 335. See also 22 L.W. 195=1925 M. 1260; 8 O.W.N. 126=1931 O. 97; 1933 L. 464. There is a vast difference between the obligations imposed by statute and the terms agreed by the contracting parties. There is no escape from the former, but the latter can always be modified by mutual agreement. 44 C. W. N. 1069.

ILLUSTRATIVE CASES.—Pawnee releasing his pledge by a subsequent transaction without intention to rescind his prior security—Subsequent transaction proved invalid—He can sue on his original security. 52 M. 465=116 I.C. 827. Plaintiff acting as commission agent for the defendant—Final closing of account—Plaintiff taking hundi for the balance due—No liability remaining standing—Plaintiff suing to recover money due on the hundi—Hundi inadmissible being unstamped—Plaintiff cannot fall back upon original transaction. See 1928 L. 424=112 I.C. 719; 1934 L. 128. As to necessity of registration, see 145 I.C. 159=1933 L. 174. A pro-note containing a promise to pay the debt due under a former pro-note wipes out the old debt and creates a new liability. The Court need not take up the old transaction except where express rules of law make it necessary to do so, *e.g.*, where the debt acknowledged is barred by time so as to exclude the application of S. 19, Limitation Act. 52 A. 169=1929 A. 980. Where a Hindu father executed a promissory note partly in renewal of an obligation incurred before partition and partly because of new advances made after partition, and the promissory note contained a more onerous obligation in respect of interest, than what was originally agreed on, *held*, that the promissory note represented a novation by which there was new liability in the place of the old one. 1930 M. W.N. 658. Mortgage-deed by husband and wife jointly—Second deed by husband alone may constitute novation of the first. 162 I.C. 388=1936 R. 396. If a contract is clear and unambiguous, its true effect cannot be changed merely by the course of conduct adopted by the parties in acting

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under it. Such conduct, if it is clear and unambiguous, may in certain events raise the inference that the parties have agreed to modify their contract, but short of that, such conduct cannot have the effect of changing the operation of an unambiguous agreement, though it might possibly in special cases support, along with other appropriate evidence, a claim for rectification. 172 I.C. 786=1938 P.C. 26 (P.C.). Where the original schedule of rates, payable to the contractor fixed under a contract between the Railway and the contractor was abandoned with the consent of both the parties and the new enhanced rates proposed to be substituted by the Railway for those rates were not accepted by the contractor, but the contract employing the contractor remained in operation and the contractor did the work for the Railway, which the latter accepted, the amount which the contractor is entitled to recover from the Railway for the work done should be determined on the basis of fair and reasonable rates. 65 I.A. 66=I.L.R. (1938) 2 Cal. 72=(1938) 1 M.L.J. 640 (P.C.).

EFFECT OF NOVATION.—Novation is a question of fact. 7 Mys.L.J. 440. Where for a note from a firm, another was accepted from surviving partners, the estate of the deceased partner is free from liability under the principle of S. 62. 42 I.C. 815=19 Bom.L.R. 837. See also 9 Bom.L.R. 364; 15 C. 309; 12 L. 239=1930 L. 985; 8 Mys.L.J. 326; 1930 P. 442. A contract by the purchaser of a property to pay the whole or part of the consideration retained by him for payment to the vendor's creditors can be enforced by the latter, though they were not parties to the contract. 22 C.W.N. 279=36 I.C. 792. The basis of the purchaser's liability is not novation or a substituted contract, but because of the fact that the purchaser is a trustee of the vendor's creditors for the money in his hands to be used for their benefit. 22 C.W.N. 279. Sometimes an agreement may be enforced by a stranger to the contract, that is, in cases of trust, quasi-contracts or near relationship. 22 C.W.N. 279. See also notes under S. 37, *supra*. Where a debtor has disabled himself from performing his promise under a later contract which had been intended to be a substitute for an earlier one it is open to the creditor to enforce the earlier contract rescinding the later and S. 62 is no bar. 66 I.C. 47=2 L. 323. When the terms of a mortgage by conditional sale are altered by mutual consent, there is novation of contract and the original sale clause cannot be enforced. 24 I.C. 684=189 P.L.R. 1914; 29 M.L.J. 125=1915 M.W.N. 408. Under S. 62 there can be an agreement to cancel or vary the old contract or substitute a new contract, even after the breach of the original contract. 45 M. 180=42 M.L.J. 236=67 I.C. 905. A new contract changing the place of

performance falls under S. 62 and no fresh consideration is necessary. 1917 M.W.N. 779=45 I.C. 401. A negotiable instrument given in discharge of a debt does not extinguish the debt, but only suspends payment. The creditor can fall back on the original contract if, for any reason, the new contract fails. 14 I.C. 399=8 N.L.R. 7. See 1936 N. 225. Effect of novation—Mortgage—Agreement to substitute fresh deed—Not fulfilled—Effect of—Estoppel. 30 I.C. 323=2 O.L.J. 402. A person not a party to a novation is not discharged from his liability under the original contract. 6 Bur.L.T. 171=21 I.C. 222.

BURDEN OF PROOF.—In a suit based on a novated contract the plaintiff must prove (1) the existence of liability under the original contract and (2) the extinguishment of that liability by the novated contract. 183 I.C. 855=1939 Pat. 477.

INVALID NOVATION.—Invalid novation—Mortgage deed executed in consideration of previous bonds—Non-registration—Effect of—Remedy of promisee. 13 I.C. 858=14 Bom.L.R. 26; 34 P.L.R. 440=1933 L. 335. To effect a novation pursuant to an agreement to accept a new contract, the contract which was substituted must be one capable of enforcement in law. 14 Bom.L.R. 26; 16 I.C. 246=16 C.L.J. 264. Where an insufficiently stamped hundi was given in renewal of a prior hundi, the plaintiff could fall back on the prior hundi. 67 I.C. 856=1922 L. 56; 1934 L. 128. Where the contemplated substituted security itself fails the parties could not be taken to have intended that the liability under the original contract would also cease. 10 L.W. 466=54 I.C. 318; 13 I.C. 858=14 Bom.L.R. 26; 26 I.C. 393=16 M.L.T. 489. A renewal of a debt does not *ipso facto* extinguish the security which a person has unless such renewal is accompanied by a fresh contract giving fresh security. 26 I.C. 393=16 M.L.T. 489. A pro-note accepted in full satisfaction of a claim debars the plaintiff from bringing a suit on the original claim. 9 I.C. 896; 112 I.C. 719. But see 52 M. 465.

DISPUTE AS TO MONEY DUE—SETTLEMENT OUT OF COURT—CONSIDERATION.—Where there is a dispute between the parties as to the amount really due from the defendants. *Held*, that the settlement of such a dispute without the necessity of going to a Court might form a valid consideration in law. 147 I.C. 1175=1934 L. 163 (1).

ALTERATION OF CONTRACT—LIABILITY OF ORIGINAL PARTY—BURDEN OF PROOF.—Where a contract note relating to the sale and purchase of certain shares was originally drawn up by the appellant who was a sharebroker, in the name of the respondent, but at the latter's request his name was deleted and the name of one H was substituted therefor in the note. *Held*, that the onus was on the appellant, and it would require very strong evidence, to show that notwithstanding such alteration in the contract note, the respondent remained liable to the appellant in

Promisee may dispense with or remit performance of promise.

63. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

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respect of the transactions in the shares. 154 I.C. 1090=68 M.L.J. 530 (P.C.).

Secs. 62 and 63.—No fresh consideration is necessary for an agreement which falls under the purview of S. 63 of the Contract Act and for the purpose of enforcing it, it is hardly necessary to invoke the aid of S. 62. 123 I.C. 225 (2). See also 131 I.C. 510=1931 R. 189; 146 I.C. 562=1933 L. 464.

Sec. 63.—S. 63 of the Contract Act has nothing to do with the interpretation of S. 92 of the Evidence Act. 1930 A.L.J. 1193=1930 A. 721 (F.B.). The section is intended to apply not to cases where the whole contract has been supplanted by a new one but to cases where the old contract subsists, but there is a voluntary remission of performance of some promise in it, for example, a remission of part of the debt at the time when it becomes payable. S. 63 will not cover a case of a binding promise to dispense with or remit performance in the future unless that waiver is made the subject of a fresh contract, because then S. 92 of the Evidence Act will stand in the way. 54 M. 889=1931 M. 636=61 M.L.J. 556. S. 63 makes a wide departure from the English Law inasmuch as it does not refer to any agreement and valuable consideration. It should not, therefore, be enlarged by any implication of English doctrine. I.L.R. (1941) 2 Cal. 237=45 C.W.N. 830. In a case falling under S. 63 no fresh consideration is necessary. 132 I.C. 321=1931 A.L.J. 481=1931 A. 589. *Quære*.—Whether consideration is necessary for the remission of a part or whole of the contract under S. 63. 148 I.C. 501=1934 P. 144. See also 156 I.C. 743=1935 R. 188; 58 M. 702=69 M.L.J. 360. For an agreement to remit consideration is necessary; but if the creditor has actually remitted a portion of the debt due to him and not merely promised to remit it, no consideration is necessary. But actual remission is not completed until the creditor accepts the part payment in full satisfaction. 49 L.W. 684=1939 Mad. 688. A creditor can extend the time under S. 63 even after the time fixed for payment has expired. (23 B. 348, not foll.) 132 I.C. 321=1931 A.L.J. 295=1931 A. 589. See also 1935 R. 188; 69 M.L.J. 360. Acceptance of performance—Cheque for smaller amount accepted and cashed—Effect of. 20 A.L.J. 717=44 A. 718. S. 63 not applicable where parties stand in the position of decree-holder and judgment-debtor and not in that of promisor and promisee. 24 I.C. 391. No consideration is needed for relinquishment of debt but free assent must be established. If the debt is enforceable, it can also be released under S. 63. It is doubtful, however, whether a dower debt could be discharged by verbal relin-

quishment. 47 C. 537=24 C.W.N. 335. English law requires consideration to support a release or relinquishment of debt. See 19 M. 398; 20 B. 636; 15 C. 319; 9 M.L.T. 270. See also 34 M. 156. S. 63 does not entitle a promisee for his own purposes and without the consent of the promisor to extend time to his own advantage. There must be an agreement or mutual understanding to waive. 68 I.C. 912=1923 L. 117. See also 30 L.W. 293=1929 M. 794; 116 I.C. 646=1929 N. 137. A promisee is not bound to accept part performance of a contract. 59 I.C. 971=3 L.L.J. 141. A promise to remit rent coupled with conditions is not an absolute promise of remission and the landlord is not estopped from enforcing his rights in full. 26 I.C. 958. This section would include what would be a conditional release in English law. 34 M. 156. Under S. 63 no consideration is necessary to forego a portion of the rent or debt payable. 25 I.C. 741=16 M.L.T. 184; 122 I.C. 641=53 M. 127=58 M.L.J. 503; 23 S.L.R. 294=114 I.C. 97=1929 S. 153. See also 116 I.C. 646=1929 N. 137 (No consideration is necessary for an agreement to extend time for performance). A suit cannot be brought for the recovery of the amount remitted when a remission had been made and communicated by the creditor to the debtor. 9 I.C. 763=9 M.L.T. 270. There is nothing in law to prevent a discharge by acceptance of something in lieu of the performance of the contract. 64 I.C. 461. An agreement to discharge a previous debt in consideration of the prompt receipt of a shorter sum is a valid agreement. 20 I.C. 544. Where a party to a contract of marriage having accepted cash and jewels repudiates the marriage, he is bound to return what he has taken. 65 I.C. 812 (15 C. 319, Ref.). Creditor extending time for payment, though not supported by consideration; is valid and binding. English law may be different on this subject. 49 A. 599=25 A.L.J. 385=1927 A. 451. See also 39 M. 129=30 M.L.J. 51 (F.B.). On this section, see also 1930 L. 193 (2).

ARRANGEMENT WITH CREDITORS—EFFECT OF.—The defendant made an arrangement with his creditors including the plaintiff, to pay them a composition of six annas in the rupee upon their respective demands and he offered the amount due to the plaintiff firm upon this arrangement, which the general agent of the plaintiff firm, refused to accept believing that the defendant had some other property which he was concealing. It was also proved that several other creditors of the defendant were paid according to the settlement. *Held*, that the case was fully covered by Ill. (e), S. 63 and that the plaintiff could not be allowed to resile from the agreement made with the defendant. 145 I.C. 801=1933 O. 361. Under S. 63, it is no doubt open to a

Illustrations.

(a) *A* promises to paint a picture for *B*. *B* afterwards forbids him to do so. *A* is no longer bound to perform the promise.

(b) *A* owes *B* 5,000 rupees. *A* pays to *B*, and *B* accepts, in satisfaction of the whole debt 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) *A* owes *B* 5000 rupees. *C* pays to *B* 1,000 rupees, and *B* accepts them, in satisfaction of his claim on *A*. This payment is a discharge of the whole claim.

(d) *A* owes *B*, under a contract, a sum of money, the amount of which has not been ascertained. *A* without ascertaining the amount gives to *B*, and *B*, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) *A* owes *B* 2,000 rupees, and is also indebted to other creditors. *A* makes an arrangement with his creditors, including *B* to pay them a ¹[composition] of eight annas in the rupee upon their respective demands. Payment to *B* of 1,000 rupees is a discharge of *B*'s demand.

64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

LEG. REF.

¹ This word was substituted for the word "compensation" by S. 2 and Sch. II of Act XII of 1891.

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promisee to remit his claim in whole or in part even without consideration. But when a person who is on the verge of insolvency purports to make a remission the validity of that transaction as against the Official Receiver cannot be determined merely with reference to S. 63 of the Contract Act. Where the remission is without consideration it would obviously be inoperative as against the Official Receiver in view of S. 53 of the Provincial Insolvency Act. Standing surety for the debtor in connection with certain loans and joining him in executing a mortgage to his creditor cannot in law amount to consideration so as to validate a remission by a debtor on the verge of insolvency as against the Official Receiver. 1940 M.W.N. 495=1940 Mad. 737. See also 44 L.W. 722=1936 Mad. 798.

Sec. 64: SCOPE OF SECTION.—See 11 Bom. L.R. 693. Section does not apply to contracts originally known to be void or illegal. 9 B. 358; 15 C.W.N. 408. See also 49 B. 576=88 I.C. 643; 44 L.W. 722=1936 M. 978; 44 C. W.N. 11. The word 'rescinds' as used in S. 64, implies an "express and unequivocal cancellation of the contract". Where a domestic servant employed as sweeper of the house leaves his master without any notice and the master does nothing except engaging another person for doing the work the contract with the former servant is not necessarily rescinded by the master and hence the servant is not entitled to get the pay for the work done. 176 I.C. 526=1938 Rang. 207. Agreement to execute contract to Municipality—Committee rescinding contract—Other party relieved of his obligation. 157 I.C. 879=1935 Pesh. 124. When a sale of minor's property by his *de facto* guardian is set aside, the minor must return to the vendee the amount

of benefit received by him thereunder. 10 L.L.J. 183=1928 L. 250; 113 I.C. 53. The term 'benefits under the contract' extends only to the money paid as consideration and not to the improvements effected by a usufructuary mortgagee. 124 I.C. 731. See also 8 P. 1. A party guilty of a breach of contract cannot claim damages arising out of his own default. Nor can he claim a refund of earnest money advanced as a guarantee for the fulfilment of the contract. 41 A. 324=50 I.C. 948. See also 39 C.W.N. 174; 23 B. 56; 24 L.W. 386=1927 M. 204=52 M.L.J. 33; 100 I.C. 860=1927 N. 168. Suit for compensation recoverable under S. 64 is barred if brought after ten years. 19 I.C. 624. Alienation by minor—Alienation set aside—Minor's liability to restore benefit received. 60 I.C. 519. See also 26 N.L. R. 85=1929 N. 156; 122 I.C. 266; 117 I.C. 371=1929 L. 331; 29 I.C. 972; 30 C. 539; 32 A. 25. Where a sale by a guardian on behalf of a minor is held to be void *ab initio*, the vendee cannot claim for the improvement effected by him, on the property. Ss. 64 and 65 do not apply to this case. 98 P. L.R. 1913=18 I.C. 485. See also 116 I.C. 713=1929 L. 332; 31 Bom.L.R. 88 (applicability of section to transaction of person of unsound mind). If a guardian sells his ward's property for purposes not binding and the price is utilized for the purchase of other lands for the ward not contemplated at the time of the sale, the lands so purchased do not constitute the benefit within S. 64 and need not be conveyed to the vendee from the guardian when the ward avoids the sale by the guardian. 42 M. 36=35 M.L.J. 652. As to borrowing by the Karnavan of a Malabar tarwad in excess of his powers, for the purpose of the *tavazhi*, see 23 L. W. 186=93 I.C. 20=1926 M. 398. Where the Karnavan acted in excess of his powers in executing a *kanom* over the properties of the *illom* but where the money so borrowed was utilised for the benefit of the *illom*, such as, for the marriage of a female

65. When an agreement is discovered to be void, or when a contract becomes

Obligation of person who has received advantage under void agreement or contract that becomes void.

void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

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member of the illom the transaction could be set aside only on condition of the illom, or its Karnavan paying the alienee the amount he had paid. 35 L.W. 171=1932 M. 303. Financing of litigation—Money advanced in part-repudiation—Right to recover. 47 I.C. 563. See also 11 O.W.N. 603=1934 O. 170. Under S. 64 a person who puts an end to a contract under S. 39 is the party rescinding a voidable contract. 38 I.C. 915=12 N.L.R. 177. Mistake—Restoration of benefit. 66 I.C. 461=1922 O. 152; 1930 A. 252; 1930 A.L.J. 327. In the case of a breach of a revocable contract or trust the choice of the remedy lies with the party whose rights are infringed, and not with the promisor or trustee. 20 I.C. 783.

Secs. 64, 65 and 72.—Applicability—Debtor of insolvent executing promissory note to creditor of insolvent on eve of insolvency and making payments thereunder the insolvency and after notice by Official Receiver—Transaction held to be fraudulent preference—Right to recover payments made—“Void”—Failure of consideration or mistake—If any. 44 L.W. 722=1936 Mad. 978. See also 1940 Mad. 737.

Sec. 65: SCOPE OF SECTION.—Section is also applicable to contracts which one had under local or special laws. 1929 L. 742=11 L. 121; I.L.R. (1940) Nag. 553. But see 137 I.C. 574=1932 O. 193 (F.B.). S. 65 covers the case of a contract void from its inception as much as one subsequently discovered to be void. 137 I.C. 574=1932 O. 193 (F.B.); 44 L.W. 722=1936 M. 798; I.L.R. (1937) N. 111. See also 39 Bom.L.R. 1124; 1941 Nag. 273; 1941 Pat. 510 also cases under “Discovered to be void”. The provisions of S. 65, Contract Act, apply to agreements which are void *ab initio*. The words “discovered to be void” in the section include such agreements. Leases granted by a Municipality, which do not comply with the requirements of S. 69 of the Madras District Municipalities Act are merely agreements which are void *ab initio*, to which S. 65 of the Contract Act is applicable. The Municipality can therefore maintain a suit against the lessees for damages for use and occupation, though the leases themselves are not enforceable at law. 43 L.W. 39=1936 M. 98. See also 162 I.C. 362=1936 O. 280; 164 I.C. 945=1936 O. 1033 I.L.R. (1939) Mad. 928=1939 Mad. 957=50 L.W. 440. Where a contract of suretyship entered into with a Local Board by a person standing surety for a contractor of lease of fisheries is discovered to be void on account of non-compliance with the formalities of the Act, S. 65 of the Contract Act would apply when S. 23 of the Contract Act does not apply, where advantage has been received by one or other of the parties and

the Court can act on the principle of *quantum meruit*. But when no advantage has been received, this cannot be done. I.L.R. (1940) Kar. 347=1940 Sind 199. See also 47 L.W. 668. S. 65 includes and applies to contracts void *ab initio*. The criterion which causes the Court to say that it will or will not assist the parties to recover the moneys paid under an unlawful agreement is not whether they have had *locus penitentiae* before carrying out the purpose of the fraud, but whether it would be contrary to morality and public policy to give the parties assistance in a Court of Law, where the purpose of the fraud has actually been wholly or partially successfully carried out. (35 C. 551, Rel. on.) 14 R. 597=1936 R. 358. S. 65, not only applies to agreements and contracts but also to transfers of property. Where therefore a mortgage is found invalid, a mortgagee can recover the mortgage-money under S. 65, if he prays for such relief in the mortgage suit. 1937 O.W.N. 784=1937 Oudh 410. See also I.L.R. (1937) Nag. 111. Where after the assignment of mortgagee rights the mortgage is declared void *ab initio*, the consideration for the assignment fails, and the mortgagee is, therefore, liable to refund the money received by him to the assignee. 40 P.L.R. 528=1938 Lah. 566. Where a transfer is set aside under S. 53, T. P. Act, the case is governed by S. 65, Contract Act, and the transferor is bound under S. 65 to restore to the transferee, the price that he has received in respect of the transfer. The transferee is not however entitled to recover the money spent in suing the creditors of the transferor, where he himself was a party to the conspiracy to defeat the creditors and was aware of all the facts. 1936 N. 268. See also 44 L.W. 722=1936 M. 978. See 11 Mys.L.J. 81. The words “when a contract becomes void” are sufficient to cover the case of a voidable contract which had been avoided. 59 I.A. 147=62 M.L.J. 451 (P.C.). Where the defendant got possession in pursuance of a contract procured by undue influence and fraud and voidable on that account at the instance of the plaintiff, if there is no proof of undue delay on the part of the plaintiff in bringing his suit to avoid the contract, and no difficulty in putting the parties back in the position which they occupied respectively when the contract was entered into, the plaintiff is entitled to an account of the rents and profits of the immovable properties—not merely from the date of the institution of the suit—but from the date when defendant got possession, the latter being entitled to credit for all payments made by him to the plaintiff. 59 I.A. 147=7 Luck. 64=1932 P.C. 89=62 M.L.J. 451 (P.C.). Where in a suit for recovery of balance, in respect of transactions entered by the plain-

Illustrations.

- (a) *A* pays *B* 1,000 rupees in consideration of *B*'s promising to marry *C*, *A*'s daughter. *C* is dead at the time of the promise. The agreement is void, but *B* must repay *A* the 1,000 rupees.
- (b) *A* contracts with *B* to deliver to him 250 maunds of rice before the first of May. *A* delivers 130 maunds only before that day, and none after. *B* retains the 130 maunds after the first of May. He is bound to pay *A* for them.
- (c) *A*, a singer, contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her a hundred rupees for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre, and *B*, in consequence, rescinds the contract. *B* must pay *A* for the five nights on which she had sung.
- (d) *A* contracts to sing for *B* at a concert for 1,000 rupees, which are paid in advance. *A* is too ill to sing. *A* is not bound to make compensation to *B* for the loss of the profits which *B* would have made if *A* had been able to sing, but must refund to *B* the 1,000 rupees paid in advance.

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tiff with a third person, arrived at after appropriating to the losses arising out of such transactions the defendant's remittances, the defendant counter-claims the amount so appropriated on the ground that the transactions entered by the plaintiff are void, the counter-claim falls to be dealt with as a claim for the restoration of an advantage under S. 65. But as the plaintiff has applied the amount or has become legally liable to meet losses arising from the carrying out of the defendant's instructions, the plaintiff cannot be said to have received an advantage within the meaning of S. 65. The fact that there was no privity of contract between the defendant and the third person makes no difference, if the plaintiff has incurred the liability to the third person in carrying out the defendant's instructions. 1938 A.L.J. 77=1938 P.C. 4 (P.C.). The principle of restitution embodied in S. 65, in case of a contract found to be invalid, is that of giving relief upon *quantum meruit*. That, however, is the general rule which does not apply to a case governed by special law. 137 I.C. 574=1932 O. 193 (F.B.). But see also 1929 L. 742=11 L. 121. See also 37 L.W. 429=1933 M. 332; 1937 Nag. 111; 1940 Sind 199. An action for money had and received does not lie if the consideration fails only in part. 1932 B. 386=56 B. 501. The maxim *in pari delicto, potior est conditio possidentis* is not applicable to a case where the parties did not know of the illegality at the time they entered into the contract. So, where the parties effected a lease without the sanction of the Deputy Commissioner without knowing that such sanction was necessary, the lessee is entitled to get back the consideration paid by him. (16 N.L.R. 129 and 32 N.L.R. 136, Dist.; 20 N.L.R. 87, Foll.) 134 I.C. 281=1931 N. 137. See also 1935 L. 401. Where a contract is held to be void a party is not entitled to claim the penalty under the contract. The right to claim relief however on the *quantum meruit* basis is not necessarily based on an agreement between the parties and if a party is otherwise entitled he should be given the relief. 39 L.W. 508=149 I.C. 503=1934 M. 335. Where in a case of supply of goods the contract is found to be void and S. 65, Contract Act, is found to be applicable, it is the doctrine of "*quantum valebat*" and not that of "*quantum meruit*" that must be applied; and where the actual goods cannot

be returned, restitution must be fixed at the price at which they were sold by the vendors. 37 L.W. 429=1933 M. 332. See also 45 I.C. 412=1933 M. 105; 152 I.C. 135=1934 N. 248. A suit is maintainable for the recovery of the money actually paid by the plaintiff to the defendant as a consideration for the latter arranging the marriage of his sister's daughter with the plaintiff's brother, which he failed to do. 1937 P.W.N. 175=1937 Pat. 330. Where the recitals in a mortgage deed suggest that money is likely to have been applied to pay off business debts and is applied to pay off business debts and not applied in any manner for the benefit of defendants there is no right to relief against the defendants, under S. 65. 44 L.W. 725=1936 M. 595. The Madras District Municipalities Act (IV of 1884) makes provisions in Ss. 45 and 46 concerning only with contracts, but it is silent with regard to any agreement entered into by a Municipal Council. Therefore if a Municipal Council makes an agreement and it is found that such an agreement is not enforceable by law as not having been properly executed the agreement becomes void; but when an agreement is discovered to be void the Municipal Council, which is a person in law, who has received any advantage under such an agreement is, under S. 65, Contract Act, bound to restore it. 1934 M. 480=67 M.L.J. 38. See also 1940 A.W.R. (H.C.) 243; 1937 Lah. 781 (Agreement to purchase plot after sanction of Municipality to "lay out" scheme and earnest paid thereon—Sanction suspended by order of commissioner—Vendor is bound to return earnest money). The agreement to sell the right of reversioner is manifestly void from its inception, because its subject-matter is incapable of being bound by sale. The vendee in this case was given the purchase-money and interest at 6 per cent. from the date of suit. 44 M.L.J. 489=45 A. 179=50 I.A. 69 (P.C.). S. 65 is not applicable when the object of the agreement was illegal to the knowledge of both parties. 8 I.C. 161=15 C.W.N. 408; 41 I.C. 877=13 N.L.R. 114. See also 89 I.C. 684=1926 L. 159; 26 A.L.J. 492; 89 I.C. 143; 1925 O. 212; 1925 O. 737; 49 B. 576; 48 M.L.J. 598; 48 M.L.J. 413; 1940 M.W.N. 342=1940 Mad. 558. Right of subscriber in chit transaction, to get back the amount subscribed and paid to the stake-holder. See 49 M.L.J. 791=92 I.C. 968=1926 M. 168. Where money

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belonging to the plaintiff was wrongly obtained by the defendant from another person under a contract with him and such person was not an agent of the plaintiff and was not held out by the plaintiff as such, the plaintiff is entitled to recover the amount from the defendant. S. 65 may not apply directly to such a case but the same principle would apply. 68 C.L.J. 94. Breach of promise of marriage—Liability to restore ornaments given to bride. 165 I.C. 247=1936 O.W.N. 879.

VOIDABLE CONTRACT.—A mortgagor who sues for the cancellation of a mortgage must refund to the mortgagee the amount paid by the mortgagee under the contract of mortgage. 27 I.C. 130. A rescinded contract becomes a void contract and the person who has received any advantage under it is bound to restore it to the other party. 27 I.C. 130. See also 1933 M. 145.

"BECOMES VOID."—S. 65 does not apply where it cannot be said that the agreement was discovered to be void or became void after it had been entered into. 18 I.C. 9; 44 A. 229=20 A.L.J. 41; 41 B. 546=40 I.C. 1002; 42 B. 499=38 I.C. 771; 40 B. 529=33 I.C. 536; 11 Mys.L.J. 81. See also 89 I.C. 684; 1941 Pat. 510; 1941 Nag. 273; 31 S.L.R. 170=1937 Sind 211; 1927 O. 177; 118 I.C. 865=1929 N. 257; 116 I.C. 497=1929 N. 241; 1930 S. 282; 8 Mys.L.J. 361. S. 65 applies even though the contract was not void *ab initio* but becomes void subsequently and a suit to recover money paid under such a contract is maintainable. 67 I.C. 367=56 P.L.R. 1922; 42 C. 286=21 C.L.J. 642. S. 65 does not apply to contracts known to be void *ab initio* by reason of the illegality of the consideration. 27 P.L.R. 1915=27 I.C. 1008; 51 I.C. 412=42 P.R. 1919; 21 I.C. 517; 37 I.C. 285; 27 A.L.J. 801=1929 A. 659. The words "when a contract becomes void" in S. 65 are sufficient to cover the case of a voidable contract which has been avoided. Where, therefore, an occupancy tenant has alienated the occupancy tenancy without the consent in writing of the landlord and the alienation has been set aside at the instance of the landlord in a suit brought under S. 60 of the Punjab Tenancy Act, the mortgagee is entitled to sue the mortgagor for refund of the mortgage-money. (59 I.A. 147, Foll.) 36 P.L.R. 233=1934 L. 853 (2) (F.B.). See also 1935 A. 256; 18 Mys.L.J. 246=45 Mys.H.C.R. 132. A contract of sale in contravention of the provisions of the Punjab Alienation of Land Act is not void *ab initio*, because there is a provision in the Act enabling the vendee to have the defect in his title removed by securing the sanction of the Deputy Commissioner. If he fails to apply for such sanction, or if such sanction is applied for and is refused, the so-called permanent alienation takes effect as a usufructuary mortgage in form (a) permitted by S. 6 for such term as the Deputy Commissioner considers to be reasonable. Where a vendee alleged himself to be a member of an agricultural tribe but

was found by the Courts to be a non-agriculturist, the case is covered by S. 65 of the Contract Act, and the vendee can recover the price paid by him to the vendor. 151 I.C. 172=1934 L. 979. Where a lease is void because the term of the lease exceeds the statutory term there is no actual illegal purpose intended or carried into effect and as such the maxim *in pari delicto potior est conditio possidentis* will not apply, but S. 65 will apply with the result that the lessor will be entitled to get back possession on the lease becoming void at the expiry of the statutory period on payment of compensation to the lessee. 1935 N. 58. See also (1941) 2 M.L.J. 216 (Loan by local authority without sanction—Right of creditor to relief). 43 Bom.L.R. 800 (Illegal contract by village panchayat—Suit to recover money on the basis of such contract). Lease for a term—Payment of money in advance—Subject-matter of lease burnt by fire—Tenant entitled to refund of lease money for unexpired period. 31 N.L.R. 368=158 I.C. 358=1935 N. 208. See also 1936 P. 462. A person exchanging a house worth more than 100 rupees by an unregistered deed, can recover possession of the same but must refund the consideration he received in exchange. 203 P.L.R. 1913=19 I.C. 236. Expression 'becoming void' in the section pre-supposes enforceability and that which is not enforceable cannot become void. 57 I.C. 680; 9 I.C. 743; 38 M.L.J. 256=55 I.C. 697=43 M. 703. The second part of S. 65, namely "or to make compensation for it" only comes into play when the advantage cannot be restored. Moreover interest on the money paid under void contract would only be payable after the advantage has been refused to be restored. Where therefore a contract of sale by District Board is found to be void for want of sanction of the Commissioner and the money paid under it is repaid to the vendee after the Commissioner had refused his sanction and it is not proved that this money had earned any interest in the hands of the District Board, the vendee is not entitled to any interest from the date when the money had been paid by the vendee to the District Board to the date of institution of suit for damages. Moreover the claim for interest cannot be granted on the ground of negligence on the part of the Board in overlooking the provisions of the law as it is equally the duty of the vendee to know the law. 1939 Lah. 564. S. 65 does not apply to a mortgage which becomes unenforceable for want of legal necessity and benefit to the family. 5 Pat.L.J. 622=58 I.C. 303; 77 I.C. 378. See also 128 I.C. 907=32 Bom.L.R. 1376=1931 B. 39; 134 I.C. 1116=1931 L. 694. Contract by trustee in contravention of scheme of management—Moneys advanced with notice to trustee not recoverable. See (1940) 1 M.L.J. 547=1940 Mad. 517. Impossibility by—Action of executive—Effect of. 51 I.C. 412=42 P.R. 1919. On this section, see also 1 Luck. 144; 1929 A. 387=119 I.C. 436; 18 Mys.L.J. 246=45 Mys. H.C. R. 132.

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DISCOVERED TO BE VOID.—"Discovered to be void"—Meaning of. 44 B. 631=44 M.L.J. 489=50 I.A. 69=1922 P.C. 403 (P.C.); 34 M.L.J. 561=44 I.C. 319; 41 M. 197=34 M.L.J. 282=41 I.C. 783; 26 I.C. 489=1915 M.W.N. 8; 39 Bom.L.R. 1124; 15 Mys.L.J. 395; 4 O.W.N. 256=101 I.C. 265=1927 O. 177. *See also* 64 M.L.J. 403 (P.C.). S. 65 does not apply where the object of the agreement was illegal to the knowledge of both the parties at the time it was made. It cannot be said that such an agreement is an agreement discovered to be void within the meaning of that section. 43 C.W.N. 260. *See also* 1938 Nag. 335 (F.B.); 1938 Lah. 721; 1938 Nag. 451; 39 Bom.L.R. 1124; (1940) 1 M.L.J. 547. Under the general law a plaintiff whose hands have not been tainted with corruption and who has not been a party to a fraud, is entitled to get back the money which he left with another. 44 B. 631. **Where a mortgage is found to be void and unenforceable** for want of proper attestation, the mortgagee is entitled to a money-decree for the amount advanced by him. 43 I.C. 266=20 O.C. 306.

CONTRACT NOT PERFORMED OWING TO EVENT NOT CONTEMPLATED BY PARTIES.—Refund of amount advanced—Interest as compensation. *See* 152 I.C. 644=1934 N. 248.

LIMITATION.—In a suit to recover money paid under a void agreement the *terminus a quo* for purposes of limitation is the date of the agreement that being the time at which (in the absence of special circumstances) the agreement was discovered to be void within the meaning of S. 65 of the Act. 60 I.A. 13=54 A. 1067=64 M.L.J. 403 (P.C.). When a transfer is void owing to a provision of law, so that a cause of action to recover the consideration under S. 65, arises, time runs, ordinarily, from the date of the agreement. 1938 N.L.J. 409.

ILLEGAL CONTRACT.—The obligation to do justice rests upon all persons natural and artificial and where a corporation receives money or property under an agreement which turns out to be *ultra vires* or illegal, it cannot retain it must either return it or make compensation for it. 43 C. 790=35 I.C. 305=20 C.W.N. 370; 43 C. 115=19 C.W.N. 919; 38 B. 249=23 I.C. 602; 42 A. 7=52 I.C. 331. S. 65 has no application where the contract embodies a purpose known to be illegal to which both sides are parties. 54 I.C. 794; 14 M.L.T. 489=21 I.C. 879; 46 I.C. 326.

MONEY ADVANCED TO PERSON WHOSE ESTATE IS UNDER COURT OF WARDS.—The question whether a contract is void or voidable presupposes the existence of a contract and cannot arise in the case of a person who is disqualified from contracting by any law to which he is subject. S. 65 has no application to such a case in which there never could have been any contract. Where therefore the consideration for a promissory note consists of advances made to a person whose estate is under the superintendence of the Court of

Wards and who is consequently incompetent by S. 31, C. P. Court of Wards Act, to enter into any such contract, the contract is an absolute nullity and the creditor is not entitled to recover the advance under S. 65. The fact that a Government ward is incompetent to enter into any contract, rules out any action founded on S. 65. 31 N.L.R. (Supp.) 62=1936 N. 15.

MINOR'S CONTRACT.—S. 65 is not inapplicable to minors; and minors are not excluded from the persons who have to restore benefits in accordance with the section. It is the duty of Courts to protect the interests of minors; but it is no part of their duty to stretch the law to do injustice on behalf of minors nor to let them escape responsibilities which properly and fairly fall upon them. 18 Mys.L.J. 246=45 Mys.H.C.R. 132. Vendee, who was minor at the date of purchase, can recover consideration money, if he is subsequently dispossessed of the property purchased. 35 A. 370=19 I.C. 610. Where persons, who are, in fact, under age by false and fraudulent misrepresentation as to their age, induce others to purchase property from them, they are liable in equity to make restitution to the purchasers of the benefit they had obtained before they could recover possession of the property sold. 1933 A. 371. *See also* 1937 O.W.N. 1012. Where a minor, who is over 18 but below 21 years of age borrows money under a mortgage deed under a fraudulent concealment of the fact that he is a minor because a guardian had been appointed for him under the Guardians and Wards Act, the mortgagee cannot enforce the mortgage against the minor even after he becomes a major, and get a decree for the amount. I.L.R. (1939) All. 860=1937 A.L.J. 688=1937 All. 610 (F.B.). S. 65 has no application to a case where there never was or could have been any contract between competent parties, as for instance, where one of the parties to a contract is a minor. 45 B. 225=59 I.C. 245; 35 A. 370=19 I.C. 610; 40 A. 558=48 I.C. 478; 10 L.W. 225=53 I.C. 14; 23 N.L.R. 8=98 I.C. 650=1927 N. 116; 100 I.C. 860=1927 N. 168; 103 I.C. 209=1927 N. 200. But *see* next case. A minor who seeks to recover the property sold by him after cancellation of the sale, must restore the benefit he had received. 24 O.C. 348=64 I.C. 771; 53 I.C. 65=15 N.L.R. 149 (11 O.C. 1, Foll.; 40 A. 558; 8 O.L.J. 287, Ref.). *See also* 4 Bur.L.J. 197=1926 R. 7; 1937 A.L.J. 688=1937 All. 610; 18 A. 373; 44 B. 175; 45 B. 225. It cannot be said that in every case in which relief is granted to a minor he should be made to return the benefit derived by him from the contract. Nor could it be said that in no case can any person who seeks to avoid a contract entered into by him in his minority be made to pay compensation to the other party. No hard and fast rule can be laid down on the point. The absence of fraud or misrepresentation on the part of the minor coupled with the fact that the vendee was cognizant of the minority of the person concerned was

Mode of communicating or revoking rescission of voidable contract.

Effect of neglect of promisee to afford promisor reasonable facilities for performance.

66. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

67. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration.

A contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

CHAPTER V.

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT.

168. If a person incapable of entering into a contract, or any one whom

LEG. REF.

¹ S. 68 has been amended in the Central Provinces by the C.P. Court of Wards (Amendment) Act (I of 1915).

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held to disentitle the vendee in such a case from claiming compensation. 15 Luck. 265 = 1940 Oudh 119. *See also* 194 I.C. 824 = 1941 Pesh. 38. In a suit on a bond, the defendant pleaded and the Court found that the executant was a minor at the time he executed the bond and got the money from the plaintiff. It was also proved that there had been no fraudulent misrepresentation by the defendant as to his age. *Held*, that plaintiff could not claim restitution under S. 65 of the Contract Act; nor could he get any compensation under S. 41, Specific Relief Act. 61 C. 1075 = 1935 C. 198. (*See Notes under S. 11, supra.*) S. 65 cannot be availed of and does not apply to a case in which there never was and never could have been a contract. Nor can the transaction be upheld under S. 43, T. P. Act. S. 43, which is based on the principle of estoppel cannot apply to the case, as estoppel cannot be pleaded against a statute so as to prejudice a minor who enjoys the protection of the law. I.L.R. (1937) All. 860 = 1937 A.L.J. 688 = 1937 All. 610 (F.B.).

CONTRACT WITH LUNATIC.—S. 65 cannot bind a party to a contract with a person of unsound mind. Such contract being void, no refund of money paid to unsound person can be claimed. 41 P.R. 1912 = 15 I.C. 404; 32 I.C. 804. (*See Notes under S. 12.*)

TRUST PROPERTY.—Where an alienation made by the shebait of a deity is held to be void, and the alienee has spent large sums of money in carrying on litigation against those persons who were in illegal occupation of the *debotter* estate, and but for his efforts the deity would never have got back its properties, and the alienee has also spent money for repairs of the temples and for carrying on *deb-sheba* which was neglected by the shebait, the plaintiff before he can recover the properties on behalf of the deity must compensate the alienee for all the expenses

which he has legitimately incurred. 45 C. W.N. 665.

INSOLVENTS.—Where a mortgage effected by the receiver of the insolvent's property is set aside by the District Judge, and the adjudication is annulled, the mortgagee, in a suit by the mortgagor for possession, is entitled to remain in possession until he is repaid by the mortgagor the sum advanced on the security of the land. 1935 L. 112. *See also* 44 L.W. 722 = 1936 M. 798. (Fraudulent preference). 58 M. 702 = 69 M.L.J. 360.

Secs. 65 and 70.—S. 65 proceeds on the basis of there having been a contract. S. 70 on the other hand does not require a contract to exist for its application. I.L.R. (1937) Bom. 782 = 39 Bom.L.R. 835 = 1937 Bom. 417. Where a lessee under an instrument not satisfying the requirements of S. 107, T. P. Act, spent money on putting up a shed and chabutra without giving notice to the lessor or obtaining her consent as he should have done under Cls. (f) and (p) of S. 108, T.P. Act, it was held that he was not entitled to reimbursement as S. 65 of Contract Act would not apply to the agreement since it was not void and that S. 70, Contract Act, also would not apply as the requirements of Cls. (f) and (p) of S. 108, T. P. Act, were not complied with. 1941 O.A. 1050.

Sec. 65, Ill. (d) is a departure from the English law. *See* 44 C.W.N. 11.

Sec. 66.—Where one party shows by acts and conduct amounting to a clear renunciation or absolute refusal to perform the contract, the other party will be justified in regarding himself as discharged from all continued liability under the contract. 43 C. 790 = 20 C.W.N. 370. *See also notes under* Ss. 3 and 5 *supra*.

Sec. 67.—Where the defendants had practically repudiated the terms of the contract it is not necessary that any actual tender of money should have been made to them and it is sufficient for the plaintiffs to show their readiness to pay the money. 1923 L. 56.

"BREACH OF CONTRACT."—What amounts to. 10 I.C. 105 = 9 M.L.T. 454.

Sec. 68.—*See* 156 I.C. 710. Supply of excessively costly articles though of real use, and objects of mere luxury are not

Claim for necessities supplied to person incapable of contracting, or on his account.

he is legally bound to support is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

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necessaries. 36 C. 768. The term 'necessaries' is not confined to goods. It can include other things such as good teaching and instruction whereby the minor may profit himself afterwards, and also money to enable him to obtain these necessities. For example, the term includes costs incurred in defending a suit to save the minor's property and to defend him in a criminal prosecution; so also reasonable marriage expenses of a minor himself or a sister or other co-parceners and such religious ceremonies as the minor would have had to perform if he had been an adult. (Case-law referred). 175 I.C. 149=1938 Nag. 65. See also 45 Mys.H. C.R. 403. Word "necessaries" in S. 68 includes money urgently needed for the requirements of a minor and cannot be restricted to what is necessary for elementary requirements of minors such as food and clothing. 1930 A.L.J. 347=123 I.C. 827=1930 A. 128. Cloth supplied to a minor and cash lent to him to effect necessary repairs in his house are "necessaries" within the meaning of S. 68. 1936 N. 12. S. 68 refers to a person who supplies a minor with necessities suited to his condition in life. It does not validate a mortgage executed by a guardian of the ward's properties. 11 R. 193=146 I.C. 922=1933 R. 83. If a loan is taken by a guardian on behalf of a minor for the purpose of some necessity or for the benefit of the minor's estate, the minor's estate is liable. (49 A. 52, followed.) 1936 A.L.J. 155=1936 A. 172. Where the *de facto* guardian of a minor executed simple money bonds (which did not specifically bind the minor's estate) and borrowed money to meet the expenses of the marriage of the minor's sister, whom the minor was under his personal law bound to maintain, in a suit by the creditor. *Held*, that the minor's estate was not liable on the contract executed by the guardian which did not purport to bind his estate but that the amount may be recovered from the minor's estate as money expended on necessities under S. 68 of the Act. (32 A. 325, Foll.; 42 M. 185, Ref.; 18 N.L.R. 119, Doubtful.) 145 I.C. 350=1933 N. 285. Where the properties of a minor are threatened to be attached and there is imminent danger of the same being sold for revenue, if a creditor realising the difficulties the minor was in, advances money which is utilised to avert the danger the creditor advancing money is entitled to be reimbursed from the property of minor. 1930 A. L. J. 347=1930 A. 128. As to proof of necessities, see 101 I. C. 702=1927 L. 414. It is a well-settled principle of the general law that a guardian cannot impose a personal liability on his ward and therefore a minor cannot be bound by a personal covenant in a contract by his

guardian. The minor's personal law may, however, affect the position. S. 68 of the Contract Act allows a person who has supplied a minor with necessities such as maintenance and litigation expenses to reimburse himself from the minor's property; and he can also claim interest on equitable grounds; and a fair rate would be the Court rate of 6 per cent. per annum. 1940 Mad. 106=I. L.R. (1940) Mad. 27=50 L.W. 323. In a case where a creditor seeks to make the estate of the minor liable for advance made for necessities (including in term advances made for necessary purposes), mere *bona fide* enquiry by the creditor into the existence of the necessity and advance in good faith thereafter will not suffice, but at the same time the creditor should not be required to prove actual application of the money. To require this of the creditor is to ask him to do the impossible. The creditor is required to prove the circumstances of the minor's estate, the absence of any other source from which the necessity could be met at the time of transaction and the suitability of the necessity having regard to the social status and the condition in life of the minor. If these are established, and the creditor has advanced money for meeting such necessities after satisfying himself about the same, the creditor is entitled to a decree against the estate of the minor unless it is proved by the other side that the guardian did not actually apply the money for necessary purposes. 175 I.C. 494=1938 Nag. 68. S. 68 refers to a person who supplies a minor with necessities suited to his condition in life. It does not validate a mortgage executed by a guardian of the ward's properties. 1933 R. 83. During the lifetime of his father, money borrowed by a person incapable of entering into a contract, to pay for the *Sradh* of his mother, is not necessity. 32 I.C. 937. Money spent on the *obsequies of the father of the minor* cannot be deemed to be necessities supplied to the minor within the meaning of S. 68 of the Act and an acknowledgment by the mother, as the guardian, of a debt borrowed for the above purposes is not binding on the minor. 10 O.W.N. 188=1933 O. 132. Discharge of decree-debt by stranger as owner of property of the deceased, while deceased's minor sons were living would not avail the stranger. 1925 A. 213. A money-lender, advancing money to a minor alleging that it was for necessities must draw the bond so as to bind the minor's estate. 37 M. 38=21 M.L.J. 1077. Litigation expenses—Payment of father's debts, if necessities. 18 N.L.R. 119=64 I.C. 851=1922 N. 247. Costs of defending minor in civil and criminal cases are necessities. 21 C. 872; 7 C. 140; 17 M. 257. It is one thing to lay down set of rules with respect to a transaction which denudes a minor of

Illustrations.

(a) *A* supplies *B*, a lunatic, with necessities, suitable to his condition in life. *A* is entitled to be reimbursed from *B*'s property.

(b) *A* supplies the wife and children of *B*, a lunatic, with necessities suitable to their condition in life. *A* is entitled to be reimbursed from *B*'s property.

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his property, or a part of it, and quite another to determine whether money and articles supplied to him which add to his property or to his convenience and comfort are necessities or benefits within the meaning of S. 68. The test of 'fair and proper' can be applied in both cases, but the standard must necessarily differ for what is fair and proper in the shape of benefits conferred or comforts supplied, may not be fair and proper in the case of an alienation. One important point of distinction between the two classes of cases is this: in the case of an alienation where necessity is alleged, enquiries made in good faith protect the transferee, whereas in the case of necessities such considerations are irrelevant. Then again an alienation by a minor would be void whatever the purpose for which it was made, but in the case of necessities supplied to him it is immaterial whether the order comes from him or from his guardian, in both the cases the test is precisely the same: the suitability of the goods supplied, or the benefits conferred, having regard to the social status and condition in life of the minor, and to his actual requirements at the time of the transaction. 175 I.C. 149=1938 Nag. 65. Neither the property nor the person of a ward under Court of Wards is liable for necessities. 61 I.C. 563=17 N.L.R. 20. When a guardian borrows money for the necessities of a minor in such circumstances as to give him a right to be reimbursed from the latter's estate, his creditor may be subrogated to the guardian's rights. 56 I.C. 740. See also 31 Punj.L.R. 471. Under Hindu Law a minor is under an obligation to provide for the marriage expenses of his sister and such a provision is a necessary within the meaning of S. 68, but the money cannot be recovered unless the money is spent and constitutes a 'debt'. 61 I.C. 278=8 O.L.J. 94. See also 145 I.C. 350=1933 N. 285. A covenant by the guardian of a Hindu minor to sell immovable property of the minor cannot be enforced against him, although if a conveyance had been executed by the guardian the vendee would have obtained a valid title to the property on account of pressing necessity for such a sale. Earnest money paid by the vendee to the guardian is not recoverable from the minor or his estate. Such money is paid as a guarantee or security for the performance of the contract which in law is no contract at all. It cannot be regarded as having been paid to the guardian for necessities or benefit of the minor. S. 68 of the Contract Act does not apply, and the vendee cannot therefore recover it under S. 68 or under Hindu Law as having been paid for the benefit of the minor's estate. I.L.R.

(1938) Mad. 928=48 L.W. 112=1938 Mad. 765=(1938) 2 M.L.J. 277. Advancing of funds to a male Hindu minor for meeting his own marriage expenses, is not supplying him with necessities suited to his condition in life within the meaning of S. 68. I.L.R. (1940) Nag. 632=1940 N.L.J. 358=1940 Nag. 327. Liability of minor for sums borrowed by mother for procuring necessities for minor. 101 I.C. 255=1927 N. 196. See also 7 Pat.L.T. 32=1926 P. 399; 32 A. 325. Minor is liable for the money borrowed by him for his marriage expenses. 42 I.C. 963=2 Pat.L.J. 627. Guardian executing bond in personal capacity—Recitals in bond as to benefit of minor—Same not corroborated by evidence—Liability of minor under the bond. See 7 O.W.N. 481. Surety for Court guardian—Payment of debt incurred by guardian for expenses of minor girl's marriage with sanction of Court—Right to reimbursement from person succeeding to estate. See 45 Mys.H.C.R. 403. Where a guardian of a Hindu minor borrowed money for Divali expenses, held, that the amount would not be allowed as it was not necessary. 175 I.C. 149=1938 Nag. 65. A sale by the administrator of the estate of the deceased of property of his minor heirs is void and cannot be supported under S. 68, nor can the sale be ratified by minor subsequently. 9 L.B.R. 186=50 I.C. 324=12 Bur.L.T. 27.

CLAIM ARISING UNDER S. 68—REIMBURSEMENT—EXTENT OF RIGHT.—Where a claim does not arise out of contract at all but under the special provisions of S. 68, the plaintiff is only entitled to reimbursement out of the minor's estate and nothing more and he cannot claim any interest on the amount claimed. 1936 N. 12.

BURDEN OF PROOF.—In the case of necessities supplied to an infant, the onus of proof lies on the creditor. He has to show first that goods or the money which represents them are suitable to the condition in life of the infant and secondly that they are suitable to his actual requirements at the time; or in other words that the infant has not got a supply from other sources. 175 I.C. 149=1938 Nag. 65. Under S. 68, it must be shown not only that the moneys were to be expended on goods suitable to the condition in life of the infant but also that they were suitable to her actual requirements at the time of sale and delivery. As any one who supplied necessities to an infant is in the position of a legal creditor, so any one who advances money to an infant for the purpose of procuring necessities is entitled to stand in the position of a legal creditor. 1938 Rang. 359.

LIMITATION.—See 50 L.W. 323=1940 Mad. 106=I.L.R. (1940) Mad. 27 (Art. 69 or Art. 120, Limitation Act applies).

Reimbursement of person paying money due by another in payment of which he is interested.

69. A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

Illustration.

B holds land in Bengal, on a lease granted by *A*, the zamindar. The revenue payable by *A* to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of *B*'s lease. *B*, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from *A*. *A* is bound to make good to *B* the amount so paid.

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Sec. 69: SCOPE OF SECTION.—Contribution means payment by each of the parties interested, of his share in any common liability. 24 I.C. 259=18 C.W.N. 1308. See also 1933 Oudh 478; 61 C. 510=59 C.L.J. 423=1934 C. 709. "Interested" does not mean only persons with real interest. 1925 P. 201; 1925 P. 737=1925 P.H.C.C. 236; 26 A.L.J. 435; 113 I.C. 441. See also 1927 M. 1060. There is no reason why a person legally bound to pay should be held to be not a person who is interested in the payment. As between a defaulting landholder and his mortgagee, the former is personally bound to pay and this initial liability does not cease because to protect his security, the mortgagee pays off the arrears. 178 I.C. 485=1938 Nag. 459. Mortgagee paying Government revenue on mortgaged land can recover it from the mortgagor. 144 I.C. 392=1933 R. 112. See also 1936 Rang. 47; 16 Mys. L. J. 399=43 Mys. H. C. R. 557 (Hindu reversioner paying Government Revenue for protection of estate). The words "interested in the payment of money which another is bound by law to pay" might include the apprehension of any kind of loss or inconvenience or any detriment at any rate capable of being assessed in money. Thus where an insolvent fraudulently transfers his land and during annulment proceedings by the receiver, the creditor pays the land revenue to avoid sale, the creditor is a person interested in payment of such money. (1914 Cal. 338, Foll.) 1937 Rang. 350. The words "a person who is interested" do not mean that the person who makes the payment must prove that he had such an interest as would stand the test of a judicial trial. All that is necessary for a person making a payment to recover it is that he should really and honestly believe that he must make the payment in his own interest. 54 A. 140=136 I.C. 66=1932 A.L.J. 63=1932 A. 332. Where a person in possession of an estate, in good faith, pending litigation makes the necessary payments for the preservation of the estate in dispute and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents. The case of Government revenue would stand on quite a different footing from other outgoings incurred by the person in possession of an estate without title and it

would be open to him to maintain an action for the recovery of the amount paid. It may also be open to him to set-off the amount in a suit for damages or mesne profits against him; what could be set off can always be claimed in an independent suit, and the fact that a set-off was not claimed against a demand in a prior suit would not preclude the claim being agitated in an independent action. 54 L.W. 286=1941 Mad. 847=(1941) 2 M.L.J. 866. A person asserting claim may pay to avert sale in execution and may get reimbursed by the true owner though he could not make good his claim. 29 C.W.N. 1052=43 C.L.J. 83=1925 C. 1097. As to right of *benamidar* setting aside Court sale in assertion of adverse title, see 85 I.C. 855=1925 M. 95=47 M.L.J. 622. A suit for contribution is a suit brought by one of several co-sharers who has discharged the liability to compel others to make good their shares. Mutuality is the test of contribution. 24 I.C. 259=18 C.W.N. 1308 (17 I.C. 45; 13 I.C. 144, Rel. on). Where in execution of a mortgage decree against two persons, the properties belonging to them were sold and one of the judgment-debtors deposited the entire decretal amount under O. 21, R. 89, C.P. Code, to set aside the sale, he is entitled to contribution from the other in respect of the latter's share of the properties. The obligation to pay is not put an end to by the mere fact of the property sold by auction; it is satisfied only if the sale has been confirmed and the amount of the decree paid to the decreeholder. 10 P. 528=134 I.C. 139=1931 P. 394. He is not entitled to contribution in respect of the compensation to the auction-purchaser under O. 21, R. 89, C. P. Code, 10 P. 528; 53 L.W. 644=1941 Mad. 635=(1941) 1 M.L.J. 793. S. 69 only applies to cases in which the person who makes the payment of money is himself not liable to pay. 17 I.C. 45=16 C.L.J. 148; 9 I.C. 489=15 C.W.N. 404; 15 C.W.N. 332=9 I.C. 219; 31 C.W.N. 630=103 I.C. 120=1927 C. 518. A purchaser of property subject to a charge, is alone liable to pay it and hence he is not entitled under S. 69 to recover the amount paid by him from the person who might originally have been liable in respect thereof, either alone or along with the person who has made the payment. I.L.R. (1940) All. 71=1940 All. 104. Firm paying super-tax invalidly assessed on a member cannot recover it from him. Principle of the section laid down. 29 C.W.N. 1052=1925 C. 1097. Vendee aware of defect in title—Discharge

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of incumbrance—Right to amounts paid when title fails—Relief—Principles laid down fully. 74 I.C. 416=1923 M. 392. *See also* 41 C.L.J. 571=52 C. 914 (Payment by receiver). Vendee discharging debts of true owner out of sale consideration—Sale void—Subrogation. 37 M.L.J. 113=51 I.C. 57. Ss. 69 and 70 of the Contract Act do not apply to claims for contribution under S. 82 of the T. P. Act. 32 M.L.J. 347=39 I.C. 405. Where crops on a portion of the land in the possession of a tenant are attached by Government for rent due by him for another plot and both the plots are in one patta, the tenant is entitled to pay off the dues and claim to be reimbursed from the landlord notwithstanding the illegality of the attachment. 33 I.C. 234=1915 M.W.N. 643; 39 M. 965=30 M.L.J. 369. A person who owns one of two lands on both of which Government revenue was jointly assessed and pays the whole revenue is entitled to claim contribution for the proportionate sum due from the other land. Neither S. 69 nor S. 70 is applicable. 28 I.C. 456; 33 I.C. 234=1915 M.W.N. 643. *See also* 144 I.C. 392=1933 R. 112. The section contemplates only a personal liability and does not refer to any lien or charge on any property. 26 M.L.J. 74=22 I.C. 253; 18 I.C. 247=25 M.L.J. 312. *See also* 54 A. 140=136 I.C. 66=1933 A. 332. S. 69 is intended to include the cases not only of personal liability, but all liabilities to payments for which owners of lands are indirectly liable, those liabilities being imposed upon the land held by them. It is not a correct view to take that the section is restricted only to a case of personal liability. 1940 All. 104=1939 A.W.R. (H.C.) 858. A Hindu reversioner who pays off a mortgage decree against the estate in the hands of a widow is entitled under S. 69 to be reimbursed by the widow in respect of the money which the latter was bound by law to pay. 35 M. 426=22 M.L.J. 364. *See also* 1928 M. W.N. 398. Where trustee of a temple borrowed money for the temple, he must be indemnified from the trust estate. 12 I.C. 335. S. 69 contemplates cases where one person is bound to pay money to a third person and another person is interested in such payment; it has no application where the person is bound to pay directly to the person who has incurred the expenses. This interest referred to in S. 69 is a pecuniary one. 35 M. 728=21 M.L.J. 600. *See also* 1923 N. 53; 63 C.L.J. 287=40 C.W.N. 1037. The doctrine of contribution applies only when the position under a joint contract by two or more persons remains unaltered. 22 I.C. 263=16 O.C. 285. Payment by a person without title and without possession but expecting to get title in a pending litigation does not entitle him to take advantage of Ss. 69 and 70. 2 Pat.L.J. 676=42 I.C. 839. A volunteer who pays of a previous attaching creditor of the person liable to pay does not stand in the shoes of the debtor but has only a cause of action against him personally. 35 I.C. 448=

10 Bur.L.T. 67. As to the period of limitation for a claim under S. 69, *see* 1937 Nag. 402; 18 Lah. 623.

"BOUND BY LAW TO PAY".—Meaning of "bound by law to pay". *See* 49 M.L.J. 88=1925 M. 1041; 43 I.C. 482=42 B. 93; 16 Mys. L.J. 27=42 Mys.H.C.R. 637; 25 A.L.J. 791=103 I.C. 289=1927 A. 713; 7 Mys. L.J. 107. The expression "bound by law to pay" means a legal liability and not a contractual liability. 39 I.C. 405=32 M.L.J. 347; 53 I.C. 796=1916 M.W.N. 878. *See also* I.L.R. (1939) 2 Cal. 226=43 C.W.N. 831. The liability for which payment may be made under S. 69, need not be statutory. A contractual liability by the defendant to pay the amount which the plaintiff with a view to protect his own interest has to pay, would entitle the plaintiff to be reimbursed by defendant for the amount paid by him. Any person substituted to the position of the defendant would also be equally liable. 1940 A.L.J. 320=1940 All. 214. The section includes cases not only of personal liability but all liabilities to payment of which owners of land are indirectly held liable. 138 I.C. 137=1932 O. 222. The section does not authorize a person who made a payment to protect his own interest from recovering it from the person on whose behalf he ostensibly paid it, unless the latter was bound in law to pay the money. 3 Pat.L.T. 122=64 I.C. 226; 59 I.C. 172 (N.). *See also* 34 C.W.N. 41=1930 C. 344. Purchaser of the right of one of the co-sharers is bound in law to pay the amount of the decree for arrears of rent for the period prior to his sale, against the co-sharers, although he was not a party to the decree. 30 C.W.N. 366=94 I.C. 159=1926 C. 657. Where a decree for rent against two joint lessees is satisfied by one of them, who sues the other for contribution, it is not open to the defendant to plead that he is not liable to contribute. 10 P. 168=132 I.C. 107=1931 P. 234. *See also* 20 N.L.J. 73=1937 N. 152. A landlord cannot under Ss. 69 or 70 recover from his tenant the cost of sweepers and *bhishtis* employed under an order of the Municipal Board to keep the premises clean. 26 I.C. 77=12 A.L.J. 931; 10 I.C. 458=8 A. L.J. 622; 45 B. 638=60 I.C. 892; 41 I.C. 242=21 C.W.N. 628. Where one of the judgment-debtors satisfies the decree by payment under compulsion of legal process, he is entitled under Ss. 69 and 70 to call upon the other judgment-debtors for contribution. 20 C.L.J. 200=19 C.W.N. 458; 32 I.C. 200=23 C.L.J. 125. A party liable to be affected by a sale under a rent decree obtained by a co-sharer landlord can satisfy the decree and sue for reimbursement. 24 I.C. 259=18 C. W.N. 130; 22 I.C. 720. One of several judgment-debtors, who purchases the decree cannot execute it against the other judgment-debtors, but can sue them for contribution under S. 69. 20 I.C. 569=18 C.W.N. 113. A co-sharer who pays the full decretal amount due to the landlord on account of a decree obtained against all the co-sharers is entitled to contribution from the other co-

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sharers. 13 I.C. 457; 16 C.W.N. 975=17 C.L.J. 179; 30 C.W.N. 366=1926 C. 657; 95 I.C. 545=1926 C. 1031. *See also* 41 C.W.N. 428. A man can recover the money paid to avoid attachment of his property in execution of a decree against another, from the judgment-debtor. 9 I.C. 966. Darpatnidar undertaking to pay patni rent—Such rent paid by mortgagee from Darpatnidar to avoid putni sale—Mortgagee has a right to be reimbursed by putnidar. 43 C.W.N. 852. The section applies to the case of a surety who pays a decree debt, which other persons besides the judgment-debtor for whom he stood surety, were bound by law to pay. 40 M.L.J. 529=62 I.C. 706. If a purchaser of the equity of redemption pays off at the time of redemption the amount of a bond not charged on the property, he cannot recover it from the mortgagor under S. 69. 28 I.C. 697. Where a mortgagee with possession failed to pay the Government revenue and the mortgagor paid the same, he can recover it with interest. 24 L.W. 607=51 M.L.J. 633. *See also* 171 I.C. 740=1937 Nag. 225. A co-sharer who is not bound by law to pay a rent-decree in favour of the superior landlord is not also liable to contribution where the decree is paid off by the other co-sharer. 56 I.C. 949. *See also* 64 I.C. 918=20 A.L.J. 42; 41 C.W.N. 428; 1937 P. 103; 1935 A. 758.

INTERESTED IN PAYMENT.—Interested in payment—Puisne mortgagee paying prior mortgage—Right to reimbursement. 63 I.C. 604=19 A.L.J. 840; 54 C. 424=101 I.C. 130=1927 C. 393. Attaching creditor interested in paying money to release property from another attachment. 97 I.C. 319=1926 A. 745. The words "interested in payment" do not exclude a person who is interested as well as bound by law to pay. The words "bound by law to pay" include persons legally bound to pay whether under contract or otherwise. 62 I.C. 881; 22 I.C. 9=26 M.L.J. 66; 48 I.C. 69=34 I.C. 367. *See also* 63 C.L.J. 287=40 C.W.N. 1037; 19 A.L.J. 73=61 I.C. 892; 113 I.C. 441. But *see* 39 M. 795=29 M.L.J. 639. The words "interested in payment of money" may include the apprehension of any kind of loss or inconvenience or at any rate, any detriment capable of being assessed in money. I.L.R. (1940) All. 580=1940 A.L.J. 511=1940 All. 416. Pre-emptor paying off mortgage when vendee had undertaken with vendor to pay—If can recover from vendee. 46 I.C. 83=16 A.L.J. 531; 19 A.L.J. 16=43 A. 268; 7 O.W.N. 475=1930 O. 266. Where a person redeemed a mortgage under the *bona fide* belief that he was entitled to the property under mortgage, he will be allowed a refund of his redemption money in a suit for possession by the legal owner. 18 I.C. 811=11 A.L.J. 179. Mortgagee paying Government revenue can recover it from mortgagor. 1933 R. 112=144 I.C. 392. Mortgagee paying rent decree amount to set aside rent sale can recover from the purchaser from the mort-

gagor under a private sale. 43 C.L.J. 172=94 I.C. 811=1926 C. 765. *See also* 144 I.C. 392=1933 R. 112. Payment of consolidated rate by owner of premises—Occupier—Contribution.—Where in a suit for contribution between co-tenants, the defendant co-tenants prove an agreement between them and the plaintiff, whereby the plaintiff alone had agreed to pay the entire rent due from the co-sharers jointly, the plaintiff is not entitled to claim contribution in respect of the rent paid by him in pursuance of the agreement. 1938 Cal. 413=44 I.C. 669. Contribution in case of joint decree debt paid by one. 22 C.W.N. 347=45 C. 691. One of several judgment-debtors paying off decree. 49 I.C. 627; 3 P.L.T. 122=64 I.C. 226; 122 I.C. 765. "Interested"—Interest must be lawful. 34 I.C. 341=21 C.W.N. 394; 22 C.W.N. 347=45 C. 691. Reversioner interested in payment of revenue by the widow. 19 M.L.J. 331. Decree for rent against Hindu widow—Deposit by reversioner—Sale cancelled—Reversioner whether entitled to reimbursement. 19 C.L.J. 72=18 C.W.N. 778. Decree for rent against co-sharer—Satisfied by one alone—Suit for contribution. 15 I.C. 55=18 C.W.N. 327; 21 I.C. 102=19 C.L.J. 525; 11 I.C. 155; 9 I.C. 615. The person interested in the payment of money under S. 69 must be a person not compellable to pay the whole or any portion of it. 39 M. 795=29 M.L.J. 639. *See also* 1927 M. 1060 (Vendor of property paying charges on land between the date of vendee entering into possession and execution of sale deed at a later date can recover the money so paid). *See also* on this point 6 Mys.L.J. 584; 1927 M. 59; 43 Bom. L. R. 225; 25 A. L.J. 791=1927 A. 713; 104 I. C. 358=1 Luck. C. 275 (Lessor failing to pay land revenue—Lessee paying the same to avoid forfeiture is entitled to be indemnified). When a person *bona fide* believing himself to have a claim to a property, pays off the charges on the property, he is entitled to recover the amount. 78 I. C. 177=1923 N. 301. *See also* 134 I.C. 1211=34 L.W. 669; 1930 M.W.N. 601; 1940 N.L.J. 337=1940 Nag. 285; 18 Mys.L.J. 290; I.L.R. (1940) Nag. 437; 50 B. 309; 53 B. 309=1929 B. 89; 32 Bom.L.R. 424=1930 B. 430 on the point. Person obtaining probate and paying off claim against deceased—Probate revoked—Suit to recover amount paid. 59 I. C. 128. The interest of the person lending the money under this section must be one as would be recognised by law. 61 I.C. 278=8 O.L.J. 94; 55 I.C. 60. An interest resting merely on grounds of sentiment or on moral or on social obligations is not an "interest" which would give in law a right to repayment. 61 I.C. 278=8 O.L.J. 94. As to right of contribution of co-defendants in respect of costs, *see* 32 Bom.L.R. 1246. As to right of equitable reimbursement and the principle thereof, *see* 53 M. 952=60 M.L.J. 13=1931 M. 207; 1930 A.L.J. 1103=1930 A.

70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Obligation of person enjoying benefit of non-gratuitous act.

Illustrations.

(a) *A*, a tradesman, leaves goods at *B*'s house by mistake. *B* treats the goods as his own. He is bound to pay *A* for them.

(b) *A* saves *B*'s property from fire. *A* is not entitled to compensation from *B*, if the circumstances show that he intended to act gratuitously.

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517. The Court of Wards assumed superintendence of a deceased Mahomedan's property and paid off his creditors from out of his pensions and jagirs. The heirs who instituted the suit for partition of their shares were held not entitled to the pensions and jagirs. *Held*, that the heirs could not take advantage of the payments made by the Court of Wards and were bound to recoup the Court of Wards to the extent of the payments made by it and the fact that the pensions and jagirs did not belong to the Court of Wards was a question entirely between it and the head of the deceased's family appointed by the Government. 193 I.C. 829=1941 Lah. 88.

PAYMENT must be in cash—Mere execution of mortgage is not enough to entitle one to contribution. 161 I.C. 152=1936 O. W.N. 301=1936 O. 253.

Secs. 69 and 70.—Ss. 69 and 70 of the Contract Act are applicable even as between co-owners and the fact that plaintiff also benefits by the payment made by him is no bar to his claiming reimbursement. 71 M.L.J. 1 (Supp.)=44 L.W. 214=1936 M. 752. Where a person, not personally bound by a maintenance decree, is only impleaded because he held a mortgage upon the property charged by the decree, he is not legally bound to pay the decretal amount within the meaning of S. 69. Other judgment-debtors are however legally bound under the decree. By the payment therefore of the decretal amount, such person obtains a right under S. 69 to be reimbursed by the other judgment-debtors. Even if he may not acquire a right under S. 69 he acquires a right under S. 70. The judgment-debtors are therefore liable to the mortgagee's claim for contribution under Ss. 69 and 70. A person's right under Ss. 69 and 70 can be kept separate from his rights of subrogation under S. 92 and the right of contribution which is a personal one. 30 N.L.R. 148=148 I.C. 815=1934 Nag. 84. *See also* 1935 L. 981. S. 69 of the Act applies to suits for contribution where both the plaintiff and the defendant are equally liable for the money paid by the plaintiff, and the fact that a decree for costs against the plaintiff, and defendant makes them jointly and severally liable, does not render S. 69 inapplicable to a suit by the plaintiff for contribution in respect of payment made by him under the decree. Even if a matter does not come under S. 69, it

can come under the wider language of S. 70 of the Act; there is no distinction between a case where execution is proceeded with by attachment and sale of the properties of the plaintiffs and one where execution has been arrested because the plaintiffs have paid the money. If the defendants have got the benefit of the payment made by the plaintiffs they are liable to contribute. 61 C. 864=38 C.W.N. 758=1934 C. 609. The plaintiff who had purchased some Zamindari shares of the defendant paid revenue for a period dating prior to the sale and terminating after that date. *Held*, that the purchaser could not recover the amount paid as revenue from his vendor. 151 I.C. 351=1934 A. 712; 188 I.C. 116; 16 Mys.L.J. 184=43 Mys.H.C. R. 105. Patnidar having 2/3 share paying entire rent to prevent sale—Darpatnidar and Sepatnidar under other patnidar contracting with him to pay his patni rent to Zamindar—No liability to contribute. I.L.R. (1939) 2 Cal. 226=43 C.W.N. 831=1939 Cal. 645.

Sec. 70: SCOPE OF SECTION.—This section goes beyond the corresponding English Law. 33 C. 377. Section 70 of the Contract Act must be interpreted according to its clear and explicit terms and not in reference to the provisions of the English law relating to the matter. The section is much wider than the English Law and goes far beyond it. 120 I.C. 615=1930 L. 364. *See also* 1936 M. 930. Where there is an express contract S. 70 does not apply. 62 C. 612=39 C.W.N. 461. S. 70 provides for a case where (1) a person lawfully does anything for another person or delivers anything to him, (2) the lawful act or delivery is not intended to be done gratuitously, and (3) the other person enjoys the benefit thereof. If these three conditions are fulfilled, the section applies and the latter person is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. The compensation to be made is in respect of the benefit enjoyed by the second person. I.L.R. (1937) Bom. 782=39 Bom.L.R. 835=1937 Bom. 417. The question whether compensation (remuneration for services rendered) should or should not be awarded must depend upon the intention of the person at the time of his doing the thing for which he demands the compensation. He is obviously the person to state what his intention was. Where it is clear that he was under the impression that he would receive remuneration for the services, it cannot be

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predicated that he intended to act gratuitously and so he is entitled to claim reasonable compensation. 45 L.W. 355=41 C.W.N. 672=39 Bom.L.R. 720=(1937) 1 M.L.J. 719 (P.C.). Section applies although there exists another remedy. 62 C. 612=39 C.W.N. 461. The section though wide, will enable the Court to do substantial justice. 42 B. 556=19 Bom.L.R. 650. See also 1925 P. 201; 90 I.C. 337=1925 M. 571; 1925 N. 19; 21 L.W. 336=47 M.L.J. 622; 1930 L. 193. The provisions of S. 70 are applicable when one of the persons concerned is a corporation or other public body. 10 R. 522=140 I.C. 737=1932 R. 176. Applicable when one of the persons concerned is a corporation or other public body. 10 R. 522=140 I.C. 737=1932 R. 176. Section does not apply to the case of a minor. 1931 L. 344. Person paying money due to save property from sale, believing the property to be his can recover the same from the rightful owner. 99 I.C. 845=1927 M. 459. See also 29 C.W.N. 1052=42 C.L.J. 83=1925 C. 1097. Payment of land revenue is a necessity and can be recovered. 84 I.C. 580=1925 N. 33; 117 I.C. 107. See also 1933 R. 112 (Mortgagee paying Government revenue). Sale by lambardar—Name not removed from Record of Rights—Payment of revenue on citation being issued to him—Right to recover the amount from the transferee. See 117 I.C. 107. Suit on hundi—Hundi held inadmissible—Plaintiff can still succeed if his suit can be treated as one for money had and received or for compensation of money paid to defendant's creditor. 51 A. 530=27 A.L.J. 333=116 I.C. 293. Compensation for use and occupation which is described sometimes as fair rent or occupation rent which in English Law is looked upon as based on implied contract cannot be so viewed in India inasmuch as the Contract Act does not speak of it in Ch. V. 30 M.L.J. 492=34 I.C. 6. It is not necessary under the section that the defendant must have an option before the benefit is conferred of accepting or declining it. 38 M. 235=25 M.L.J. 433; 141 I.C. 68=1933 L. 95. But see 28 I.C. 697; 25 I.C. 783=16 M.L.T. 375; 1931 M. 51=129 I.C. 828. Section 70 applies to all cases of benefit *bona fide* conferred by one person upon another and which benefit is enjoyed by the other person. 38 M. 235=25 M.L.J. 433. In construing the section, Courts in India should be guided more by justice, equity and good conscience than by English precedents. Even though plaintiff might have an interest in paying money, yet it might none the less be for defendant. (*Ibid.*) Section 70 applies only in the absence of express contracts. 32 I.C. 511. See also 13 L. 561=140 I.C. 621 (Rent reserved under such lease can be adopted as the basis for compensation). Where a portion of the amount deposited by the plaintiff was appropriated by Government for the satisfac-

tion of a debt due from the defendants, it is not a case of any voluntary payment by the plaintiff, but of one of appropriation without consent. As the defendants obtained the benefit of the appropriation, an implied obligation on their part to repay the plaintiff arose, on which he can sue to recover the amount. 1938 A.L.J. 223=1938 All. 206. On this section, see also 1927 M.W.N. 872; 1930 M.W.N. 601.

ENJOYING BENEFIT.—Plaintiff is not entitled to compensation under S. 70, where payment was not made by him for defendant's benefit or with his knowledge or consent. 40 B. 646=35 I.C. 794; 75 I.C. 624=1923 A. 404 (2); 62 I.C. 615=25 C.W.N. 813; 53 I.C. 90=30 C.L.J. 34; 1931 M. 51. See also 141 I.C. 68=1933 L. 95. The word "enjoys" should not be construed as meaning "accepts and enjoys." It is not necessary that the person from whom contribution is sought should have had an opportunity of declining such benefit. If he retains or enjoys the benefit of something lawfully done for him, he is bound to make compensation. 134 I.C. 139=1931 P. 394. See also 38 M. 235=150 I.C. 1131=1934 P. 346. Two conditions are essential for establishing a liability to contribution under S. 70: (i) The work must have been done in part at least for the benefit of the defendant. It is not enough that it has in fact resulted in benefit to the defendant. (ii) The defendant should have had after the execution of the work an opportunity or option of accepting or rejecting the benefit. 1931 M.W.N. 1231=34 L.W. 859. See also 1936 M.W.N. 761=44 L.W. 518=1936 M. 930; 16 Pat.L.T. 649=158 I.C. 25; 148 I.C. 1052=1934 O. 307. To sustain a claim under S. 70, the person benefited should have had an opportunity of accepting or rejecting a benefit. So, where a co-owner, whose interest was the same as that of the co-owner defendants, produced evidence, engaged counsel and succeeded in defeating the plaintiff and, incidentally and without any special effort on his part, the other defendants derived advantage, it cannot be said that the contesting co-owner had done something for the benefit of the others for which they would be bound in law or equity to make a proportionate reimbursement. 141 I.C. 68=34 P.L.R. 28=1933 L. 95. See also 34 I.C. 54. It is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay. (2 I.A. 131, Ref.) 11 O.W.N. 606=1934 O. 307. In a suit for compensation where the sole or dominant motive for the payment is not to save another man's property, the payment cannot be said to have been made for such other man and compensation under S. 70 cannot be given. The

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mere fact that the person can benefit by such payment is not sufficient. 1930 M. 644. Purchaser of the share of one co-sharer is a person benefited by payment of the amount of the decree for arrears of rent he obtained against all the co-sharers, though the rent sued for relates to a period prior to the purchase. 30 C.W.N. 366=94 I.C. 159=1926 C. 657. See also 148 I.C. 1052=1934 O. 307. The liabilities of joint tenants for rent is joint and several under S. 43 and if one of them pays the whole rent, he can sue the others for contribution. 27 I.C. 334=20 C. L.J. 492; 21 C.W.N. 394=34 I.C. 341; 61 P.R. 1914=25 I.C. 542; 10 P. 168=132 I.C. 107=1931 P. 234. Where a person is bound to do an act or would do an act, whether another consents to it, or not, the former cannot claim contribution even though the latter derives benefit in consequence of the act. 43 M.L.J. 271=1923 M. 64 (45 I.C. 786; 21 C. 496; 33 M. 15; 16 M.L.T. 375, Foll.). Under S. 70 it is sufficient if the payment is lawful and not intended to be gratuitous, i.e., it should be a *bona fide* payment. It is not necessary that the payer should be interested in paying the money as in S. 69. 51 I.C. 857=9 L.W. 435. See also 38 C. W.N. 554=1934 C. 667. Suit on promissory note—Execution not properly proved—Benefit of loan taken—Restoration of benefit. See 1934 A. 390=154 I.C. 405; 120 I.C. 615=1930 L. 364. A person who claims compensation under S. 70 need not have acted from purely disinterested motives because the very expression "not intending to do so gratuitously" suggests that there must be an element of self-interest also in the act performed by him. 10 P. 528=134 I.C. 139=1931 P. 394. The authorities do not sanction recovery under S. 70 when the person primarily liable has no knowledge, actual or imputed, that expenditure is or probably may be necessary on this behalf. 39 M. 965=30 M.L.J. 369. Where a creditor lends money to an executor even if it be for a purpose sanctioned by the will, he has no right in a suit to recover the debt to enforce his claim against the estate itself and S. 70 cannot be invoked for that purpose. 35 C.W. N. 850=59 C. 216. Where the plaintiff and the defendant were co-sharers in the properties sold in execution and the plaintiff deposited the entire decree amount to redeem the properties, he must be deemed to have acted 'for' the defendant also so as to be entitled to contribution. 10 P. 528=1931 P. 394. Village panchayat rendering latrine service is entitled to charge for service rendered. 1935 N. 242.

COMPENSATION—BASIS OF.—The basis of compensation under S. 70 would plainly not be the same as on contractual rights. Under S. 70, it would be in proportion to the benefit enjoyed by the party bound, and appropriate compensation is to be awarded mainly

from that aspect. I.L.R. (1937) Bom. 782=39 Bom.L.R. 835=1937 Bom. 417.

MINOR—LIABILITY OF.—S. 73 of the Contract Act does not apply to a minor. In the circumstances set out in S. 70, the law implies a promise to pay. A minor who is incompetent to contract, cannot be made liable on such a contract. An implied contract is nothing more than a promise which is inferred from certain circumstances. The basis of a suit under S. 70 is a contractual one and consequently a minor cannot be sued under S. 70. A liability which cannot be imposed by an express contract cannot be imposed under an implied contract. 19 Pat. 739=21 P.L.T. 587=1940 Pat. 324 (F.B.).

CONTRACT WITH MUNICIPALITY.—A contract for delivery of goods was made with the plaintiff by or on behalf of the Municipal Committee which not being in writing under seal was not binding on the Municipal Committee under S. 47, Punjab Municipal Act. Plaintiff who delivered the goods to the Committee claimed the price thereof and the Committee resisted the claim on the ground that the plaintiff was entitled to the return of the goods only and not its price. The Municipal Committee also resisted the plaintiff's claim for amendment of the plaint by inserting a relief for the return of goods under S. 70, Contract Act. Held, that as the Committee resisted the plaintiff's claim to amend the plaint by inserting a relief for the return of the goods, it was not open to the Committee to say that the plaintiff was entitled to a return of the goods only and not for recovery of its price. 145 I.C. 687=1933 L. 14. See also 13 L. 54=140 I.C. 621. S. 70 contains a provision for finding a person to make compensation under conditions which do not postulate a contract. The applicability of the section cannot be excluded by the fact that there is no enforceable contract, e.g., that there is no contract binding on a Municipality by reason of the requirements of the Municipal Boroughs Act not having been followed. S. 70 does not depend upon the existence of a contract binding on the parties and does not provide for contractual liabilities. I.L.R. (1937) Bom. 782=39 Bom.L.R. 385=1937 Bom. 417. Where a plaintiff sues for recovery of money on the basis of an alleged agreement which is found against and there is no relief asked for under S. 70, it is not open to the Court to grant that relief. I.L.R. (1938) Lah. 511=1938 Lah. 71. See also (1941) 2 M.L. J. 469=1941 Mad. 887.

CO-OWNERS.—See 167 I.C. 42=18 Pat. L.T. 333=1937 P. 103. Irrigation—Contribution—English and Indian Law. 28 M. L.J. 384=28 I.C. 309. Suit for contribution for repairing irrigation channel belonging to plaintiff and defendant by plaintiff alone. See 1927 M. 122=92 I.C. 838; 18 Pat.L.T. 333=1937 Pat. 103. Such suit is not maintainable if repair is done

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by plaintiff without defendant's consent and under his exclusive supervision and to his substantial benefit. 27 L.W. 406=1928 M. 320. Where the villages have utilized water from the pyne on the construction of the bund, contribution towards the construction is payable on account of the villages under S. 70. 150 I.C. 1131=1934 P. 346. Where several persons join together in instituting a suit to secure a common benefit, and one of them bears the expenses of the litigation, he is entitled to be reimbursed by his co-plaintiff under S. 70 in the absence of an express agreement between them settling the proportions which each had to bear. 34 I.C. 54=2 Pat.L.W. 437.

EXTENT OF BENEFIT.—In order to take advantage of S. 70 the plaintiffs must prove the extent of benefit derived by the other party. 30 I.C. 178=29 M.L.J. 597; 60 I.C. 414. See also 132 I.C. 78=1931 O. 242. Where the contract is to do work for a lump sum nothing could be recovered as *quantum meruit* for part only of work done. 19 I.C. 48=6 Bur.L.T. 53; 16 I.C. 692=1912 M.W.N. 956. Work done under contract not validly executed—Right to compensation for benefit taken can be enforced though not suit based on contract. 38 P.L.R. 618.

GRATUITOUS PAYMENT FOR SERVICE.—Where a pleader works for a client without any contract as to remuneration he will be entitled to a reasonable payment for his services. 20 I.C. 47 (1)=20 C.L.J. 424. Hindu joint family—Execution of decree against individual member—Payment by him—Suit for refund. 54 I.C. 807=11 L.W. 115; 27 A.L.J. 902=119 I.C. 81=1929 A. 834. S. 70 is not applicable to a case where a person does some act for his own benefit unavoidably. 45 I.C. 786; 54 I.C. 807=11 L.W. 115. See also 1941 O.A. 1050 (lessee under an invalid lease spending money on shed and building is not entitled to reimbursement). Act done by plaintiff primarily for his own benefit, but resulting in indirect benefit to defendant—No liability on defendant to compensate plaintiff. 1936 M.W.N. 761=44 L.W. 518=1936 M. 930. The question whether compensation (remuneration for services rendered) should or should not be awarded must depend upon the intention of the person at the time of his doing the thing for which he demands the compensation. He is obviously the person to state what his intention was. Where it is clear that he was under the impression that he would receive remuneration for the services, it cannot be predicated that he intended to act gratuitously and so he is entitled to claim reasonable compensation. 167 I.C. 5=45 L.W. 355=1937 P.C. 50=(1937) 1 M.L.J. 719 (P.C.). When it is proved that the plaintiff has really done some work under a contract,

which he alleged but failed to prove the alleged contract, reasonable compensation should be given to the plaintiff for the work done. 30 I.C. 223=2 O.L.J. 332. Where a contract placed by a District Council with the plaintiff was not reduced to writing, plaintiff is nevertheless entitled under S. 70, to be compensated for the work done on the principle of *quantum meruit*, though he could not sue on the contract. 10 R. 522=140 I.C. 737=1932 R. 176. See also 54 C. 189; 1936 A.M.L.J. 37; 1935 C. 347. Where by the terms of a contract, the person who does a work agrees that he is not entitled to any remuneration unless the work has been check-measured, then clearly he cannot claim for any work which has not been check-measured. There is no room for any implied contract, where there is an express contract in existence, and in such a case the principle of *quantum meruit* cannot be applied. 54 L.W. 342=1941 Mad. 887=(1941) 2 M.L.J. 469. Where no relief was asked for on the footing of *quantum meruit* the Court has no jurisdiction to grant any. 37 L.W. 313=142 I.C. 683=1933 M. 344. See also 1938 Lah. 71. Where there has been no express agreement about the fees to be paid to a medical man he is entitled to a reasonable amount to be fixed by the Court. 25 I.C. 777.

"LAWFULLY."—The word "lawfully" means merely "*bona fide*." 9 Mys.L.J. 364. Money left with vendees for payment to mortgagees—Properly mortgaged different from property sold—Vendees not entitled to recover amount paid in excess of that directed to be paid by the vendors. 40 A. 555=47 I.C. 903; 11 L.L.J. 435=1929 L. 737; 1930 M. 644. See also 14 C.W.N. 699; 18 Bom.L.R. 730. Hindu reversioner paying money to prevent sale for road cess—Right to recover from widow or life estate holder. 25 C.W.N. 1029=49 C. 470=1922 C. 353. See also 86 I.C. 737=1925 M. 1175. A payment under O. 21, R. 89, C.P. Code, is a valid payment for the purposes of S. 70. 13 I.C. 144=16 C.L.J. 156. See also 1931 M. 753; 10 P. 528=1931 P. 394. But compensation paid to the auction-purchaser cannot be recovered as plaintiff also was responsible for the sale. 10 P. 528=1931 P. 394. A person paying rent in order to create title must be deemed to be making it voluntarily and not lawfully and so S. 70 would not apply. 15 C.W.N. 332=9 I.C. 219=13 C.L.J. 646; 9 I.C. 615. (21 C. 142, Foll.) A payment made by the purchaser of certain property to redeem an antecedent mortgage which was not disclosed to him at the time of his purchase is a lawful payment within the meaning of the section. 128 I.C. 907=32 Bom.L.R. 1376=1931 B. 39. In ascertaining whether an act is lawfully done within the meaning of the section, it must be ascertained whether the

Responsibility of finder of goods.

Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.

71. A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.

72. A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it.

Illustrations.

(a) A and B jointly owe 100 rupees to C. A alone pays the amount to C and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

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person so acting held such a position to the other as either directly to create, or by implication reasonably to justify, the inference that by the act done for the other person, he was entitled to look for compensation. (*Ibid.*) A person who pays assessments honestly and under the belief that he has title to the land could not recover them from the defendant, if it is clear that the defendant and not he is the real owner. 12 M.L.T. 261=17 I.C. 253. Co-sharer making improvements—Right to recover. 10 I.C. 694=7 N.L.R. 11.

LANDLORD AND TENANT.—Unauthorised use of water. 22 I.C. 34=1914 M.W.N. 66. See also I.L.R. (1940) Kar. 200 (suit for compensation for use and occupation).

LEGAL PRACTITIONER.—Suit for fees on basis of agreement barred by S. 28, Leg. Prac. Act—Claim for reasonable compensation not sustainable. 8 Pat.L.T. 175.

PRINCIPAL AND AGENT.—Where an agent borrows money for the benefit of his principal without proper authority from him, the principal is liable jointly and severally with the agent for such money as is applied for his benefit. 39 P.L.R. 208.

INTEREST.—Where compensation is awarded under S. 70, it is open to the Court to award interest on such compensation. 134 I.C. 1028=32 P.L.R. 546=1931 L. 457.

Sec. 72.—Coercion in this section is used in its general sense. 5 R. 653. Where a municipal toll-contractor insists upon the payment of tolls every time a vehicle enters the municipal limits, and the vehicle cannot cross the municipal limits without such payment the payment made by the owner of the vehicle must be presumed to be not voluntary, but under coercion. A suit by the owner of the vehicle to recover the payments made on the ground that the collection of the same by the municipal contractor was wrongful and unauthorised cannot be defeated on the ground that the payment was voluntary. 15 Mys.L.J. 489.

MISTAKE.—S. 72 does not apply to a case where a person has been required by an order of a Court of competent jurisdiction to pay the money and the validity of the order has been challenged. Moreover the

section relates to questions of fact and not questions of law. 171 I.C. 401=1937 Rang. 234. As the section lays down that a person to whom money is paid by mistake or coercion must repay or return it, it implies that the money was not really due to the person to whom it was paid. 43 A. 272=60 I.C. 881; 45 M.L.J. 497=4 L. 284=50 I.A. 162 (P.C.); 42 B. 161=42 I. C. 869. A person who makes a payment of a tax to a municipality under a misapprehension as to his liability to do so cannot recover it in a Court of law, although one would expect a corporate body to refund voluntarily any amount which had been paid to it in error. Payments made by mistake of law cannot be covered. 52 L.W. 437=1940 Mad. 956=(1940) 2 M.L.J. 469. The fact that a person pays a tax such as octroi to a local body without a protest at the time does not lead to the inference that the payment is voluntary so as to disentitle him from suing for refund of the tax paid on the ground that the tax has been illegally levied. Where the consequences of not paying the tax would be that the articles on which tax is claimed would be seized and detained, the payment of tax to avoid such consequence is a payment under duress and not a voluntary payment and can be recovered under S. 72. 18 Mys.L.J. 477. A person who has paid taxes and licence fees to a Panchayat Board under the mistaken belief that the properties or business in respect of which the taxes or fees were paid were situate within the jurisdiction of that Board, must be held to have done so under a mistake of fact and is entitled to recover them as money had and received under S. 72. 51 L.W. 437=1940 Mad. 660=(1940) 1 M. L.J. 582. Mistake in—Meaning of—Mistake a ground for relief under Ss. 20 and 21. 56 M.L.J. 269. Mistake of law—If and when a ground for redress—Pure mistake of law—Mistake bearing upon private or special right of party—Distinction. 56 M. L.J. 269. Payment of money on mistake of fact—Suit for recovery of—Nature of suit. See 1928 P.C. 261=29 L.W. 72 (P.C.). A person paying under a mistake of fact, however, ignorant he may be and however forgetful he may have been, is entitled to recover such money unless he has at any time waived his claim or has been

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estopped by reason of conduct by which the payee has altered his position by parting with the money. But the mistaken payment must be of such a nature that, if such payment is not rectified a liability will be created against the person paying. 151 I.C. 1018=12 R. 25=1934 R. 66. Money paid under pressure of legal process—Mistake—Action for money had and received—Maintainability. 56 B. 501=34 Bom.L.R. 791. Money paid into Court to set aside Court sale in execution of decree—Decree subsequently set aside or reversed—Claim for refund of money paid into Court is maintainable—Right to restitution. (1940) 1 M.L.J. 340=52 L.W. 226=1940 Mad. 725. Money paid under mistake to person supposed to be heir—Real heir's right subsequently established—Liability of person receiving payment to refund amount to real heir—Interest whether chargeable. See 50 A. 818=115 I.C. 114. Money paid under a mistake of fact on the part of both the parties is recoverable. 1922 C.1 (2); 16 I.C. 131=16 C.L.J. 437; 90 I.C. 906=1925 M. 762. (Power of Court to take notice of facts arising subsequent to suit). The doctrine of equitable restitution has no application where the defendant labouring under the same mistake as the plaintiff has *bona fide* parted with the goods to others. 43 M.L.J. 142=70 I.C. 751=1923 M. 17; 15 I.C. 361=5 Bur.L.T. 75. Where the plaintiffs through negligence wrongly accepted the position of drawees of hundi presented by a bank, *held* there was gross carelessness on their part in not detecting the mistake immediately and also in not intimating the bank of it within a reasonable time after they discovered the mistake and they were not entitled to recover the money from the defendant bank. 50 B. 49=91 I.C. 342=27 Bom.L.R. 1229=1926 B. 66. Money paid to wrong person by plaintiff's broker contrary to plaintiff's instructions can be recovered under S. 12. 1925 S. 93=18 S. L.R. 65. Money paid under a decree which is afterwards found not to be due cannot be recovered as money had and received, in a fresh suit, unless the decree is set aside or superseded by some ulterior proceeding. 46 I.C. 562. Banker and customer—Drawing cheque—Countermanding payment—Bank making payment in forgetfulness of order of countermand—Bank can recover amount paid from payee. 11 Lah. 667=31 Punj.L.R. 369. Where a debtor alleges that he overpaid his creditor under a mistake of law but makes the payment voluntarily he is not entitled to claim a refund of it. (1920 Bom. 192; 1930 Bom. 430, Ref.) 1933 L. 523. See also 150 I.C. 890=1934 M. 420=67 M.L.J. 566. Insolvency—Money paid in excess under mistake of fact by officer of Court—Claim for refund by other creditors—Maintainability.

See 29 Bom.L.R. 1167. On this section, see also 1928 L. 316=111 I.C. 554.

COERCION.—Where property of one person is wrongfully attached in execution of a decree against another and the real owner pays off the decree amount under protest the owner is entitled to demand repayment from the decree-holder. This is the law both in England and in India. 40 C. 598=40 I.A. 56=25 M.L.J. 104 (P.C.) [8 I.A. 93 (P.C.), Rel.]. See also 1933 A. 953; 47 L.W. 188. Where a third party who had purchased the property prior to the attachment by the decree-holder made a deposit of the purchase-money under O. 21, R. 89, C. P. Code, to set aside the sale in execution and subsequently succeeded in his suit for a declaration of his right to the property he is entitled to a refund of the deposit so made by him from the decree-holder-auction-purchaser (irrespective of the applicability of R. 89) under S. 72 of the Contract Act, as an involuntary payment made under coercion. 34 L.W. 399=1931 M. 753. See also 57 B. 601=35 Bom.L.R. 462=1933 B. 239. The word "coercion" in S. 72 is used in its general and ordinary sense and not in the sense in which it is defined in S. 15. 40 C. 598=40 I.A. 56 (P.C.). See also 5 R. 653; 47 L.W. 188; 65 I.C. 517; 17 I.C. 205=14 Bom. L. R. 854. Where a municipality erroneously conceiving itself justified under the circumstances in making a demand makes a demand in the common form requiring the assessee to either pay or show cause for not paying the same and in default warning him that steps will be taken by distraint to enforce payment and that he has a right of appeal, the payment in pursuance of such notice is not sufficient to take it out of the category of voluntary payments. Payment so made without any expression of objection or unwillingness under the erroneous belief that it was unobjectionable, cannot be recovered. 39 L. W. 660=1934 M. 420=67 M.L.J. 566. See also 1934 P. 605; 1933 L. 523. Money paid under legal process—Recoverability. 43 C. 269=20 C.W.N. 188; 53 I.C. 553. Money paid by a person under arrest in a non-compoundable case with a view to stifle a prosecution amounts to payment under coercion. 40 M. 285=31 M.L.J. 264. A landlord collected water-cess from plaintiffs at a penal rate and paid it to the Government. He is not liable to be sued by the plaintiffs for the recovery of the water-cess so paid by them. 29 M.L.J. 597=30 I.C. 178. A payment of water-cess made under fear of coercive process is not a voluntary payment. 37 M. 322=24 M.L.J. 365. Suit against Hindu widow—Personal decree—Estate attached in execution—Property put to sale—Owner paying decretal amount to avoid sale—Right to recover the money so paid could be recovered back as money paid under compulsion. The fact that the per-

CHAPTER VI.

OF THE CONSEQUENCES OF BREACH OF CONTRACT.

73. When a contract has been broken, the party who suffers by such breach

Compensation for loss or damage caused by breach of contract.

is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the

parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

When an obligation resembling those created by contract has been incurred

Compensation for failure to discharge obligation resembling those created by contract.

and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

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son paying could have been made liable for the amount paid, had suitable proceedings been taken, was held to make no difference. I.L.R. (1938) Nag. 382=1938 Nag. 225. Money paid under compulsion of a legal process cannot be recovered as money had and received unless it was realized by fraud or some unconscionable dealing or by a grave mistake which a Court of equity will relieve against. 46 I.C. 534=3 P.L.J. 465. On this section, see also 32 Bom.L.R. 424; 44 L.W. 722=1936 Mad. 978. Money paid to official assignee under garnishee order cannot be recovered back. 171 I.C. 401=1937 Rang. 234.

Sec. 73: SCOPE.—See 18 N.L.J. 313. Section merely prescribes method of assessing damages. It does not take away right of seller to sue for price when property in the goods has passed to buyer. 34 B. 192; 36 C. 736. The buyer has no right without the consent of the seller to extend the time and claim damages at the rate prevailing on the deferred date. 97 I.C. 269=19 S.L.R. 41. Section applies only when contract has been broken. See 4 Bom. L. R. 874. The party to be entitled to compensation must have done something to his own prejudice in the performance of his part of the contract. Where therefore the vendors have no goods to deliver they suffered no injury by the vendee's breach not to take delivery and the vendors are not entitled to any damages. 151 I.C. 56=1934 N. 129. When a person is guilty of a breach of contract then ordinarily, the other party to the contract has open to him two remedies, one by a suit for damages and the other by a suit for specific performance of the contract. Of course, some kinds of contracts cannot be specifically performed, but in every case

there is a right of action for damages, and in India that applies to contracts for the sale of immovable property just as much as to contracts for the sale of movable property. 189 I.C. 23=1940 Rang. 146. No difference between movable and immovable property. 1927 S. 49; 1930 M. 748; 32 Bom.L.R. 272=1930 B. 213. Law does not regard collateral and consequential damages arising from delay in payment of money. See 35 C. 683. So also loss of profits on breach of contract, is not to be considered in measuring damages. See 21 M. 172; I.L.R. (1938) 2 Cal. 88. As to delivery by instalments, see 21 M.L.J. 182. See also 30 C. 477; 1 C. 264. When a buyer of goods becomes aware of a breach of a condition of the contract by the seller, he is entitled to a reasonable time to consider what he will do and his failure to reject the goods at once does not prejudice his right to reject them within a reasonable time. What is a reasonable time must always be a question of fact, having regard to the particular circumstances of each case. 44 C.W.N. 1069. Where a person is not prepared to wait even a short time before giving final instructions for the cancellation of his contract to purchase goods to see whether the injunction prohibiting importation of his contracted goods was to be continued as to future importations, nor does he care on its discharge to cancel his letter of cancellation which he could easily have done by cable, in spite of the fact that the vendors were still prepared to keep the contract open, the cancellation is not due to the granting of the injunction but is a voluntary act on the part of the person for which the person obtaining injunction is not liable. 1929 P.C. 222=57 M.L.J. 558 (P.C.). See also 1930 L. 193. Plaintiff can claim damages as on the date when the defendant failed to take

Illustrations.

- (a) *A* contracts to sell and deliver 50 maunds of saltpetre to *B*, at a certain price to be paid on delivery. *A* breaks his promise. *B* is entitled to receive from *A*, by way of compensation, the sum, if any, by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.
- (b) *A* hires *B*'s ship to go to Bombay, and there take on board, on the first of January, a cargo which *A* is to provide and to bring it to Calcutta, the freight to be paid when earned. *B*'s ship does not go to Bombay, but *A* has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. *A* avails himself of those opportunities, but is put to trouble and expense in doing so. *A* is entitled to receive compensation from *B* in respect of such trouble and expense.
- (c) *A* contracts to buy of *B*, at a stated price 50 maunds of rice, no time being fixed for delivery. *A* afterwards informs *B* that he will not accept the rice if tendered to him. *B* is entitled to receive from *A*, by way of compensation, the amount, if any, by which the contract price exceeds that which *B* can obtain for the rice at the time when *A* informs *B* that he will not accept it.
- (d) *A* contracts to buy *B*'s ship for 60,000 rupees, but breaks his promise. *A* must pay to *B*, by way of compensation, the excess, if any, of the contract price over the price which *B* can obtain for the ship at the time of the breach of promise.
- (e) *A*, the owner of a boat, contracts with *B* to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to *B* by *A* is the difference between the price which *B* could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.
- (f) *A* contracts to repair *B*'s house in certain manner, and receives payment in advance. *A* repairs the house, but not according to contract. *B* is entitled to recover from *A* the cost of making the repairs conform to the contract.
- (g) *A* contracts to let his ship to *B* for a year, from the first of January, for a certain price. Freight rises, and on the first of January the hire obtainable for the ship is higher than the contract price. *A* breaks his promise. He must pay to *B*, by way of compensation, a sum equal to the difference between the contract price and the price for which *B* could hire a similar ship for a year on and from the first of January.
- (h) *A* contracts to supply *B* with a certain quantity of iron at a fixed price, being a higher price than that for which *A* could procure and deliver the iron. *B* wrongfully refuses to receive the iron. *B* must pay to *A*, by way of compensation, the difference between the contract price of the iron and the sum for which *A* could have obtained and delivered it.
- (i) *A* delivers to *B*, a common carrier, a machine, to be conveyed, without delay, to *A*'s mill, informing *B* that his mill is stopped for want of the machine. *B* unreasonably delays the delivery of the machine, and *A*, in consequence, loses a profitable contract with the Government. *A* is entitled to receive from *B*, by way of compensation, the average amount of profit which would have been made, by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.
- (j) *A*, having contracted with *B* to supply *B* with 1000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with *C* for the purchase of 1000 tons of iron at 80 rupees a ton, telling *C* that he does so for the purpose of performing his contract with *B*. *C* fails to perform his contract with *A*, who cannot procure other iron, and *B*, in consequence, rescinds the contract. *C* must pay to *A* 20,000 rupees, being the profit which *A* would have made by the performance of his contract with *B*.

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delivery of goods. 54 C. 97=99 I.C. 244=1927 C. 291. Measure of damages where no time is fixed for delivery. See 14 A. L.J. 597. As to damages in case of *breach of promise of marriage*, see 42 B. 499. Also 152 I.C. 913=35 P.L.R. 480=1934 L. 544. Where a contract is entered into between two Hindus that the daughter of the one should be given in marriage to the son of the other, the agreement is between or on behalf of the respective families of the parties to the marriage. When it is broken, damages of two kinds may naturally result: (1) the pecuniary loss, if any, and injury to the feelings and prospects to the bride or bridegroom personally; (2) the pecuniary loss and the loss to the credit and reputa-

tion of the family of the injured party. A suit by the father of the bride for damages suffered by him as head of the family and as father of the bride is not strictly an action for breach of promise of marriage as known to English law. S. 73 of the Contract Act which prescribes the general measure of damages for all contracts must be applied to the case. A claim to recover amounts by way of increased expenditure on the bride's subsequent marriage alleged to her having been discarded cannot be allowed, because the increased expenditure cannot be said to arise naturally and directly from the breach of the first marriage and is generally too remote a consequence. 1937 M.W.N. 1274. See also 43 Bom.L.R. 35. A master can claim compensation for breach of contract

(k) *A* contracts with *B* to make and deliver to *B*, by a fixed day, for a specified price, a certain piece of machinery. *A* does not deliver the piece of machinery at the time specified, and, in consequence of this, *B* is obliged to procure another at a higher price than that which he was to have paid to *A*, and is prevented from performing a contract which *B* had made with a third person at the time of his contract with *A* (but which had not been then communicated to *A*), and is compelled to make compensation for breach of that contract. *A* must pay to *B*, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by *B* for another, but not the sum paid by *B* to the third person by way of compensation.

(l) *A*, a builder, contracts to erect and finish a house by the first of January, in order that *B* may give possession of it at that time to *C*, to whom *B* has contracted to let it. *A* is informed of the contract between *B* and *C*. *A* builds the house so badly that, before the first of January, it falls down and has to be re-built by *B*, who, in consequence loses the rent which he was to have received from *C*, and is obliged to make compensation to *C* for the breach of his contract. *A* must make compensation to *B* for the cost of re-building the house for the rent lost, and for the compensation made to *C*.

(m) *A* sells certain merchandise to *B*, warranting it to be of a particular quality, and *B*, in reliance upon this warranty, sells it to *C* with a similar warranty. The goods prove to be not according to the warranty, and *B* becomes liable to pay *C* a sum of money by way of compensation. *B* is entitled to be reimbursed this sum by *A*.

(n) *A* contracts to pay a sum of money to *B* on a day specified. *A* does not pay the money on that day. *B* in consequence of not receiving the money on that day is unable to pay his debts, and is totally ruined. *A* is not liable to make good to *B* anything except, the principal sum he contracted to pay, together with interest up to the day of payment.

(o) *A* contracts to deliver 50 maunds of saltpetre to *B* on the first of January, at a certain price. *B* afterwards, before the first of January, contracts to sell the saltpetre to *C* at a price higher than the market price of the first of January. *A* breaks his promise. In estimating the compensation payable by *A* to *B*, the market price of the first of January, and not the profit which would have arisen to *B* from the sale to *C*, is to be taken into account.

(p) *A* contracts to sell and deliver 500 bales of cotton to *B* on a fixed day. *A* knows nothing of *B*'s mode of conducting his business. *A* breaks his promise, and *B*, having no cotton, is obliged to close his mill. *A* is not responsible to *B* for the loss caused to *B* by the closing of the mills.

(q) *A* contracts to sell and deliver to *B*, on the first of January, certain cloth which *B* intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. *B* is entitled to receive from *A* by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) *A*, a ship-owner, contracts with *B* to convey him from Calcutta to Sydney in *A*'s ship, sailing on the first of January, and *B* pays to *A*, by way of deposit, one-half of his passage-money. The ship does not sail on the first of January, and *B* after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. *A* is liable to repay to *B*, his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which *B* lost by arriving in Sydney too late.

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of service by his servant. 32 P.L.R. 275 = 1931 L. 133 (2). Manager of a joint Hindu family personally liable in damages for failure to perform a contract for sale of immovable property when the sale is not binding on the minor coparceners. 100 I. C. 422 = 1927 L. 252. As to the duty of plaintiff suing for damages to take all reasonable steps to mitigate the loss consequent upon breach of contract, see 43 C. 493 = 43 I.A. 6 (P.C.). In general the date of breach is the date when the contract ought to have been but was not fulfilled and not the date of refusal of liability or repudiation. 11 P. 600 = 63 M.L.J. 270 (P.C.). In the case of a C.I.F. contract ordinarily the date of breach is the date on which the documents would have to be tendered. 26 S.L.R. 167.

SET-OFF.—Where a contract for the sale

of goods falls through the default of the purchaser, the latter is entitled to recover the purchase-money paid by him (excluding the earnest or deposit), and the seller can only resist the claim by seeking to set-off against the said sum any damages which he might have incurred by reason of the purchaser's non-performance of the contract. But before the seller can substantiate his claim to set-off, he should prove his readiness and willingness to perform his part of the contract and that he was in a position to perform the contract on the date fixed for the performance of the contract. 1941 Mad. 108 = 1940 M.W.N. 756 = 52 L.W. 251.

INTEREST ACT.—There is no conflict of any kind between the single section of Interest Act and this section. 21 N.L.R. 16 = 1925 N. 451. See also 8 L. 310 = 100 I.C. 846 = 1927 L. 333. Interest Act permits the Court to allow interest in certain circum-

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stances but does not limit its doing so only to those circumstances. 1925 N. 451. In cases not covered by the Interest Act, the Court cannot award interest by way of damages, under S. 75 of the Contract Act, as component of the compensation to be fixed for the loss caused to the plaintiff by reason of the breach of contract, unless the plaintiff proves special loss or damage sustained by him in consequence of the non-payment of money. A mortgage-deed provided that the mortgagee should pay the peishcush and the land cess due on the portion mortgaged. The mortgagee defaulted to pay and the mortgagor who was compelled to pay the amount sued for the recovery of the amount and claimed interest thereon, *held*, that (i) the case was not governed by the Interest Act, (ii) apart from the Act, in the absence of proof of special loss or damage, interest cannot be awarded under S. 73 of the Contract Act, as damages for the mere wrongful detention of money. 145 I.C. 721=1933 M. 729=65 M. L.J. 623. *See also* 1940 O.W.N. 581=1940 Oudh 308; 1940 Pat. 155. Where plaintiff is kept out of his money and the defendant has the use of the money in breach of his obligation to the plaintiff, S. 73 applies and the plaintiff is entitled to receive not only the money he ought to have been paid on the due date but also interest at a reasonable rate for the period during which he has been kept out of it. 1936 M. 486=70 M.L.J. 433. *See also* 156 I.C. 643=1935 C. 347. Where a vendor fails to give possession to the vendee of the property sold, and the vendee files a suit for recovery of the amount paid and damages, interest by way of damages can be allowed for breach of the contract even though the formalities required by the Interest Act have not been complied with as the Interest Act has no application to such cases. 146 I.C. 154=1933 L. 556. Even though there is no agreement to pay interest, Court can award damages for wrongful detention of money. 93 I.C. 647=1926 C. 755; 95 I.C. 175=1926 O. 514. Interest cannot be awarded as damages when there has been no demand. 101 I.C. 57=1927 A. 444. Besides the Interest Act and Ill. (n) to S. 73 there are other circumstances in which interest can be awarded on general grounds of equity. 1932 A.L.J. 733=139 I.C. 158. *See also* 1936 R. 141.

INTEREST—AWARD OF.—The Illus. (n) to S. 73 does not confer upon a creditor a right to recover interest upon a debt which is due to him when he is not entitled to such interest under any provision of the law. 65 I.A. 66=I.L.R. (1938) 2 Cal. 72=42 C.W.N. 985=1938 P.C. 67=(1938) 1 M.L.J. 640 (P.C.). S. 73 is merely declaratory of the common law as to damages. Interest cannot be allowed at common law by way of damages for wrongful detention

of debt. 65 I.A. 66=I.L.R. (1938) 2 Cal. 72=1938 A.L.J. 169=1938 P.C. 67=(1938) 1 M.L.J. 640 (P.C.). The rule of law is that, in the absence of special circumstances, interest cannot be allowed on damages for breach of contract for sale of goods. 40 P.L.R. 531. Interest cannot be given merely because money due has been withheld but can be awarded by way of damages under S. 73. Where damages can be claimed, interest can usually also be allowed under S. 73 unless there is any other measure of compensation, such as the difference between the purchase price at the time of the contract and the purchase price at the time of the breach. 30 N.L.R. 213=148 I.C. 822=1934 N. 78. *See also* 1940 O.W.N. 581=1940 Oudh 308; 1939 P. W. N. 769. *Also* 12 P. 216. Interest should not be allowed on unliquidated damages. 11 L. L.J. 537=120 I.C. 482=31 Punj.L.R. 294=1930 L. 374; 26 S.L.R. 167. Where under an improvement lease it was provided that the lessee was to pay rent when the land was assessed by government and the lessor later on instituted a suit to recover the arrears of rent with interest, *held*, that interest could not be allowed under S. 73, Ill. (n), because there was no agreement or usage to support the claim. 31 L.W. 655=1930 M.W.N. 438. Difference in prices represents the full amount of compensation to be given under S. 73, Contract Act, on account of loss sustained by fall of market prices and decree for interest on such amount should not be given. But plaintiff is entitled to interest on account of delay in payment of amount due to him as loss and it can be awarded as compensation calculated on basis of interest. 1930 A.L.J. 297=1930 A. 132. *See also* 27 A.L.J. 674=1929 A. 801; 12 P. 216. Increased interest default—If allowances. 144 I. C. 215=1934 N. 224. Breach of contract—Vendee obliged to pay third person—Interest on that amount—Right of vendee to recover. 1933 A.L.J. 963=1933 A. 455.

RIGHT TO DAMAGES.—The remedy in a suit for damages or breach of a contract need not be one of the terms of the contract, but becomes available under the law in case of a breach of a contract without any express stipulation. 23 Pat.L.T. 11. Right to sue for damages not transferable. 25 A.L.J. 811=102 I.C. 766=1927 A. 621. Party rendering performance impossible cannot get damages. 1925 N. 119 (2). Where a person contracts to indemnify another in respect of any liability which the latter may have undertaken on his behalf, such other person may compel the contracting party *before actual damage is done* to place him in a position to meet the liability that may hereafter be cast upon him. 1931 A.L.J. 687=1931 A. 754. Damages in usual way must be awarded to purchaser, if vendor fails to make good title to property sold by him. 85 I.C. 421=1925 L. 262. *See also* 19 S.L.R. 337=1927 S. 120.

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Interest—Whether can be awarded by way of damages. 12 P. 216. Delay in delivery—Acceptance—Right to fix the date for performance by notice and claim damages. 9 Mys.L.J. 249. For a case of *quantum meruit*, see 56 C.L.J. 285. Compensation can only be claimed under S. 73 of the Contract Act when loss or damage has been caused, and it is doubtful whether it could be held that the mere passing of a decree in favour of a third party in respect of property sold actually causes any loss or damage to the purchaser before the decree is executed. 1936 O.W.N. 143=1936 O. 141. The doctrine of *frustration of contract* only applies if the disturbing cause goes to the extent of substantially preventing the performance of the whole contract: "Interference leaving a considerable part capable of performance will not be an excuse." Impossibility arising from the promisor's own act or default is not in any case an excuse for non-performance of his contract. 19 Pat. 1=1940 Pat. 204. The doctrine of "*frustration of venture*" is based not upon the existence of any actual impossibility in fact but upon the existence in the circumstances of the case, of an implied condition. In order to justify such an inference, the implied condition must be absolutely necessary to give effect to the transaction which the parties must have intended. I.L.R. (1941) 2 Cal. 78=45 C.W.N. 660=73 C.L.J. 294. See also 19 Pat. 1=1940 Pat. 204.

DUTY TO MINIMISE DAMAGES.—Every person who has a right to damage for breach of contract must take all reasonable steps to mitigate the loss arising from such breach. Where a tenant who promised to pay Government revenue and cess has failed to pay it, but the landlord who has notice of the intended sale takes no steps to avoid the sale by paying necessary dues and the property is ultimately sold, the landlord in a suit by him for damages for breach of contract cannot claim as damages any loss which he could have mitigated by taking necessary steps. 186 I.C. 852=1940 Pat. 88. If a contracting party has suffered damages through breach of contract by the other contracting party, it is his duty to minimise that damage and if he fails to do so when it was in his power he cannot recover in respect of the damage which he could have avoided. 1933 A.L.J. 670=1933 A. 511. The duty on the part of the plaintiff to minimise damages arises only after breach has occurred. 83 I.C. 260=1924 C. 427. See also (1938) 1 M.L.J. 857; 1940 Pat. 88; 49 B. 25=86 I.C. 521.

MEASURE OF DAMAGES.—The theory of damages is that they are a compensation and satisfaction for the injury sustained, that is, that the sum of money to be given for reparation of the damages suffered should, as nearly as possible, be the sum which will put the injured party in the same position

as he would have been if he had not sustained the wrong for which he is getting damages. 196 I.C. 529=14 R.S. 70=1941 Sind 146. See also 19 Pat. 1=1940 Pat. 204. Measure of damages to which a promisee is entitled in a case of a breach of contract is the difference between the contract rate and the market rate on the date of breach of contract. 43 C. 493=43 I.A. 6; 36 C. 617; 41 M. 409; 22 M.L.J. 413. See also 38 C. 458; 5 Bur.L.J. 198; 102 I.C. 628; 97 I.C. 871; 1926 M. 1021=57 M. L.J. 243; 116 I.C. 551; 1930 M.W.N. 195=1930 M. 748 and 1933 N. 263 (immovable property); 1940 Rang. 146; 63 M.L.J. 270=11 P. 600 (P.C.). In the case of breach of contract of sale of goods, the damages must be based on the difference between the market price and the contract price, if there was an available market for the goods at the date of breach. 1936 A.L.J. 704=1936 A. 514. See also 1937 Nag. 345; 1938 Rang. 359; 1939 Rang. 139=1939 Rang. L.R. 622; 1940 Rang. 146. Where on the buyer committing breach of contract by failing to take delivery of the goods within the time agreed upon, the seller sells the goods, the measure of damages is the price of the goods on the date of the breach and not on the date of the sale. 44 C.W.N. 792; I.L.R. (1938) 2 Cal. 88. As to estimation of market value where no market rate is proved, see 9 Mys.L.J. 249. In the case of goods specially made to order, a distinction has to be drawn between goods which are marketable and which are not marketable and in the latter case the price of the goods is the measure of damages. 1931 L. 742. Regarding measure of damages in cases of re-sale, see 1927 M.W.N. 549. See also 100 I.C. 422=1927 L. 252. Regarding measure of damages in case of anticipatory breach, see 1933 R. 25. Breach of contract—Measure of damages—Costs incurred in defending suit by party committing breach—No right to recover. 1940 Rang. 146. Time spent in survey of the goods does not postpone date of breach. 45 B. 129. Value created for special purpose is irrelevant. 26 B. 235 (239). Due date is date when goods ought to be delivered according to contract. 7 Lah.L.J. 360=1925 L. 513. In a contract which fixes the date for performance the due date is as a rule ascertainable. (*Ibid.*) Damages, measure of—Time, if essence of contract. See 49 B. 1=1924 B. 473. Consignment of 200 bundles forwarded by railway—Nine bundles missing—Damages extent of. 1933 A.L.J. 1360=1933 A. 595. Measure of damages—Failure of commission agent to obey instructions. 1933 Sind 247. Lease of rice mill—Failure to give possession—Measure of damages—Applicable to cases of contract affecting immovable property. See 4 Bur.L.J. 93=1925 R. 261. In cases of loss arising from dispossession, see 1927 N. 75=94 I.C. 999. See also 1940 N.L.J. 486 (Building contracts). Sale—Part of consideration retained with vendee for payment

74. ¹[When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable

Compensation for breach of contract where penalty stipulated for.

LEG. REF.

¹ These paragraphs were substituted for the first paragraph of S. 74 by S. 4, Act VI of 1899.

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to a mortgagee—Failure to pay—Decree and sale on the mortgage—Personal decree, under O. 34, R. 6 for balance—Vendor's right to recover from vendee the amount of decree—Plea in defence, of existence of prior mortgage not sustainable—Vendor, not estopped from proving their non-subsistence. 1939 A.W.R. (H.C.) 161=1939 All. 289.

EARNEST MONEY AND DEPOSIT FORFEITURE OF.—In the absence of stipulation vendor must prove special damage when claiming forfeiture of earnest money when contract is broken by vendee. 1925 N. 109=20 N. L.R. 192. The use of the word 'deposit' in contract implies an agreement that the sum deposited may be forfeited in case of breach by the depositor. 1937 Lah. 847. In the case of mercantile contracts, even in respect of sale of goods, it has been customary in India to receive sums of money by way of deposit or earnest and such sums can be forfeited by the vendor when default is committed by the vendee in the performance of his part of the contract. The fact that the vendor was equally at fault in performing his part of the contract makes no difference. 1941 Mad. 108=52 L.W. 251=1940 M.W.N. 758. See also 1937 Rang. 357; 1938 Lah. 62. It is a well-known principle or law that if a purchaser on agreeing to purchase a property agrees to pay and does pay, an advance or a deposit, that must be regarded as security for the fulfilment of the contract of sale, more especially when the deposit is insisted upon by the vendor as a term of the contract. Though there is nothing specific said about forfeiture, the mere fact that a deposit is demanded carries with it the implication that it should be forfeited if the contract is broken, unless the vendee proves an agreement to the contrary. Where a sale-deed recites that the consideration for the sale should be paid before the registering officer, the implication is that the same must be paid within four months which is the period limited for registration of the document. Where the vendee after paying a deposit and taking delivery of the sale-deed from the vendor returns it to the vendor being unable to find the purchase money and allows the period of four months' time for registration to pass without making any further payment, he is not entitled to claim back the deposit paid by him and plead that

the vendor has treated the contract as at an end. The vendee who holds a deposit which he can forfeit is not bound to institute a suit for damages or other remedy against a vendee who has no money to pay the vendor. It cannot be inferred from the omission of the vendor to take legal proceedings in such a case that he has treated the contract of sale as at an end. 1937 M.W.N. 1288=1938 Mad. 246. Where it agreed to pay money by various instalments and it is provided that in case of default in the payment of any instalment, the amounts paid till then would be forfeited, the provision is in the nature of a penalty and in case of default only a reasonable sum can be claimed as damages. 15 Luck. 550=1940 O.W.N. 395=1940 Oudh 257. Breach of contract—Amount not deposited as earnest money and not appropriated by payee to loss due to breach—Amount is not liable to forfeiture on breach. See 90 I.C. 573=1925 Sind 254. See also 103 I.C. 158=1927 N. 281; 100 I.C. 860=1927 B. 195. When the breach is not by vendee he can claim back his earnest money. 51 B. 247=101 I.C. 229=29 Bom. L.R. 19=1927 B. 195.

Illustrations: SCOPE OF.—The illustrations to S. 73 are not more than general rules. 196 I.C. 529=1941 Sind 146. The words 'which naturally arose in the usual course of things from such breach' in S. 73 do not mean that general rules such as those given in the illustrations to the section must be followed irrespective of the facts, but only impose a limitation upon the damages which can be allowed that the damages must not be remote. 196 I.C. 529=1941 Sind 146.

MISCELLANEOUS.—Clause empowering vendor on vendee's default to pay on due date to re-sell at any time and on such terms and conditions as vendor might decide is valid provided vendor acts within its limits. 49 B. 25=86 I.C. 521. As to what amounts to repudiation of a contract, see 1931 R. 126. Right of buyer to extend time without consent of seller and claiming damages, see 1927 Sind 49=19 S.L.R. 4.

PENALTY.—The stipulation in a post-decretal agreement to pay the amount of the decree in instalments and that if one instalment is not paid the whole amount shall be paid forthwith is not a penal provision. 25 S.L.R. 279=131 I.C. 710. Relief against penalty can be granted even in compromise decrees. 1925 M. 264 (1)=80 I.C. 925.

Sec. 74: SCOPE.—The section as it originally stood was intended to do away with

compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

¹*Explanation.*—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the ²[Central Government] or of any, ³[Provincial Government] gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations.

(a) A contracts with B to pay B Rs. 1,000 if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000 as the Court considers reasonable.

(b) A contracts with B that, if A practises as a surgeon within Calcutta, he will pay B Rs. 5,000. A practises as a surgeon in Calcutta. B is entitled to such compensation, not exceeding Rs. 5,000 as the Court considers reasonable.

(c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

⁴[(d) A gives B a bond for the repayment of Rs. 1000 with interest at 12 per cent. at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.]

⁴[(e) A, who owes money to B, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.]

⁴[(f) A undertakes to repay B a loan of Rs. 1000 by five equal monthly instalments with a stipulation that in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.]

⁴[(g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.]

LEG. REF.

¹ These paragraphs were substituted for the first paragraph of S. 74 by S. 4, Act VI of 1899.

² These words were substituted for the words "Government of India" by A.O., 1937.

³ These words were substituted for the words "Local Government" by *ibid.*

⁴ Illustrations (d) and (e) were inserted by S. 4 (2), Act VI of 1899.

NOTES.

the distinction between penalty and liquidated damages. 9 C. 689 (692); 3 M. 224; 11 C. 545; 5 A. 238; 27 C. 421; 3 C.W.N. 43 (45); 17 B. 106 (111). S. 74 boldly cuts the most troublesome knot in the common law doctrine of damages. Whether actual damage or loss is proved or not, the Court is entitled to award reasonable damages not exceeding the stipulated amount. 189 I.C. 785=1940 Sind I. The right of a party complaining of a breach of contract to reasonable compensation under S. 74 is not dependent on proof of actual loss or damage. Even when no actual damage or loss is proved to have been caused by the breach the party is entitled to compensation. 1937 A.L.J. 1385=(1938) A.

W.R. (H.C.) 11. Agreed liquidated damages, if to be enforced, must be the result of a 'genuine pre-estimate of damages'. They do not include a sum fixed *in terrorem* covering breaches of contract of many varying degrees of importance, the possible damages from which bear no relation to the fixed sum, and which obviously have at no time been estimated by the contracting parties. 1941 O.A. 618=1941 P.C. 101 (P.C.). S. 74 applies to cases in which there is a breach of contract and is inapplicable to a case of breach of warranty. 1930 L. 843. Section does not apply to covenants in a lease of which the breach involves forfeiture. 42 M. 654. An agreement that the pledge should become irredeemable if not redeemed after a certain period, although it may be an unfair agreement, would not in itself constitute an agreement by way of penalty unless the value of the thing pledged is so very much larger than the amount of the loan that it would become obvious that the clause is really inserted as a means of bringing pressure upon the pledgor to repay the loan within the contracted time. 1939 Rang. 413. As to the commencement of the operation of the amended section

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See 25 M. 343; 26 M. 445; 25 A. 169 (Conflict of rulings). The doctrine of penalties is not applicable to stipulations contained in a decree. 1925 P.H.C.C. 353. The section does apply to a compromise decree and it is open to a Court executing such decree to go behind it so as to interfere with a stipulation by way of penalty contained in the compromise. 1933 A.L.J. 132=1933 A. 252 (F.B.); 1925 M. 264. A compromise, being an agreement, is subject to S. 74 of the Contract Act, and to the equitable relief which the Court can give under that provision, notwithstanding that the compromise is embodied in a decree. The test to decide whether a default clause in a compromise decree is a penalty is to see whether it is a liability imposed on the defendant to pay the decree-holder something more than he would be entitled to under the decree. *See also* 1937 Nag. 413; 1941 O.A. 865=1941 O.W.N. 1138. A compromise, being an agreement, is subject to S. 74 of the Contract Act, and to the equitable relief which the Court can give under that provision, notwithstanding that the compromise is embodied in a decree. The test to decide whether a default clause in a compromise decree is a penalty is to see whether it is a liability imposed on the defendant to pay the decree-holder something more than he would be entitled to under the decree. 44 L.W. 832=1937 M. 234. Payment of larger amount in default of conditions provided in a compromise decree depends on determination of the question whether the larger amount was actually due or whether an amount not actually due sought to be recovered. 103 I.C. 805=1927 L. 659. *See also* 1927 M. 965=53 M. L.J. 562; *B* occupied some premises owned by *M* at the rate of Rs. 55 per mensem under a lease terminable by a month's notice. Subsequently *B* obtained some additional premises at an additional rent of Rs. 25 per mensem. There was a rise in rentals in the neighbourhood in which the premises stood. On 24th August, 1931, *M* sent a notice to *B* giving him the alternative of quitting the premises by 27th September, 1931, or, if he failed to give up possession of continuing his occupation at a rental of Rs. 125 per mensem for both premises, "as rents had risen very high," *B* sent a reply on 20th October, 1931, to the effect that he would leave the premises on 1st November, 1931, but he made no reference to the proposal to increase the rent. *B* actually vacated the place on 25th December, 1931. *B* sued in January, 1932, for arrears of rent for three months at Rs. 125. *Held*, that S. 74, Contract Act, was not applicable as *B* did not break a contract, and his liability therefore was not one for damages for breach of contract. As *B* refused to vacate and remained in possession he must be *held to have agreed by implication* to hold over and to have accepted the proposal to pay rent at the enhanced rate proposed by the

landlord in his notice and therefore *M* could claim the rent at Rs. 125. 1934 A.L.J. 421=1934 A. 115. Where the *promise of marriage is broken* a suit is maintainable for the return of the bridal gifts made to the woman and her parents. But the provisions of the *Dhammathats* as to payment of double value by way of compensation are archaic and obsolete and should not be enforced. Even if in such a case the parent had promised to return double the value, the Court should apply S. 74 of the Contract Act and grant reasonable compensation and not the penalty stipulated for. 11 R. 143=146 I.C. 724=1933 R. 198 (1). When a party to a contract commits an anticipatory breach, the injured party has an option of rescinding it or of electing to treat it as continuing and then suing on the due date for such damages as then accrue. An election once made cannot be avoided. Damages for the breach are to be assessed not from the date of breach but from the date on which the other side elects to rescind. There can be no claim for damages with respect to a contract which is still in being, and it is clear the contract cannot be determined by one side alone except by performance. Unless and until the other side chooses to rescind, the contract remains alive for all purposes. It is difficult to see why the wrongdoer should be entitled to take advantage of his own wrong. 171 I.C. 553=1937 Nag. 289.

PENALTY.—Where a condition in contract carries with it an element of punishment, it is in the nature of a penalty. 144 I.C. 756=10 O.W.N. 759=1933 O. 291. *See also* I.L.R. (1937) 1 C. 300=41 C.W.N. 751=1937 Cal. 654. When a contract contains a term which, not being an integral part of the contract, is introduced only for the purpose of securing the performance of the contract, that term is penal and equity interferes to relieve a party to the contract against it. A penalty is a term which is extraneous and collateral to the actual contract. The reservation of a right to have full payment of money actually due on an existing contract, should there be a failure to pay a smaller sum on a day certain, cannot be treated as a penalty. 1937 Nag. 413. Where the parties themselves contemplate at the time of the transaction that there might be delays in payment and provide for the payment of compound interest from the date of default at the same rate at which simple interest was payable before, it is not a penalty. The word "penalty" is used in S. 74 in the sense of a secondary stipulation which provides for the payment of an additional burden on default. 1934 M. 31 (2)=148 I.C. 467 (F.B.). A penalty under the section will only follow a breach of a contract or an obligation. Where there is no obligation at all there is no question of penalty. 1925 P. 122=7 P.L.T. 299. Where the contract is for the payment of a larger sum with a concession enabling a smaller sum to be paid in a particular way in full satisfaction, the law relating to penalties and S. 74 of

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the Contract Act have no application, and terms must be carried out according to intention of the parties. 58 B. 610=152 I.C. 575=36 Bom.L.R. 798=1934 B. 370. See also I.L.R. (1941) Kar. 389. It cannot be said the terms of a chit-fund contract cannot be penal. 102 I.C. 14. See also 1927 M. W.N. 527. The provision in a Kuri (Chit-fund) to the effect that the winner of the prize should pay his future instalments regularly and on default in the payment of any one instalment, the stake-holder was to be entitled to recover all the remaining instalments in one lump sum is not penal in its nature and is enforceable. 1933 M. 252=65 M.L.J. 29; 38 L.W. 344=1933 M. 725. See also 65 M.L.J. 302=146 I.C. 1026. Penalty—Liquidated damages—Difficulty of ascertaining amount of damages. See 6 L.L.J. 554=84 I.C. 865=1925 L. 284. Regarding return of earnest money in case of breach, see 101 I.C. 841 (2)=1927 Sind 205; 100 I.C. 860=1927 N. 168; 101 I.C. 686; 102 I.C. 766. It is forfeited when the transaction falls through by reason of the fault of the vendee. 94 I.C. 782=1926 P. C. 1=50 M.L.J. 629 (P.C.); 1938 Lah. 62. See also 39 Bom.L.R. 835; 15 Mys. L.J. 339; 1937 Rang. 357. Regarding recovery of entire amount due under instalment bond in cases of failure to pay instalments, see 1927 M.W.N. 527; 157 I.C. 200=1935 L. 873; 49 L.W. 534=1939 Mad. 481=(1939) 1 M.L.J. 491; 103 I.C. 148=1927 N. 284; 26 L.W. 351=104 I.C. 827. The amount which was found due under a decree was Rs. 5,600. This included a sum of Rs. 850 compound and penal interest provided for in the original document as penalty. The decree provided that if the amount less the penalty was paid in certain instalments the debtor would be allowed a rebate of this amount of penalty imposed in the original document between the parties. In default of the payment of instalments the defendant would be liable to pay the whole sum of Rs. 5,600. Held, that there was clearly a penal clause. Held, further, that the executing Court as a Court of equity had the power to relieve against the penalty, even if the decree was one on award. 177 I.C. 925=1938 Sind 185. A stipulation in a maintenance deed for possession of land in case of default of payment would amount to penalty. 27 N.L. R. 24=1931 N. 60. Rules of a benefit fund providing for loans at a low rate of interest to shareholders—The whole loan becoming re-payable at an enhanced rate of interest on the death of a shareholder and the failure of his legal representative to apply to continue as shareholder—The provision does not amount to a penalty. 95 I.C. 610=1926 M. 785=50 M.L.J. 595. Under a compromise decree plaintiff agreed to accept a smaller sum than what he claimed and it was to be paid in two instalments on dates fixed. If default were made in payment on the due date, the full amount claimed by

the plaintiff was payable. Held, the provision was not penal. 91 I.C. 790 (2)=24 A.L. J. 210=1926 A. 278. See also 1935 R. 341; 132 I.C. 580=1931 L. 696. Even in the case of *consent decrees*, the Court can relieve a party from provisions which are of a penal character. But the provisions in a compromise of a mortgage suit allowing the decree-holders the right to sell the mortgaged property in case of default in payment of any instalment is not a provision of such character. 9 Luck. 387=147 I.C. 559=148 I.C. 251=1934 O. 44; 1935 R. 341. See also 44 L.W. 832=1937 Mad. 234; 1938 Sind 185. The question whether a default has or has not taken place is one of fact to be decided on the facts of each case. Similarly it depends on the facts, if time was of the essence of the contract. As a result of the default, the judgment-debtor has to pay a larger amount, but where the decree-holder is merely withdrawing a concession and the amount claimed by him does not exceed what was due to him, there is no equitable ground for treating the sum as a penalty and refusing to enforce its payment. 132 I.C. 580=1931 L. 696; 1933 L. 523. See also 8 Mys.L.J. 433; 1938 Sind 185. The undertaking by a mortgagor to pay a larger sum than the principal at the time of redemption is enforceable. 3 O.W.N. 610=96 I.C. 538=1926 O. 502. The fact that the parties have termed the amount paid as earnest is not conclusive and it is necessary for the Court to consider whether or not the payment although so termed is in reality earnest money. Where Rs. 530 out of Rs. 720 fixed as price have been paid the stipulation that the sum of Rs. 530 should be forfeited on default is of the nature of the penalty and the vendor is entitled to only reasonable compensation. 143 I.C. 192=1933 N. 223. It is a well-understood principle of English law that where under a contract of sale of land a sum of money is paid as deposit the vendor is entitled to retain the same if the contract goes off by default of the purchaser, the basis of the rule being that the sum paid as deposit is a guarantee for the performance of the contract. This principle also applies to India. 46 L.W. 839=1937 Mad. 681.

INTEREST AMOUNTING TO PENALTY.—Question as to stipulation being by way of penalty is to be decided from circumstances of each case. 1925 M. 84=47 M.L.J. 605. See also 105 I.C. 477; I.L.R. (1937) 1 C. 300. If an agreement provides for a certain rate of interest in case of single default and an enhanced rate of interest in the event of consecutive defaults, the provision for enhanced interest in the event of consecutive defaults is a stipulation by way of penalty in view of the explanation to S. 74. 1934 P. 16. Where the bond stipulates that the loan will carry no interest for a period but in default of payment during that period interest is to be charged then (1) if the interest is to be charged from the date of the bond, whatever the rate may be the stipula-

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tion is in the nature of the penalty; (2) if interest is to be charged from the date of default at the usual ordinary contract rate, the stipulation is not in the nature of penalty; (3) if the loan includes the sum advanced and further compensation or past interest due, the stipulation for payment of interest at any rate from the date of default is penal; (4) if the rate of interest is exorbitant the stipulation is penal. 35 C.W.N. 1224. Where interest on a mortgage is payable at 12 per cent. merely because compound interest is payable on default to pay interest regularly, rate of interest should not be held to be excessive or exorbitant, unless it is proved that the rate is unreasonable or extortionate. 56 A. 496=1934 A.L.J. 371=1934 A. 152. When a mortgage deed provides for interest on interest, it is part of the contract itself; and the mere fact that under S. 74, Contract Act, the Court is given power to reduce the rate does not make the reduced rate any the less a claim under the Contract Act. No doubt, the word "penalty" is used in S. 74 when speaking of "enhanced" interest, but it is not in the sense of a claim *de hors* the contract. The security created by the document is also available in respect of the enhanced rate of interest allowed by the Court. 1934 M. 695=67 M.L.J. 653. Agreement for hire—Payment of amount stipulated for non-return of hired animal whether amounts to penalty. 46 C.L.J. 362. As to when stipulations for interest are penal, on the question of penalty, [see Law of Interest M.L.J. Edn.] Where reasonable compensation for breach is provided, there is no penalty, but where it is *in terrorem* it is a penalty. 47 M.L.J. 833=1925 M. 177. See also 1938 Mad. 304. A stipulation charging enhanced interest from the date of the bond on failure of payment on the fixed date is penal and cannot be enforced. 89 I.C. 896. See also 89 I.C. 119; 83 I.C. 773=1923 L. 452; 106 I.C. 38; 11 L. 635=1931 L. 120. Stipulation to pay compound interest on default is not penal. 47 M.L.J. 910=85 I.C. 391. See also 103 I.C. 496; 101 I.C. 759=1927 A. 538 (1); I. L. R. (1938) Nag. 91=20 N.L.J. 285=1938 Nag. 112; 1939 P.W.N. 319=1939 Pat. 743; 1940 Sind 68; 20 Pat.L.T. 343=1939 P.W.N. 256=1939 Pat. 360; 20 Pat.L.T. 743=1939 Pat. 457. Where compound interest at 25 per cent. is claimed a Court of equity is justified in cutting it down to 6 per cent. simple interest. 86 I.C. 176=1925 L. 450. See also 145 I.C. 188=10 O.W.N. 193=1933 O. 190; 1933 M.W.N. 597; 1937 A.M. L.J. 97. Kabuliyat—Provision for $6\frac{1}{4}$ per cent. interest per mensem in case of even petty defaults—Power of Court to relieve against—B. T. Act, S. 179—If bars powers of Court to reduce rate of interest. See 1939 P.W.N. 220. Where there have been distinct laches on the part of the borrower and, owing to such laches and delay the amount has swelled to a great extent, there

is no good reason for reducing interest. 1931 N. 91. Rate of Re. 1-8-3 per cent. per mensem compound interest was held as not penal. 7 L.L.J. 417=1925 L. 580. See also 1925 S. 164; 21 L.W. 54=85 I.C. 261; 87 I.C. 129=1924 B. 264; 100 I.C. 269=27 P.L.R. 807=1927 L. 113; 92 I.C. 593 (1)=1926 C. 690. Provision in the mortgage document for compound interest at a higher rate on default—Penal. See 85 I. C. 392=1925 M. 302; 28 N.L.R. 149. See also 36 P.L.R. 178=1934 L. 321. Compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty. [34 C. 150 (P.C.) Rel. on.] 164 I.C. 27=44 L.W. 414=1936 P.C. 283 (P.C.). See also 18 N.L.J. 267; 1935 M. 385=41 L.W. 376=69 M.L.J. 283. In a suit for arrears of rent in terms of a kabuliyat which provided for interest at 75 per cent. per annum, held, that in the absence of anything to show that there was undue influence, the rate of interest cannot be treated as penal or unconscionable, merely because it was high. 151 I.C. 155=38 C.W.N. 182=1934 C. 511. Compound interest is said to be penal only when the rate increases in default. 100 I.C. 679=1927 A. 315; 104 I.C. 191=1927 N. 338; 104 I.C. 817=26 L.W. 351; 50 M. 614=1927 M. 620=103 I.C. 394=52 M.L.J. 612. Stipulation to pay compound interest at $1\frac{1}{2}$ per cent. per mensem on default to pay simple interest at 2 per cent. per mensem was held a penalty and rate was reduced to 1 per cent. compound interest. 1925 A. 78. An agreement to pay compound interest at 25 per cent. from the date of default, the original rate being 25 per cent. simple, can be given effect to. The fact that the security is ample is no ground for refusing to enforce the contract. 1933 M.W.N. 408. Stipulation for interest at 144 per cent. per annum is by way of penalty. 1934 P. 16. Where the evidence is that from 8 annas to 2 per cent. is the usual rate the Court cannot hold that 2 per cent. compoundable every six months is also a fair rate. 1931 A.L.J. 29=1931 A. 203. Stipulation to pay interest from the date of bond on failure to repay a loan by a certain date is penal. 1925 O. 72. Stipulation to pay enhanced interest, when penal. 84 I.C. 677=1925 P. 64; 9 Lah.L.J. 301. The question whether a stipulation for enhanced interest contained in a mortgage-deed is or is not penal in any particular case must depend on the facts and circumstances of the case. 9 O.W.N. 1081=1933 O. 81. Stipulation to take no interest up to a certain date, $37\frac{1}{2}$ per cent. afterwards is penal. 28 O.C. 51=83 I.C. 92=1925 O. 231. It is not right to hold that in every case where there is a stipulation for payment of interest on non-payment of rent within a certain date it must be taken to be penal. 41 C.L.J. 453=1925 C. 722. Provision for damages at

Party rightfully rescinding contract entitled to compensation.

75. A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

Illustration.

A, a singer, contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre, and *B*, in consequence rescinds the contract. *B* is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

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25 per cent. in case of default and in addition to rent with interest was not a penalty and even if it were so, the Court should give effect to the terms of the agreement. 132 I.C. 912=53 C.L.J. 516=1931 C. 772 (1). Where there is no undue influence or unconscionable bargain, high rate of interest is not penal. 30 C.W.N. 83=1925 C. 1193. When interest in a pro-note was fixed at 12 per cent. but a less rate was provided in case of monthly payment, the higher rate is no penalty. 105 I.C. 592=5 R. 573. 21 per cent. rate on mortgage security held not excessive. 55 I.A. 107=1928 P.C. 80=50 M.L.J. 32 (P.C.). If the Court thinks the stipulated rate of interest to be penal, the Court should award some compensation for default at a reasonable rate. The Court ought to give reasons for refusing to award compensation on default of payment on the proper date. 33 L.W. 540=1931 M. 137; 158 I.C. 358=37 P.L.R. 156=1935 L. 456; 42 L.W. 802=1935 M. 1072=69 M.L.J. 841.

DAMAGES—ASSESSMENT OF.—In the case of a breach of warranty as to the petrol consumption of a motor car, the mode of assessing damage at the extra running costs on the supposed life of the car as 200,000 miles is quite unreasonable (damages were reduced from Rs. 3,000 to Rs. 2,000). 1934 All. 392. Where the contract is made at *O* for ready delivery and the plaintiff produces no evidence to show what was the market rate on or about the date of the breach of contract at *O*, the plaintiff has failed to show that he was entitled to any damages. 149 I.C. 1119=1934 L. 59. Where defendant agreed that if plaintiff was required to pay certain money with 6 per cent. interest which defendant was bound to pay, defendant would pay it along with damages for any contingency. *Held*, that plaintiff could not recover interest at 24 per cent. simply because he had to borrow at 24 per cent. 1934 A.L.J. 682=1934 A. 525. *See also* 1937 Nag. 205.

DAMAGES—BURDEN OF PROOF.—Under S. 74, Contract Act, where liquidated damages are entered in a contract itself as payable in the event of breach, then damages payable, when a breach occurs, are to be assessed in the ordinary way subject to that fixed amount as a maximum; and it is for the plaintiff to prove the exact amount of damages which he suffered and that amount only could be awarded. The gain derived by defendant by breach should be taken to

be loss suffered by plaintiff. 1935 Pesh. 57=156 I.C. 146. *See also* 149 I.C. 1119=1934 L. 59. Under S. 74, the plaintiff must prove his damage in a general sense. The contract made by the parties estimating their damages is in itself evidence and if there is no other evidence of damage, this evidence alone will be considered sufficient. The sum named, however, is not conclusive evidence; and if there is other evidence or circumstances showing that it was excessive or unreasonable, the Court will not consider itself bound by it. The plaintiff will have to prove his damages irrespective of the figure. (1929 P.C. 179 and 11 C. 545, Cons.) 60 C. 1379=1934 C. 285.

CONTRACT WITH GOVERNMENT.—Forest contract — Breach — Rescissions—Penalty—Damages, right to—Forest Act. S. 84—Effect of. *See* 49 B. 194=27 Bom.L.R. 66.

HINDU LAW—PARTITION.—Annuity granted to one of the members in lieu of share—Provision for resumption of share in default of payment of annuity—Penalty, relief against. 1925 M. 84.

SECOND APPEAL.—S. 74 empowers the Court to award reasonable compensation and what is reasonable must depend on the circumstances of each case. It is a question of fact and not of law, and the decision of the Courts of fact with regard to the amount of compensation is not open to be challenged in second appeal. 1934 P. 16.

EXCEPTION.—Court not bound to exact the whole amount. 95 I.C. 614=1926 N. 435. *See* I.L.R. (1938) Nag. 31=1937 Nag. 289.

Sec. 75.—A marriage was arranged between the plaintiff's son *M*, and *A*, the second defendant niece of the first defendant. The negotiations were conducted by the plaintiff on behalf of his son and by the 1st defendant on behalf of his niece. After the negotiations were concluded with the usual *pan rusum* ceremony for which the plaintiff spent some amounts, the plaintiff discovered that the prospective bride suffered from epileptic fits during her childhood and so broke off the engagement. He then sued for recovery of the money, spent by him for *pan rusum* ceremony, alleging that he would not have consented to the engagement if he had known of the girl's disease and that the first defendant who was under a duty to disclose it, having failed to disclose it, was liable for the plaintiff's claim. *Held*, (1) that the contract of marriage came under the category of contracts *uberrimae fidei*, and that the first defendant who was in posses-

[CHAPTER VII.—Sections 76—123, Sale of Goods.]
 Repealed, Act III of 1930, S. 65.

CHAPTER VIII.

OF INDEMNITY AND GUARANTEE.

124. A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity" defined.

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sion of the facts had the duty on him to disclose the fact of his niece having had epileptic fits; but that the 1st defendant was guilty only of a mere passive disclosure and not of any false representation; (2) that the plaintiff though justified in rescinding the contract of marriage was not entitled to obtain the damages claimed as the same did not arise through non-fulfilment of the contract; (3) that when any contract is avoided for breach, it remained operative as to the past and so claims for restitution in respect of acts of performance prior to the rescission are precluded. I.L.R. (1937) Nag. 299=1937 Nag. 270.

Sec. 124.—See 41 P.L.R. 569=1939 Lah. 509. Contract Act is not exhaustive of the law of indemnity and guarantee, see 40 Bom.L.R. 989; 1938 Mad. 885; and of agency 176 I.C. 675=1938 Nag. 254; (1940) 2 M.L.J. 726=1941 Mad. 6.. It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done. The liability is said to be based on a contract implied by law, the request importing a promise to indemnify the other party against the consequences to him of acting upon the request. The fiction of a contract implied by law adds nothing, though it may seem to justify the Court in holding as a matter of law that the party is entitled to the indemnity on the basis that the assertion by the applicant of his request is the offer of a promise to indemnify if the other party acts upon that request to his damage. 65 I.A. 286=I.L.R. (1938) Bom. 502=42 C.W.N. 957=1938 P.C. 191=(1938) 2 M.L.J. 169 (P.C.). Unlike the case of a contract of guarantee, there is no direct right of action on the original contract to the person who indemnifies, against the person whose conduct has caused loss—He can sue only in the name of the promisee. 49 M. 156=95 I.C. 154=1926 M. 544. See also 42 Bom.L.R. 550=1940 Bom. 315=I.L.R. (1940) Bom. 522. Covenant against loss—Breach—Suit for damages when person indemnified had not paid money. 41 A. 395=51 I.C. 158. Contract of indemnity—Decree against defendant—Third party notice—Claim should be confined only to

amount decreed. 59 I.C. 16. As to indemnifying surety, see also 63 I.C. 108. It is not necessary that actual damage should be caused before the party affected can sue on it. 92 I.C. 715=1926 M. 597. Where the vendor contracts to indemnify the vendee against the costs of litigation the vendee can claim pleader's fee unless they are unreasonable. 43 M. 898=39 M.L.J. 316. When an assignee of a debt whom the assignor had agreed to indemnify against loss sues on the debt and his suit is dismissed after a fair trial, he is entitled to be indemnified. 1917 M.W.N. 868. A stipulation in a contract of sale to discharge an existing encumbrance on the property sold is in the nature of an indemnity. 38 I.C. 188=5 L.W. 228. Forbearance to sue principal at the surety's request is sufficient consideration for promise by a surety to pay the amount himself. 12 I.C. 126=(1911) 2 M.W.N. 145. Suretyship and indemnity—Distinction. 3 Pat.L.J. 396=46 I. C. 27. An undertaking by a second mortgagee to pay off a prior mortgage cannot be held to be a contract of indemnity in the absence of an express provision in the deed of mortgage to the second mortgagee to indemnify the mortgagor; a suit for damages based on the breach of the undertaking to pay off the first mortgage is governed by Art. 116 of the Limitation Act, when the contract is registered. Limitation commences to run from the time the contract is broken and not from the time at which any damage arising therefrom is sustained by the plaintiff. 17 Pat. 338=19 Pat.L.T. 198=1938 Pat. 275. See also 1938 A.L.J. 455.

IMPLIED CONTRACT OF INDEMNITY—SALE OF PROPERTY SUBJECT TO CHARGE.—Where property is sold subject to encumbrances, the purchaser impliedly agrees to indemnify the vendor against the encumbrances. This implied right of indemnity arises not only in cases of purchase of the equity of redemption but also to sale of property subject to a "charge." 1933 M.W.N. 486=38 L.W. 818. See also 156 I.C. 94=1935 N. 147.

Secs. 124, 125 and 126.—Reading Ss. 124 and 125, Contract Act and Art. 83 of the Limitation Act, it is clear that under a contract of indemnity the cause of action arises when the damage which the indemnity is intended to cover is suffered; and a suit brought before the actual loss had accrued must be thrown out as premature. 42 Bom. L.R. 175=1940 Bom. 161.

CONTRACT OF GUARANTEE AND CONTRACT OF INDEMNITY—DISTINCTION—BROKER AND SUB-

Illustration.

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

125. The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

Rights of indemnity-holder when sued.

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

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BROKER.—A contract of guarantee as defined by S. 126 involves three parties, the creditor, the surety and the principal debtor; and it involves a contract to which those parties are privy. The contract need not be embodied in a single document, but there must be a contract or contracts to which the three parties are privy. There must be a contract, first of all, between the principal debtor and the creditor. That lays the foundation for the whole transaction. Then there must be a contract between the surety and the creditor, by which the surety guarantees the debt, and the consideration for that contract may move either from the creditor or from the principal debtor or both. But if those are the only contracts, the case is one of indemnity. In order to constitute a contract of guarantee there must be a third contract, by which the principal debtor expressly or impliedly requests the surety to act as surety. Unless that element is present, it is impossible to work out the rights and liabilities of the surety under the Contract Act. It is impossible to imply a promise by the principal debtor to indemnify the surety, unless the principal debtor is privy to the contract of suretyship. An agreement between a broker and a sub-broker by which the latter agrees to save the former from any loss which he would suffer by reason of his effecting transactions at the request of the sub-broker for the constituents introduced by the sub-broker, the constituents being unascertained at the time and knowing nothing of the guarantee, is a contract of indemnity under S. 124 and is not a contract of guarantee falling under S. 126. I.L.R. (1940) Bom. 522=42 Bom.L.R. 550=1940 Bom. 315. See also 49 Mad. 156.

Sec. 125.—S. 125 must be read along with Art. 83, Limitation Act, 1935 L. 974. May be compelled to pay—Meaning of, 1935 L. 974. Suit for damages lies for breach of contract of indemnity for loss of possession when the title is impaired and not necessarily when possession is actually lost.

31 M.L.J. 556=35 I.C. 789. Suit by surety on a contract of indemnity before he has paid the money is premature. 50 I.C. 611=15 N.L.R. 78. "Payment" means payment in money or its equivalent and not by the execution of a fresh bond. (*Ibid.*) Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be indemnified should never be called upon to pay. Where property subject to a charge is sold in execution and the purchaser neglected to satisfy the charge, the owner of the property is entitled to have his right of indemnity declared and enforced, if necessary, by the sale of the properties and adjustment of the equities even though he has not actually paid off the charge himself. (51 M.L.J. 203, Foll.) 1933 M.W. N. 486=38 L.W. 818. But see also 60 C. 761, *infra*. Where a purchaser of property agrees to release the property from an existing mortgage and on default to do so if the vendor is made liable for the debt, further agrees to indemnify the vendor, a suit by the vendor when he has not paid anything to the mortgagee is not in the nature of a suit to enforce a trust and is premature. 60 C. 761=146 I.C. 863=1933 C. 641. Where on a sale of land, a portion of the purchase-money is left with the vendee to pay certain debts of the vendor and the vendee also agreed to compensate the vendor in case of his default in paying the amounts, the vendor can sue the vendee on a breach of the covenant without proof of actual loss sustained by him (vendor) by such breach. 35 M.L.J. 692=49 I.C. 313. The amount recoverable is the amount which has been paid whether under a consent decree or under *bona fide* compromise. 50 I.C. 611=15 N.L.R. 78. Decree against promisee—If can be impeached by promisor—Recovery of costs. 22 N.L.R. 49=1926 N. 109. As to liability of surety, see also 7 B. 76; 6 Bom.H.C.R. 241; 30 M. 235; 88 I.C. 699; non-liability for time-barred debt. 19 B. 697. Limitation against surety. See 44 C. 978 and 34 A. 429=14 I.C. 245.

126. A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the surety; the person in respect of whose default the guarantee is given is called the "principal debtor," and the person to whom the guarantee is given is called the "creditor." A guarantee may be either oral or written.

127. Anything done, or any promise made, for the benefit of the principal

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Sec. 126: CONTRACT OF SURETYSHIP—REQUIREMENTS.—No doubt for a contract of suretyship there should be concurrence of the principal debtor, the creditor and the surety. But this does not mean that there must be evidence showing that the surety undertook his obligation at the express request of the principal debtor. An implied request will be quite sufficient to satisfy this requirement. 12 Luck. 484=1937 O. 19. As to continuation of contract of guarantee *See* (1937) 1 M.L.J. 143; (1939) 1 M.L.J. 897; 1940 Bom. 315. *See also* I.L.R. (1937) 2 Cal. 698. Where A tells B that he may safely do business with C, as he was helping them with finance and taking goods from him, that falls far short of a guarantee. I.L.R. (1939) Mad. 282=1939 Mad. 520=(1939) 1 M.L.J. 509. *See also* 1937 Sind 50. S. 126 makes no difference between an oral and written guarantee, the former being as equally binding as the latter. 42 A. 70=52 I.C. 684; 168 I.C. 222=1938 Sind 50. A contract of guarantee need not necessarily be in writing; it may be expressed by word of mouth or it may be tacit or implied and may be inferred from the course of conduct of the parties concerned. Chapter VIII of the Act is not exhaustive on the subject. 1930 A.L.J. 1217=1930 A. 848. A contract of guarantee as specified in S. 126 presupposes the existence of a 'principal-debtor' and no such contract can be made before a sale has taken place, when there is no principal debtor in existence in respect of whose default the guarantee can be given. 30 N.L.R. 205=1934 N. 163. In construing a guarantee, the principle is that a guarantee will only extend to a liability precisely answering the description contained in the guarantee. Therefore before a creditor can enforce the liability given by a guarantor, he must satisfy that the conditions of the bond executed by him are fulfilled and that he is seeking the very liability which has been undertaken by the guarantor under the bond. 47 L.W. 84=1938 Mad. 422. Contracts of guarantee have to be interpreted having due regard to the relative position of the contracting parties and to the circumstances surrounding the contract. It is important that a condition contained in general terms is subject to restrictions which follow from the nature and character of the principal's engagement. The extent of the condition of an indemnity bond might be restrained by the recitals. 1930 A.L.J. 1217. *See also* 45 L.W. 605=1937 Mad.

360=(1937) 1 M.L.J. 143; 1937 Sind 50. Where a person promises to pay an extra rate of interest in consideration of the creditor giving more time to the debtor without any liability on the part of the debtor towards the creditor for such an extra rate, the position of that person with regard to the payment of this excess of interest is not that of surety, but by this contract he makes himself personally and directly liable for the amount. 1930 A. L.J. 1181=1930 A. 543. Where a surety has paid off the whole debt, he is entitled to stand in the place of the creditor who has been so paid off and is entitled to the benefit of every security which the creditor had against the debtor at the time when the suretyship contract was entered into. (*Ibid.*) Where, without any contract of suretyship, there is a primary and secondary liability of two persons for one and the same debt, the debt being as between the two that of *one of those persons only, and not equally of both*, the other, if he should be compelled to discharge the liability due to the creditor, though not a surety strictly so called, has nevertheless been in equity allowed to be subrogated to the rights of the creditor. But if the debt was borrowed by two persons jointly and severally bound as principals and shared by them—so that the debt was one equally of both—one of them is not, on payment even of the entire debt, entitled to the benefit of the security held by the creditor, in the absence of a contract with the creditor. 55 M. 949=139 I.C. 562=63 M.L.J. 615. Mere recommendation does not constitute guarantee. 1927 M. 620; 24 M.L.J. 249. As to enforcement of surety bond, *see* 57 M. 688=1934 M. 186=66 M.L.J. 248. As to deposit of Government promissory notes as accounts, *see* 1938 Cal. 649.

Secs. 126 and 127.—Contract of guarantee necessity for strict proof. *See* 156 I.C. 200=1935 P. 376. *See also* on the section, 138 I.C. 879=1932 N. 62. Where a decree-holder has attached his judgment-debtor's property and A offers a cheque to the decree-holder in satisfaction of his claim against the judgment-debtor A is not surety for the judgment-debtor and if A stops payment of cheque the decree-holder has independent cause of action against A and A cannot take advantage of S. 134. 193 I.C. 51=1941 Pesh. 6.

Sec. 127.—Consideration between the principal debtor and the creditor is good consideration for guarantee given by surety. 112 I.C. 843=1929 L. 203. *See also* 112

Consideration for guarantee. debtor may be a sufficient consideration to be surety for giving the guarantee.

Illustrations.

(a) *B* requests *A* to sell and deliver to him goods on credit. *A* agrees to do so, provided *C* will guarantee the payment of the price of the goods. *C* promises to guarantee the payment in consideration of *A*'s promise to deliver the goods. This is a sufficient consideration for *C*'s promise.

(b) *A* sells and delivers goods to *B*. *C* afterwards requests *A* to forbear to sue *B* for the debt for a year and promises that if he does so, *C* will pay for them in default of payment by *B*. *A* agrees to forbear as requested. This is a sufficient consideration for *C*'s promise.

(c) *A* sells and delivers goods to *B*. *C* afterwards, without consideration, agrees to pay for them in default of *B*. The agreement is void.

Surety's liability.

128. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

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I.C. 740. A mere recommendation by one person to another to lend money to a third person does not render the first person, a surety or liable for the loan, if given. 27 M.L.J. 249=25 L.C. 726. See also 97 I.C. 866; 1927 M. 620=52 M.L.J. 612. As to what is good consideration for surety for giving guarantee, and as how surety is discharged, see 23 C.W.N. 545=50 I.C. 651 (P.C.). Under S. 127 it is not necessary that the thing done or the promise made for the benefit of the principal debtor should be at the desire of the surety. The section has implied in it some such expression as 'notwithstanding anything contained in S. 2 (d) of the Act'. The word 'done' in S. 127 shows that past benefit to the principal debtor can be good consideration for a bond of guarantee. 1940 O.W.N. 486=15 Luck. 656=1940 Oudh 346. Under S. 127 anything done for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee. The release of a certificate-debtor from arrest under the Public Demands Recovery Act, on a security bond being executed by a surety in favour of the certificate officer, is a sufficient consideration for the bond. I.L.R. (1937) 2 Cal. 698=66 C.L.J. 373. A contract of guarantee cannot be enforced unless there was some consideration for the guarantee. 33 I.C. 723. On this section, see also 31 C. 242; 1 A. 487.

Sec. 128.—"Liability" under Ss. 126 and 128 means a liability enforceable at law and if such liability does not exist, there cannot be a contract of guarantee. 42 B. 444=46 I.C. 122. A payment by principal is not binding on the surety. 44 C. 978=21 C. W.N. 482. S. 128 is directed to defining the liability of a surety upon the terms of a guarantee, not intended to affect the statute of limitation. 44 C. 978, *supra*. Applicability of section to surety under S. 145, Cr.P. Code. 29 I.C. 149=19 C.W.N. 961. There need not be privity between a principal debtor and a surety. All debtors whose debt the surety promises to pay are his principal debtors, though they are not the objects of his benevolent intention. 40 M.L.J. 529=62 I.C. 706. Principal and surety—Liability of—Limitation for suit against surety

—Starting point. 53 I.C. 999. See also 1940 All. 116=1939 A.L.J. 1137. Where a claim is barred against principal debtor but not against surety, by virtue of payments and endorsements made by him, the creditor can get a decree against the surety only. 10 R. 398=1932 R. 88. See also under S. 134. Surety must pay interest until satisfaction. 9 S.L.R. 237=1925 S. 164. This section does not refer to the nature of the principal's obligation but only to the extent of the surety's liability. 2 L. 204=22 Cr.L.J. 662=63 I.C. 454. The liability of the surety being co-extensive with that of the principal debtor is joint and several with the latter and, therefore, it is at the option of the creditor, in the absence of a clear intention to the contrary, to decide whether he shall proceed against the surety or the principal debtor. 118 I.C. 443=1929 L. 393. See also 132 I.C. 590=1931 L. 691. Where sureties joined in execution of a mortgage though having no interest in the mortgaged property a personal decree can be passed against them under O. 34, R. 6. 132 I.C. 561=1931 A. 631. Where a person undertakes that if the mortgagee's money is not realised from the property mortgaged by the mortgagors, then the mortgagee would be entitled to realise his mortgage money from him, the surety, the intention is clear that the mortgagee was first to proceed against the mortgaged property and was to take every step that could be taken against it to realise his money, and the time begins to run against the surety only when the mortgagee fails to realise the whole amount due to him from the mortgaged property and not from the date when the mortgage money becomes due under the mortgage-deed. 187 I.C. 152=1940 A. 116=1939 A.L.J. 1137. See also 1941 Lah. 16. Sureties for a guardian of property are liable only to the amount of their bond for any defalcation which may be found to have occurred during the period of guardianship. 1929 P. 626=11 Pat.L.T. 561. Surety's liability—Letter guaranteeing payment of pro-note debt—Breach by surety—Suit against principal and surety—Covenant as to assignment of pro-note to surety—Effect

Illustration.

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

NOTES.

—Failure to do so whether non-suits plaintiff. 1928 M. 1262=113 I.C. 337. So long as the notice has not been given to the debtor (or to the surety for the debtor) as to the appropriation of any amount to any particular account it is open to the creditor to alter it and make re-appropriation. 1930 M. 874=59 M.L.J. 513. Surety's liability can be limited by special contract or made contingent upon some event other than the principal debtor. 95 I.C. 707 (2)=1926 N. 449; 57 C. 764. The words "if the aforesaid persons fail to pay the amount, I will pay it" do not limit the liability of the surety. 138 I.C. 879=1932 N. 62. See also 35 C. W.N. 986=1931 P.C. 224=61 M.L.J. 191 (P.C.). (On a construction of the contract of guarantee of a mortgage loan, sureties held liable in the first instance and not merely in the event of a deficiency remaining after realising the security). A creditor may sue the surety though he does not sue the insolvent principal debtor. In a suit by the creditor against the surety, principal debtor need not be a party. 50 I.C. 312. See also 1940 All. 116=1939 A.L.J. 1137. A suit may be maintained against the surety though the principal has not been sued. 48 I.C. 424=91 P.R. 1918. See also 10 Mys. L.J. 175; 59 I.C. 312; 52 I.C. 870 (S.). A decree against a debtor in a proceeding to which the sureties could not be parties shall not deprive the creditor of his remedy against the sureties. 147 I.C. 702 (2)=1934 P. 52 (2). When, on appeal by the principal debtor only, against a decree both against him and surety, the decree is reversed the surety is not thereby discharged from his liability. 14 P.W.R. 1911=9 I.C. 742. The liability of a surety is co-extensive with that of the principal debtor and the liability ceases when the principal's debt has been extinguished by the merger of the estate of the creditor and the debtor. 44 M.L.J. 171=72 I.C. 194=1923 M. 340. See also 1934 A.L.J. 682=148 I.C. 639=3 A.W.R. 697=1934 A. 525; 157 I.C. 979=42 L.W. 291=1935 M. 748; 171 I.C. 527=1937 Rang. 197. Surety's contract of guarantee provided "If you fail to realise the price thereof (goods supplied) I and my property will be responsible for that amount". Held, that it was impossible to read into the words of the contract of guarantee that the creditor would be entitled to proceed against the surety only if all remedies known to law were first exhausted against the principal debtor. It was an ordinary contract of guarantee and therefore the liability of the surety was co-extensive with that of the principal debtor. I.L.R. (1941) Lah. 323=1941 Lah. 16. See also 1940 All. 116. Where the cause of action is separate, the liability of the surety is also separate with

respect to each of the promissory notes, although he became surety for the consolidated amount. 40 I.C. 347=5 L.W. 721. A creditor can proceed against the surety and compel him to pay before exhausting his remedies against the principal debtor. 37 I.C. 401=5 L.W. 161; 157 I.C. 979=42 L.W. 291=1935 M. 748. As to the liability of surety under a limited guarantee, see 57 C. 764. Guarantee for advances made by bank—Extent of liability of surety. See 1930 P.C. 272=128 I.C. 657 (P.C.). Principal debtor discharged from liability for part of debt under Madras Agriculturists' Relief Act—Surety not agriculturist—If also discharged *pro tanto*. See (1941) 2 M.L.J. 751. Decree against principal and surety—Effect—Release of principal debtor before the Debt Conciliation Board—Surety cannot claim to be absolved also. 1939 N. L.J. 402. Where a surety promised to make good any discrepancies of the principal debtor in his dealings with A to the extent of Rs. 1,000 and wrote a letter subsequently to entrust the principal debtor with further business referring to the guarantee already given, his liability does not thereby become unlimited. 21 I.C. 322=14 M.L.T. 249. A surety becomes liable only on the contract of suretyship and not by the mere fact of the loan. He is liable for each loan as soon as it is made. 9 I.C. 204=21 M.L.J. 457. A surety is not liable in respect of a separate obligation entered into by the principal debtor apart from the surety bond and without the knowledge of the surety. 134 I.C. 1100=1931 O. 430. Where the contract is invalid for want of registration but only the equities arising in favour of the parties out of the subsequent acts of the parties can be enforced under the doctrine of part performance the liability of the surety under the contract cannot be enforced. 95 I.C. 824=1926 N. 466. If the contract entered into by the principal debtor is void or voidable the creditor can fall back on the contract of indemnity and enforce the liability of the surety. 22 O.C. 109=52 I.C. 88. Under this section the death of the principal debtor does not discharge the surety from his obligation. 69 I.C. 557=1923 L. 145. Under S. 128 of the Contract Act, if a person guarantees the payment of a promissory note without qualification he would be, equally with the principal debtor, liable for the interest. It is, however, open to the guarantor to limit by contract his liability to the principal amount of the note. 44 C.W.N. 511. Surety—Rights and liabilities of. See 27 I.C. 309=8 S.L.R. 112. LIABILITY OF SURETY UNDER C.P. CODE, S. 145.—S. 145, C.P. Code, must be read with S. 128, Contract Act, which makes the liability of the security co-extensive with that of the principal debtor. After the

Continuing guarantee.

129. A guarantee which extends to a series of transactions is called a "continuing guarantee."

Illustrations.

(a) *A*, in consideration that *B* will employ *C* in collecting the rent of *B*'s zamindari, promises *B* to be responsible, to the amount of 5,000 rupees, for the due collection and payment by *C* of those rents. This is a continuing guarantee.

(b) *A* guarantees payment to *B*, a tea-dealer, to the amount of £100, for any tea he may from time to time supply to *C*. *B* supplies *C* with tea to above the value of £100, and *C* pays *B* for it. Afterwards *B* supplies *C* with tea to the value of £200. *C* fails to pay. The guarantee given by *A* was a continuing guarantee, and he is accordingly liable to *B* to the extent of £100.

(c) *A* guarantees payment to *B* of the price of five sacks of flour to be delivered by *B* to *C* and to be paid for in a month. *B* delivers five sacks to *C*. *C* pays for them. Afterwards *B* delivers four sacks to *C*, which *C* does not pay for. The guarantee given by *A* was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

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judgment-debtor fails to pay the decretal amount the decree-holder is entitled to proceed against the surety as if he was his judgment-debtor. 1933 N. 287. See also 57 M. 688=66 M.L.J. 248=1934 M. 186. Under S. 128 the liability of a surety is co-extensive with that of the principal debtor only when it is not otherwise provided for in the contract. Where the vendee executed a security bond for the due discharge of a decree debt but failed to act accordingly and the vendor sued to recover the amount as well as interest thereon as agreed in the security bond. Held, that the vendee was liable for interest alone. 1934 A.L.J. 682=148 I.C. 639=1934 A. 525. Where a surety by his letter of guarantee undertakes to pay the creditor the amount which may become due to him under the letter of guarantee "after attempts have been made by the creditor to realise the same from the principal debtor," there is a special contract between the creditor and the guarantor to the effect that the creditor should not be entitled to recover from the guarantor until he has first attempted and failed to obtain satisfaction by some sort of proceedings against the principal debtor. The creditor's right to recover from the grantor is restrained or postponed and does not accrue until the creditor has taken steps to recover the debt by proceeding against the principal debtor or his assets. It is not enough for the creditor to merely demand payment from the principal debtor, as that would not amount to an attempt to realise the debt from the assets of the principal debtor. 1937 A.L.J. 1265.

Sec. 129.—Continuing guarantee must refer to a series of transactions some of which were unknown at the time. 1925 N. 7=22 N.L.R. 158. Whether or not the transaction is a continuing guarantee is to be determined by the terms of the instrument. It is mainly a question of construction. The document should be interpreted as a whole and is not to be confined merely to the operative part. If there is any ambiguity, it is permissible to press into consideration the nature and character of business, the relative position of parties and surrounding circumstances. 1930 A. 730. Licence

to sell liquor for 3 years granted on the faith of the guarantee—It was not a continuing guarantee. 96 I.C. 248=28 Bom.L.R. 662=1926 B. 465. A security contained the following clause "our heirs and legal representatives shall be bound by the terms of this surety bond in the same way in which we are bound by them." Held, that it amounted to a continuing guarantee. 55 C. 154. Surety bond for the production of the judgment-debtor in Court on each occasion when his attendance is called for, is a continuing guarantee. 52 A. 1014=1931 A. 243. Where a suit is instituted by a company on the basis of a continuing guarantee entered into by certain persons for the due performance of his duties by a certain person while in the service of the company, the burden is upon the plaintiff company of proving that the person concerned was guilty of such lack of diligence and faithfulness as caused a loss to the company and thereby constituted a breach of the agreement of guarantee. If the losses were the direct result of the company's own bad system and the employee was plainly unfitted for the work entrusted to him by reason of deficiency in education and experience he cannot be held guilty of lack of diligence and faithfulness, so as to make his guarantors liable under the agreement of guarantee. 167 I.C. 292=1937 R. 37.

Sec. 129, III. (a).—Illustration (a) to S. 129 is wrong as a statement of law. 1930 R. 173.

Secs. 129 and 130.—A guarantee in the nature of a surety for the servant's fidelity cannot be held to be a continuing guarantee revocable under S. 130. Still in such a case of fidelity guarantee, once exact information reaches the surety that the person for whom he has remained surety has been guilty of misconduct, the surety is entitled to recall the guarantee as against the creditor or the obligee in the bond. But this is an equitable relief and such a relief must be very strictly administered. The misconduct must be clearly proved at the time of revocation. 1930 R. 173. A person who becomes a surety under S. 55 (4) of the C. P. Code cannot claim to be released from his obligation at his pleasure. There is no analogy between a security bond executed under S.

Revocation of continuing guarantee.

130. A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Illustrations.

(a) A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 2,000 rupees. Afterwards, at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 2,000 rupees, on default of C.

(b) A guarantees to B, to the extent of 10,000 rupees, that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

Revocation of continuing guarantee by surety's death.

131. The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

132. Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety on other's default.

Illustration.

A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B; and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

133. Any variance, made without the surety's consent, in the terms of the

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55 (4), C. P. Code, and a continuing guarantee under S. 129 and S. 130 of the Contract Act (and its principle) cannot apply to a surety under S. 55 (4), C. P. Code. The surety under S. 55 (4) cannot be discharged from his obligation at any stage before he has fully carried out his undertaking to the Court. 1941 M.W.N. 793= (1941) 2 M.L.J. 650.

Sec. 130.—A continuing guarantee enables surety to withdraw as to future transactions but a guarantee covering definite case does not enable a surety to nullify the security by withdrawal by means of a mere notice to creditor. 37 I.C. 919. See also 56 B. 101, cited under S. 133. It is not competent to the surety for a receiver appointed by Court, to discharge himself merely by notice to the decree-holder or other person at whose instance or for whose benefit the receiver was appointed. 30 C. W.N. 266=1926 P.C. 32 (P.C.). A contract of suretyship under O. 41, R. 6, C. P. Code, is not a continuing guarantee within S. 130. 32 I.C. 807. A surety for the production of a judgment-debtor in Court can revoke the guarantee even on the day prior to the date fixed for appearance. It is not necessary that there should be a special reservation as to the right to revoke. 52 A. 1014=1931 A. 243. Where a surety for the appearance of the judgment-debtor

who was arrested in execution of a decree, produces the judgment-debtor in Court and requests to be absolved from further liability under the surety bond, the Court should not refuse to grant the prayer. It is open to the decree-holder to apply to the Court for the arrest of the judgment-debtor until he furnishes a fresh security. 151 I. C. 154=1934 Lah. 962. Where the surety deposited certain securities as security for faithful discharge of duty by his son, his death does not determine the guarantee. 42 I.C. 900. This section does not apply to special contract of suretyship by surety to administration bond, irrespective of the grant of Letters of Administration. 36 I. C. 1000=10 Bur.L.T. 237. Surety to administration bond, discharge of. See 5 Mys. L.J. 105; 54 A. 293=140 I.C. 127=1932 A. 262. Where a member of a club guaranteed payment of rent by the club for premises leased to it, it is a continuing guarantee and can be revoked by a notice. 129 I. C. 897=1930 Sind 316.

Sec. 131.—Continuing guarantee—Does not terminate on death of guarantor. 43 A. 132=61 I.C. 138; 47 I.A. 164 (P.C.); 55 C. 154; see also 42 I.C. 900.

Sec. 132.—See 3 C. 184 (Liability of acceptor and drawer of bill of exchange).

Sec. 133: DISCHARGE OF SURETY—PRINCIPLES.—The principle of the law on the discharge of sureties is that the surety, like

Discharge of surety by variance in terms of contract.

contract between the principal ¹[debtor] and the creditor, discharges the surety as to transactions subsequent to the variance.

Illustrations.

(a) *A* becomes surety to *C* for *B*'s conduct as a manager in *C*'s band. Afterwards, *B* and *C* contract, without *A*'s consent, that *B*'s salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. *B* allows a customer to overdraw, and the bank loses a sum of money. *A* is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) *A* guarantees *C* against the misconduct of *B* in an office to which *B* is appointed by *C*, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, *B* misconducts himself. *A* is discharged by the change from future liability under his guarantee, though the misconduct of *B* is in respect of a duty not affected by the later Act.

(c) *C* agrees to appoint *B* as his clerk to sell goods at a yearly salary, upon *A*'s becoming surety to *C* for *B*'s duly accounting for moneys received by him as such clerk. Afterwards, without *A*'s knowledge or consent, *C* and *B* agree that *B* should be paid by a commission on the goods sold by him and not by a fixed salary. *A* is not liable for subsequent misconduct of *B*.

(d) *A* gives to *C* a continuing guarantee to the extent of 3,000 rupees for any oil supplied by *C* to *B* on credit. Afterwards *B* becomes embarrassed, and, without the knowledge of *A*, *B* and *C* contract that *C* shall continue to supply *B* with oil for ready money, and that the payments shall be applied to the then existing debts between *B* and *C*. *A* is not liable on his guarantee for any goods supplied after this new arrangement.

(e) *C* contracts to lend *B* 5,000 rupees on the 1st March. *A* guarantees repayment. *C* pays the 5,000 rupees to *B* on the 1st January. *A* is discharged from his liability, as the contract has been varied inasmuch as *C* might sue *B* for the money before the 1st of March.

LEG. REF.

¹ This word was inserted by S. 2 and Sch. I of Act XXIV of 1917.

NOTES.

any other contracting party, cannot be held bound to something for which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contract no further question arises. The original contract has gone, and unless the surety has assented to the new terms, there is nothing to which he can be bound, for the final obligation of the principal debtor will be something different from the obligation which the surety guaranteed. Presumably he is discharged forthwith on the contract being altered without his consent, for the parties have made it impossible for the guaranteed performance to take place. S. 133 cannot operate to alter the primary law of the contract of guarantee that the promisee must show performance before he can hold the promisor to his promise and while by S. 128 the liability of the surety is co-extensive with that of the principal debtor, it only extends to this liability on the contract guaranteed and not on something different. Accordingly where the guaranteed transaction is an advance of a certain amount on the security of four properties but the transaction carried out is an advance of a less amount on security of three properties, the sureties cannot be held liable in respect of this performance which is not what they contracted to guarantee. 153 I.C. 700=1935 P.C. 21=68 M.L.J. 339 (P.C.). Discharge of surety—Rescission of contract. 58 I.C. 272=22 Bom.L.R. 711. See also 91 I.C. 772=1925 L. 552. Principal and surety—Variation in contract with principal, effect of. 45 B. 157=58 I.C. 184; 73 I.C. 353=1924 L. 211; 71 I.C. 783 (2); 112 I.C. 843=1929 L. 203.

See also 56 B. 101=34 Bom.L.R. 167=1932 B. 168. [S. 133 not being applicable to a guarantee for a single transaction, English Law applied]. 134 I.C. 1097=1931 O. 426. [On a construction of the surety bond, guaranteeing a clerk's fidelity, the terms of the bond held to apply to any office to which the principal might be appointed in future.] So long as an account with the Bank is unbroken, a surety should not, without his consent express or implied, be prejudiced by any departure from the rule of appropriation of items in order of date. 33 I.C. 34=20 C.W.N. 562. A surety cannot escape liability on the ground that the circumstances were such that the principal debtor was entitled to avoid the contract when in fact the contract was not avoided. 29 I.C. 712. A slight alteration in the course of business does not amount to an alteration in the main contract such as would affect the liability of the surety. 21 I.C. 322=14 M.L.T. 249. Security bond—Bond to Court pending appeal—Alteration in judgment-debtor's position by act of third party—Liability of surety. 1936 L. 470. A surety giving security under O. 38, R. 5, C. P. Code, for the value of property sought to be attached before judgment continues to be liable though the suit is decreed not by the Court but by an award of arbitrators. Reference to arbitration is an ordinary incident of the suit. 45 I.C. 429=11 S.L.R. 122. Equitable principles underlying the section—Application—Surety bond executed in pending suit—Parties entering into compromise—Surety if discharged. See 31 Bom.L.R. 1442. Stay of execution—Surety not discharged by agreement between judgment-debtor and decree-holder increasing rate of interest and extending time for payment. 91 I.C. 772=1925 L. 552. The rule that a surety is discharged if any alteration is made

134. The surety is discharged by any contract between the creditor and

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in the contract without reference to the surety applies to a surety who is under no personal liability but has merely deposited documents. 55 B. 677=33 Bom.L.R. 709=1931 B. 337. See also 152 I.C. 874=1934 S. 152. It is well-established that a guarantor is *prima facie* entitled to have the debt proved as against him. The fact that the principal debtor has admitted the debt, or that a judgment or award has been given against him for the debt, does not bind the guarantor, unless he was a party to the proceedings in which the judgment or award was given, or was party to the admission of the principal debtor. The liability of a guarantor must depend on the true construction of the guarantee which he has given. If the guarantor merely guarantees payment of the debt of the principal debtor, then he is entitled to require the debt to be proved as against him in accordance with the ordinary law. If, on the other hand, the principal debtor has agreed that as against him the debt shall be proved in a particular way, and the guarantor has guaranteed the debt so to be proved, then there can be no doubt that the guarantor would be bound by the particular method of proof agreed to by the principal debtor and accepted by himself. I.L.R. (1941) Bom. 273=43 Bom.L.R. 53=1941 Bom. 108. Where the business in respect of which a surety had guaranteed losses regarding the share of a partner was one the capital of which was limited to a certain amount, and according to the terms of the partnership deed it was stipulated that when losses occurred the partnership was to be dissolved forthwith, the continuation of the business, after losses were incurred, on an extended scale by amalgamation with another concern and the addition of new dealings to the business of the new concern thereby changing the character of the original business constitute not only breaches but also variations of the terms of the contract and exonerate the surety from liability. 41 P.L.R. 47=1939 Lah. 193. Surety for tax-collector of municipal committee—Son of tax-collector allowed to collect taxes without notice to surety—Defalcation by son—Surety not liable. 177 I.C. 75=1938 R. 126. A executed a surety bond for the appearance and production of accused in Court at X. The case was transferred to the Court at Y where another surety bond was executed by another person in respect of the same accused. The case was re-transferred to the Court at X where the surety of A was forfeited. On a reference to the High Court, *held*, that the bond executed by A was in the nature of a contract and that the transfer of the case from the Court at X to the Court at Y undoubtedly amounted to the substitution for the former agreement of a new and totally different agreement which substitution hav-

ing been made without A's knowledge or consent would suffice to discharge him and that the circumstance that from Y it was once again transferred back to X was a second variation which did not revive the obligation of the original contract. 152 I.C. 874=1934 S. 152. It is a fundamental principle of the law of suretyship that a surety cannot be bound to something for which he has not contracted. The provisions of the Contract Act cannot be deemed to be exhaustive. S. 133 of the Act cannot, in any view, operate to alter the primary law of the contract of guarantee that the promisee must show performance before he can hold the promisor liable. If the contract with the principal debtor is varied without the consent of the surety, the latter who is not a consenting party to the variation is discharged from liability, although the principal debtor who is entitled to cancel and does cancel the contract, subsequently withdraws the cancellation and submits to the claim of the creditor. If the consideration for the original contract with the principal debtor fails, the latter is relieved of all liability, and necessarily the surety also ceases to be liable as surety. The fact that the principal debtor withdraws his defence to an action by the creditor and allows judgment to be given against him cannot affect the position of the surety. 1938 M.W.N. 325=1938 Mad. 585. Surety for appearance of defendant arrested before judgment—Return of plaintiff for presentation to Court having jurisdiction—Surety is discharged—Plaint represented in proper Court—Surety bond does not cover new suit. See (1939) 2 M.L.J. 816=50 L.W. 426=1939 Mad. 933.

Secs. 133 to 139.—These sections cannot be made applicable to the bond given by a surety to the Court. 1935 N. 258.

Secs. 133, 135 and 139.—Applicability—Surety bond to Court pending suit—Decree—Execution against surety not proceeded with—Appeal from decree—Application for stay of execution—Offer and acceptance of fresh surety in appeal—Effect—Former surety is discharged. 40 Bom.L.R. 989. Having regard to the definitions in S. 126 of the Contract Act, Ss. 133, 135 and 139 of the Act cannot in terms apply to a surety who executes a surety bond to a Court; there is in such a case no creditor within the meaning of S. 126. But there is no reason why the principles underlying those sections should not be applied *mutatis mutandis*, though the question whether a surety is discharged from the undertaking he has given to the Court depends on the construction of the surety bond. 40 Bom.L.R. 989.

Sec. 134.—If a creditor allows his remedy against the principal debtor to become time barred, the surety is deemed to have been discharged. See 25 A.L.J. 937; 1930 A.L.J. 1084; 1932 A. 610. But see 100 I.C. 922=1927 L. 396; 138 I.C. 305=

Discharge of surety by release or discharge of principal debtor.

the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

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1932 L. 419; 10 R. 398=1932 R. 88. (There is a conflict of rulings between the several High Courts on this point.—*Vide* the following rulings.) The omission of a creditor to sue the principal debtor, within the period of limitation prescribed for a suit against the debtor, does not discharge the surety under S. 134. 25 N.L.R. 74=116 I.C. 421=1929 N. 145. Where the creditor filed the suit against the principal and the surety but he gave up the former and expressly reserved his remedy against the surety, *held*, that the surety was not discharged and that S. 134 of the Act had no application. 31 Punj.L.R. 329. *See also* 38 M.L.J. 131=54 I.C. 758; 10 Mys.L.J. 175; 1935 A.W.R. 492. Where the creditor allows his suit against the principal debtor to abate, on account of his omission to bring the legal representative on record, the surety is discharged. 106 I.C. 481 (2)=29 P.L.R. 68; 138 I.C. 305=1932 L. 419. *See also* 54 I.C. 105. Omission to proceed against principal in time owing to difficulty in service—Striking off his name—Rights of surety. If surety is discharged, *see* 39 B. 52=27 I.C. 165. *See also* 5 B. 647; 13 C. 330; 33 M. 308; 14 B. 267; 7 B. 146. Failure to obtain permission of the Insolvency Court before suing the debtor who had been adjudicated insolvent, does not release the sureties from the debt. 1939 A.M.L.J. 84. Principal and surety—Decree against surety—Appeal—Cross appeal by creditor—Principal not made party—Appeal. 16 I.C. 387 (2). A surety is discharged if a consent decree is passed without his knowledge and consent. 30 C.W.N. 540=95 I.C. 409=1926 C. 818. Change in relationship between debtor and creditor—Discharge of surety. 71 I.C. 783 (2)=1924 L. 194. Plaintiff withdrawing his suit against principal debtor—Suit against the surety must also be dismissed. 40 I.C. 400. *See also* 1925 S. 164. The surety of an agreement originally void is not discharged if the creditor withdraws his claim against the principal or his legal representatives and he impliedly assents to it. 54 P.R. 1916=35 I.C. 537. Where one of two co-sureties discharges the principal debt without the knowledge of the other by the execution of a fresh promissory note to the original creditor's transferee he is not entitled to contribution as against the co-surety on his discharging the latter note. 15 L.W. 143=70 I.C. 355. By telling the principal debtor that he would not be called upon to pay and that the amount would be recovered from

the surety, who may sue him if he likes, the creditor has not done or omitted to do any act, the legal consequence of which would be to discharge the principal debtor. 96 I.C. 248=28 Bom.L.R. 662=1926 B. 465. The principle of the English law that discharge of principal debtor will not affect right of suit against sureties where there is a reservation to proceed against them is applicable in India. 38 M.L.J. 131=54 I.C. 758. That the creditor cannot proceed with his suit against principal debtor owing to disappearance of the latter, and demands relief against surety only, does not amount to discharge of the surety. 17 I.C. 893=8 N. L.R. 188. A foreign judgment dismissing a suit of the creditor against the principal debtor for default is not a judgment *inter partes* on the merits of the case and cannot be availed of by the surety to resist his liability to the creditor. 37 P.L.R. 92=1935 L. 729. As to discharge of obligation on continuing guarantee, *see* 151 I.C. 981=1934 A.L.J. 763=1934 P.C. 210 (P.C.). *See also* 1930 L. 812=31 P.L.R. 329. Suit dismissed as against principal—Surety if discharged. 44 I.C. 693. Surety, discharge of—Waiver of claim against principal debtor—Waiver and forbearance—Distinction—*Locus penitentiae*. 20 I.C. 189=6 Bur.L.T. 62. A suit is maintainable against the surety, although no suit is filed against the principal debtor. 52 I.C. 870=13 S. L. R. 92; 48 I.C. 424; 59 I.C. 312. When once a decree is passed both against the principal debtor and the surety, the surety becomes a judgment-debtor. His debt becomes a debt of record. The original contract has merged in the decree. Hence when a creditor releases a principal debtor and retains his rights as against the surety judgment-debtor, in proceedings before the Debt Conciliation Board, the surety cannot thereby claim that he is also absolved from his liability. S. 134 of the Contract Act has no application to such a case. 1939 N. L.J. 402. *See also* (1941) 2 M.L.J. 751; 1938 Nag. 413.

SURETY BOND EXECUTED IN FAVOUR OF COURT.—S. 134 presupposes the existence of a contract of guarantee, to which the creditor and the surety, if not also the debtor are parties. The liability of the surety arises from an undertaking given by him to the creditor in consideration of something done by the latter. Hence where there are no contracts between the sureties and creditor and security bonds are executed by the sureties at the instance of the debtor and in pursuance of the orders of the Court granting stay the creditors are not a party

Illustrations.

(a) *A* gives a guarantee to *C* for goods to be supplied by *C* to *B*. *C* supplies goods to *B*, and afterwards *B* becomes embarrassed and contracts with his creditors (including *C*) to assign to them his property in consideration of their releasing him from their demands. Here *B* is released from his debt by the contract with *C*, and *A* is discharged from his suretyship.

(b) *A* contracts with *B* to grow a crop of indigo on *A*'s land and to deliver it to *B* at a fixed rate, and *C* guarantees *A*'s performance of this contract. *B* diverts a stream of water which is necessary for irrigation of *A*'s land and thereby prevents him from raising the indigo. *C* is no longer liable on his guarantee.

(c) *A* contracts with *B* for a fixed price to build a house for *B* within a stipulated time, *B* supplying the necessary timber. *C* guarantees *A*'s performance of the contract. *B* omits to supply the timber. *C* is discharged from his suretyship.

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to the contract of guarantee even though they are empowered under the security bond to enforce and hence S. 134 does not apply to this case. 1936 A.L.J. 860=1936 A. 549.

Secs. 134 and 137: CONSTRUCTION.—The mere fact that an execution against the principal judgment-debtor has been allowed to be barred by lapse of time is no ground for the release or discharge of the surety. 40 C.W.N. 465. A surety is discharged when at the date of the suit against him the creditor's remedy against the principal debtor has become barred by time. 1939 A. M.L.J. 66. A creditor does not lose his remedy against the surety by reason of the fact that he did not prefer his claim within time against the principal debtor. 1941 O. W.N. 473=193 I.C. 344. The omission of a creditor to sue the principal debtor within the period of limitation does not discharge the surety from his liability. 41 C.W.N. 1361. Mere entering into a compromise decree by the parties would not necessarily discharge the surety. But where a complicated arrangement is entered into which could not have been within the contemplation of the surety and new terms are imported which are quite outside the reasonable requirements of a settlement by consent, the surety will be discharged. 1937 Rang. 499.

Secs. 134, 137 and 139.—See 154 I. C. 814=1935 O. 260=1935 O.W.N. 274. A surety is discharged if the creditor, without his consent, either releases the principal debtor or enters into a binding arrangement with him to give him time. In each case the ground of the discharge is that the surety's right to pay the debt at any time and after paying it, to sue the principal in the name of the creditor, is interfered with. Ss. 134 and 139 of the Contract Act are merely declaratory of what the law of England was and is. S. 139 only applies where the eventual remedy of the surety against the principal debtor is impaired. Under S. 134 the surety is discharged if, and only if, a contract has been entered into by which the debtor is released or if there has been any act or omission on the part of the creditor the legal consequence of which has been to discharge the principal debtor. 66 I.A. 198=43 C.W.N. 641=1939 P.C. 110=(1939) 2 M.L.J. 253 (P.C.). A credi-

tor while enforcing his contract may elect to have recourse to the surety rather than to the principal debtor; but he must not in so doing release the latter in such a way as to render the contract unenforceable against him and therefore void. If he does this, the surety can have no recourse to the principal debtor for repayment and both by virtue of Ss. 134 and 139 the surety is discharged. (1920 Mad. 216, Diss.) Thus if the creditor chooses to have recourse to the surety the principal debtor remains liable to the latter, but if the creditor after having instituted a suit against both the principal debtor and his surety, extinguishes his remedy against the principal debtor by withdrawing a suit against him without the permission of the Court under O. 23, R. 1 (3), C. P. Code, then his act discharges both the principal debtor and by virtue of Ss. 134 and 139, Contract Act, the surety in addition. (1 L.B.R. 150, Foll.) The test is not whether the creditor has for the time being confined his attention to the surety rather than to the principal debtor, but whether he has irrevocably abandoned his rights against the principal debtor by releasing or discharging him from the contract or has impaired the remedy of the surety against the principal debtor. 171 I.C. 291=1937 Rang. 302.

Secs. 134 and 139: DISCHARGE OF SURETY.—The mere filing beyond time by the creditor of an application for restoration of his suit against the principal debtor which had been dismissed for default, will not be legally sufficient to absolve the surety from liability either under S. 134 or S. 139 of the Contract Act. 1935 L. 729=37 P.L.R. 92. The position of the surety is twofold: on the one hand he is liable to pay the debt, on the other hand when he pays the debt, he stands in the shoes of the creditor and he is entitled to enforce against the principal debtor all the remedies which were available to the creditor. If the liability of the surety is so co-extensive with that of the principal debtor, his right is not less co-extensive with that of the creditor after he satisfied his debt. To enable the surety to enforce his right against the principal debtor, there are two essential conditions (i) that the debt itself must subsist, (ii) that his remedy against the principal must remain unimpaired. Consequently the creditor will be entitled to compel the surety to perform his promise only if the debt subsists

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.

135. A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

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and the surety's remedy is unimpaired. 176 I.C. 686=1938 Nag. 413. Creditor excluding debt guaranteed by surety from settlement by the Debt Conciliation Board—Surety discharged. 176 I.C. 686=1938 Nag. 413.

Secs. 134 and 145.—The effect of the creditor waiving his claim against the principal debtor in a suit brought against the principal debtor and the surety is the barring of the remedy by suit against the debtor, and is not the extinction of the debt. The remedy of the surety under S. 145 of the Contract Act against the debtor remains open and unimpaired to the surety, and therefore the surety is not discharged. 14 R. 594=1937 R. 72. *See also* 1935 L. 906.

Sec. 135.—[*See also* notes under S. 133.] As to the principle of this section, *see* 4 C. 132; 14 M.L.T. 249. S. 135 has no application to the case of a surety under O. 38, R. 3, C. P. Code. 37 M.L.J. 435=53 I.C. 367. *See also* 1936 A.M.L.J. 1. A surety's liability does not come to an end if the creditor gives time to the principal debtor in consideration of part payment of the debt by the latter. 24 I.C. 864 (22 A. 351, Dist.). Striking of balance in account book does not confer any benefit upon the principal debtor, and therefore does not discharge the surety from liability. 133 I.C. 652=1931 L. 627. Where a creditor extends time for the payment of debt, without surety's consent the surety is discharged. 30 I.C. 637=8 Bur.L.T. 114. *See also* 120 I.C. 552 (1); 122 I.C. 602 (2); 1929 A. 664=27 A.L.J. 1137. But a surety executing a bond under S. 55 (4), C. P. Code, which is in favour of the Court, although the ultimate beneficiary may be the decree-holder, is not discharged by decree-holder granting time to judgment-debtor. 100 I.C. 762=1927 L. 336. *See also* 120 I.C. 58=59 M.L.J. 89=1929 P.C. 273 (P.C.). Compromise with the principal debtor discharges surety. 11 P. 590=140 I.C. 564=1932 P. 313; 31 Bom.L.R. 1442. The effect of a compromise on the liability of the surety is a question of fact in each case. Where surety undertook liability for the restoration of the property and payment of mesne profits in case the decree of the trial Court was reversed on appeal and his liability was not in terms excluded in case of a compromise, the surety is bound by the terms of a compromise between the parties although entered into without his knowledge. But if the compromise provides for postponed payment or for the amount being paid in instalments, the surety is discharged from his obligations. 56 M. 625=1933 M. 309=64 M.L.J. 386. The appellant was the surety for the judgment-debtor. He

undertook to 'fulfil the terms of the decree or order that may be passed in the suit by the trial or the appellate Court.' The suit was *bona fide* compromised. It was held that on the terms of the bond, the surety's liability was not discharged by the compromise. 55 B. 97=32 Bom.L.R. 1394=1931 B. 55. Liability of the surety for the appearance of the judgment-debtor ceases if the latter appears and is allowed to pay the decree amount in instalments. 56 C.L.J. 586=1933 C. 337=143 I.C. 322. If a creditor agrees to discharge the principal debtor but reserves his rights against the surety, the agreement though entered into behind the back of surety only operates as a covenant not to sue between the creditor and the debtor and does not operate to discharge the surety, because the surety's right of recourse against the debtor is not extinguished. 1933 M. 309=64 M.L.J. 386=56 M. 625. The opening of a second account in favour of the principal debtor does not discharge the guarantee. 23 C.L.J. 256=20 C.W.N. 562. *See also* 3 C. 177; 119 I.C. 749=1929 R. 187.

"GIVES TIME"—MEANING OF—ACCEPTANCE AS ADDITIONAL SECURITY.—By giving time is meant not merely forbearance to sue but entering into a binding agreement by which the creditor precludes himself from suing within a certain time. The third defendant had given a guarantee to the plaintiff in respect of advances to the first defendant for trade purposes. The plaintiff who had accordingly advanced about Rs. 13,000, demanded payment. The first defendant asked for time and gave the plaintiff bills payable at a future date as security. The bills were presented in due course for payment and dishonoured. In a suit by the plaintiff, *held*, that the surety was discharged; the mere taking of additional security would not discharge the surety, unless there was in addition an express or implied contract to give time. By taking bills payable at a future date, the plaintiff had put it out of his power to sue for the amounts till the date of maturity and the surety was therefore discharged. 65 M.L.J. 458. The calculation of interest on the amounts due up to the date of maturity and the acceptance of interest in advance would amount to giving of time. 146 I.C. 608=1933 M. 756=65 M.L.J. 458. In view of 55 M.L.J. 1 (P.C.) it is doubtful whether the rule laid down in 22 A. 351, that a mere gratuitous agreement by a creditor to give time to the principal debtor will not discharge the surety, and that in order to have such effect, an agreement to give time to the principal debtor must amount to a contract, that is, there must be consideration, therefore, is

Surety not discharged when agreement made with third person to give time to principal debtor.

136. Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration.

C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

137. Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Creditor's forbearance to sue does not discharge surety.

Illustration.

B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

138. Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.

Release of one co-surety does not discharge others.

139. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Discharge of surety by creditor's act or omission impairing surety's eventual remedy.

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good law. 1933 S. 311. Where in an execution case, the auction-purchaser who had deposited the sale price in Court was allowed to withdraw it on furnishing security to re-deposit when asked to do so, and on so being asked he wanted a month's time to deposit the amount which was granted by the Court and was not objected to by the counsel for the decree-holder, but on subsequent date the Court being aware of the surety bond ordered the surety to deposit the amount and modified the previous orders. *Held*, that the surety was not absolved under S. 135. The bond was in favour of the Court and the Court had discretion to order the auction-purchaser to deposit the amount at any date it liked and the consent of the counsel for the decree-holder was immaterial. 40 P.L.R. 755=1938 Lah. 472.

Secs. 135, 136 and 139.—See 15 Mys. L.J. 56.

Sec. 137.—A mere forbearance or delay in suing the principal or pressing him for payment does not discharge the surety. 55 I.C. 610=1 L. 262. See also 161 I.C. 244=1936 Pesh. 80. The words "mere forbearance" in S. 137 mean forbearance of the creditor from suing the debtor within the period of limitation. The simple reason for this interpretation is that a person can only forbear to do a thing as long as he has got a right to do it. Directly the suit of the creditor becomes time-barred he loses his power to enforce his claim. (24 A. 504, Foll.) 160 I.C. 1005=1936 Pesh. 20. See also 40 C.W.N. 465. On this section, see 11 A. 310; 24 A. 504; 22 A. 351; 12 C.

330; 8 A. 259; 1933 M.W.N. 1281; 1935 O. 260=1935 O.W.N. 274.

Sec. 138.—See S. 44, *supra*.

Sec. 139.—Bank deposits—Security for—Liquidation—Creditors applying for dividends is not inconsistent with rights of surety. 4 L.L.J. 183=1922 L. 89. Surety is discharged from liability to the extent that he was deprived from recovering from the principal debtor the amount claimed by the creditor. 58 P.L.R. 1912=15 I.C. 469. See also 149 I.C. 168=1934 A. 616. Where a person stands surety for several defendants but the plaintiff proceeds against one defendant only, the exoneration of the remaining defendant discharges the surety. 60 I.C. 114. Discharge of surety—Conduct of creditor—Negligence. 38 M.L.J. 402=58 I.C. 648. See also 1937 Rang.L.R. 405 (neglect by obligee to observe rules as to supervision and checking). As to the effect of withdrawal of suit against the principal debtor, see 38 M. L. J. 131; 25 A. L. J. 937; 1927 L. 396 cited under S. 134. As to the effect of the creditor allowing his suit against the principal debtor to abate, see 106 I.C. 481 (Punj.) and 1932 L. 419 cited under S. 134. Suit against debtor dismissed for default—Creditor applying for its restoration beyond time—Surety not discharged. 16 L. 757=1935 L. 729. Surety undertaking obligation on behalf of two defendants—Liability in respect of the amount decreed against the defendants—Suit dismissed against one defendant—Compromise decree passed against another defendant—Effect of all this is the discharge of the surety. 47 L.W. 84=1938 Mad. 422.

Illustrations.

(a) *B* contracts to build a ship for *C* for a given sum, to be paid by instalments as the work reaches certain stages. *A* becomes surety to *C* for *B*'s due performance of the contract. *C*, without the knowledge of *A*, prepays to *B* the last two instalments. *A* is discharged by this prepayment.

(c) *C* lends money to *B* on the security of a joint and several promissory note made in *C*'s favour by *B*, and by *A* as surety for *B*, together with a bill of sale of *B*'s furniture, which gives power to *C* to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, *C* sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realized. *A* is discharged from liability on the note.

(c) *A* puts *M* as apprentice to *B*, and gives a guarantee to *B* for *M*'s fidelity. *B* promises on his part that he will, at least once a month, see *M* make up the cash. *B* omits to see this done as promised, and *M* embezzles. *A* is not liable to *B* on his guarantee.

140. Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

141. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Illustrations.

(a) *C* advances to *B*, his tenant, 2,000 rupees on the guarantee of *A*. *C* has also a further security for the 2,000 rupees by a mortgage of *B*'s furniture. *C* cancels the mortgage. *B* becomes insolvent, and *C* sues *A* on his guarantee. *A* is discharged from liability to the amount of the value of the furniture.

(b) *C*, a creditor, whose advance to *B* is secured by a decree, receives also a guarantee for that advance from *A*. *C* afterwards takes *B*'s goods in execution under the decree, and then, without the knowledge of *A*, withdraws the execution. *A* is discharged.

NOTES.

Sec. 140: "INVESTED"—MEANING OF.—27 Bom.L.R. 1168=1925 B. 457. A surety upon payment of the debt to the creditor becomes clothed with all the rights of the creditor against the principal debtor as also persons claiming under the principal debtor. 99 I.C. 676=25 L.W. 190=1927 M. 421. The word 'invested' dispenses with necessity of assignment. 27 Bom.L.R. 1168=94 I.C. 575=1925 B. 547. As to what rights are acquired by a surety who pays part only of the debt due, see 49 A. 640=101 I.C. 513=1927 A. 538. A surety's right stands on a higher footing than a right for contribution. He is bound to discharge the liability of the person for whom he stands surety but he is not liable jointly and severally to pay the decree debt along with all the judgment-debtors. 40 M.L.J. 529=62 I.C. 706. As to rights of a transferee of surety's estate paying a debt due by his transferor as surety for another, see 1932 A.L.J. 868=1932 A. 610.

Sec. 141.—Sec 7 B.H.C. 118. See also 1930 A.L.J. 1181=1930 A. 543 cited under S. 126. One of the joint promisors paying the entire debt is not entitled to the benefit of the security held by the creditor in the absence of special contract. 55 M. 949=139 I.C. 562=63 M.L.J. 615. S. 141 does not

cover the case where the creditor and debtor agree between themselves to vary their original contract by reducing the amount to be advanced and the number of properties to be given as security. There is, in such a case, no parting with security. 56 B. 101=34 Bom.L.R. 167=1932 B. 168. See also 152 I.C. 571=59 C.L.J. 503=1934 C. 699. In a suit on a mortgage bond against the mortgagee and his surety, the plaintiff mortgagee claimed only a money decree and stated in the plaint that he had "given up only the mortgage right and filed the suit as on a simple bond". The surety pleaded that he was exonerated from liability by the reason of the plaintiff having given up his rights under the mortgage bond. Held, that notwithstanding this statement in the plaint, the plaintiff could still sue, under O. 34, R. 14, C.P. Code, for sale, and there was nothing to preclude him from assigning the mortgage right to the surety or to preclude the surety from enforcing the mortgage right by reason of the provisions of S. 141, Contract Act, which entitled him by way of subrogation, to the benefit of the securities held by the principal creditor, and that the surety was therefore not discharged. 45 L.W. 602=(1937) 1 M.L.J. 469=1937 Mad. 501.

Sec. 141, Ill. (b).—See 149 I.C. 168=1934 A. 616.

(c) *A*, as surety for *B*, makes a bond jointly with *B* to *C*, to secure a loan from *C* to *B*. Afterwards, *C* obtains from *B* a further security for the same debt. Subsequently, *C* gives up the further security. *A* is not discharged.

142. Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Guarantee obtained by misrepresentation invalid.

143. Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

Guarantee obtained by concealment invalid.

Illustrations.

(a) *A* engages *B* as clerk to collect money for him. *B* fails to account for some of his receipts, and *A* in consequence calls upon him to furnish security for his duty accounting. *C* gives his guarantee for *B*'s duty accounting. *A* does not acquaint *C* with *B*'s previous conduct. *B* afterwards makes default. The guarantee is invalid.

(b) *A* guarantees to *C* payment for iron to be supplied by him to *B* to the amount of 2,000 tons. *B* and *C* have privately agreed that *B* should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from *A*. *A* is not liable as a surety.

144. Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

Guarantee on contract that creditor shall not act on it until co-surety joins.

145. In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Implied promise to indemnify surety.

NOTES.

Sec. 143.—On this section, *see also* 15 B. 585=33 C. 713; 6 M. 406. S. 143 is not applicable to cases of mere non-disclosure, because mere non-disclosure, as distinguished from intentional concealment cannot amount to keeping silence under the section. There is no general obligation on the part of a bank to volunteer to a surety particulars of one of its constituent's indebtedness, for this is a matter on which the surety has to inform himself. I.L.R. (1940) Mad. 757=1940 Mad. 437=(1940) 1 M. L. J. 424. *See also* 1930 Mad. 874, *infra*. Where a person stands surety for another as regards an advance to be made by a Bank, the Bank is under no obligation to disclose any past indebtedness existing at the date of the contract of suretyship. It is a matter on which the person standing as surety has to inform himself. If, of course, he wanted the information and the Bank gave him wrong information it might vitiate the contract of suretyship. There is difference in this respect, between fiduciary guarantees, *e.g.*, guarantees for the fidelity of servants, assurances upon ships and lives, etc., and guarantees by persons in favour of Banks. In the latter case, the surety is not entitled to receive without inquiry from the party to whom he is about to bind himself, a full disclosure of all circumstances of the dealings between the principal and the party. If he wants to know any particular matter he must make

it the subject of a distinct enquiry. 1930 M. 874=59 M.L.J. 513.

Sec. 145.—*See* 14 R. 594=1937 R. 72. The rights of a surety under the section is not limited to the rights of a creditor against the principal debtor. 1932 A.L.J. 868=1932 A. 610. "Rightfully paid," meaning of. *See* 26 M. 332; 49 B. 202=27 Bom.L.R. 178=86 I.C. 883=1925 B. 244. A payment by surety to creditor made after the suit against the principal debtor had been instituted and with the object of assisting that suit to reach a successful termination might be held to be a wrongful payment, while a payment made before the institution of such suit might be held to be a rightful payment. 1930 L. 812=31 P.L.R. 329. "Wrongfully" meaning of. *See* 1936 A.M.L.J. 41. The liability of the principal debtor to pay the surety cannot arise from a mere implied promise to indemnify contained in S. 145 but must be the result of a contract between the surety and the creditor to which the debtor is a party. The implied rights possessed by a surety are available when the suretyship has been undertaken at the request, actual or constructive of the principal debtor but not otherwise. 39 M. 965=30 M.L.J. 369. Where a person stands surety for another, there is always an implied warranty by the latter that he would indemnify such person in case he is damaged owing to a default made by him in the performance of any of the conditions imposed upon him under the security bond. A person giving security for

Illustrations.

(a) *B* is indebted to *C*, and *A* is surety for the debt. *C* demands payment from *A*, and on his refusal sues him for the amount. *A* defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from *B* the amount paid by him for costs, as well as the principal debt.

(b) *C* lends *B* a sum of money, and *A*, at the request of *B*, accepts a bill of exchange drawn by *B* upon *A* to secure the amount. *C*, the holder of the bill, demands payment of it from *A*, and, on *A*'s refusal to pay, sues him upon the bill. *A*, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the Bill and costs. He can recover from *B* the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) *A* guarantees to *C*, to the extent of 2,000 rupees, payment for rice to be supplied by *C* to *B*. *C* supplies to *B* rice to a less amount than 2,000 rupees, but obtains from *A* payment of the sum of 2,000 rupees in respect of the rice supplied. *A* cannot recover from *B* more than the price of the rice actually supplied.

146. Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same

Co-sureties liable to contribute equally. or different contracts, and whether with or without the knowledge of each other, the co-sureties in the absence of any contract to the contrary, are liable as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Illustrations.

(a) *A*, *B* and *C* are sureties to *D* for the sum of 3,000 rupees lent to *E*. *E* makes default in payment. *A*, *B* and *C* are liable, as between themselves, to pay 1,000 rupees each.

(b) *A*, *B* and *C* are sureties to *D* for the sum of 1,000 rupees lent to *E*, and there is a contract between *A*, *B* and *C* that *A* is to be responsible to the extent of one-quarter, *B* to the extent of one quarter, and *C* to the extent of one-half. *E* makes default in payment. As between the sureties, *A* is liable to pay 250 rupees *B* 250 rupees, and *C* 500 rupees.

Liability of co-sureties bound in different sums. 147. Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Illustrations.

(a) *A*, *B* and *C* as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 30,000 rupees. *A*, *B* and *C* are each liable to pay 10,000 rupees.

(b) *A*, *B* and *C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 40,000 rupees. *A* is liable to pay 10,000 rupees, and *B* and *C* 15,000 rupees each.

NOTES.

the payment of the decretal amount who is made to pay the decretal amount on the ground that a default has been made in the performance of the conditions of the security bond by the judgment-debtor is entitled to a decree for the decretal amount against the original judgment-debtor. 123 I.C. 126=1930 L. 399. Surety for the appearance of another cannot be permitted to claim the money forfeited as it would be opposed to public policy. 1932 L. 23=32 P.L.R. 739. S. 145 of the Act does not debar a surety from making a claim against the principal debtor in cases where he has not made the payment under the guarantee but has become liable only *in presenti* to do so. In the absence of a provision in the statute restricting the claim of a surety against principal debtor to cases where the surety has already paid the amount the Court would be at liberty to apply the principle of the English decisions which hold that as soon as the obligation to pay becomes absolute, a surety has a right in

equity to be exonerated by his principal. 32 Bom.L.R. 207=1930 B. 331. Execution of mortgage by a surety is payment and suit would lie to recover it from the debtor. 58 I.C. 123. The payment which gives the surety a right of action against the principal debtor must be a payment of money or money's worth. Where the surety has not paid the amount due by the principal debtor to the creditor but merely executes a bond for its future payment, a suit by the surety for recovery of the amount due by the principal debtor to the creditor is premature and he has no cause of action until he pays the amount due under the bond. 14 R. 511=163 I.C. 668=1936 R. 235. "Payment" means payment in money or property as money equivalent and not merely in the shape of a bond or a promote or acknowledgment of liability. 50 I.C. 611=15 N.L.R. 78. See also 89 I.C. 65=1925 N. 392; 14 Rang. 594=1937 Rang. 72.

Sec. 146.—See S. 43, *supra*. See 26 A. 407; 4 B. 321.

(c) *A, B and C, as sureties for D, enter into three several bonds, each in a different penalty namely, A in the penalty of 10,000 rupees. B in that of 20,000 rupees, C in that of 40,000 rupees conditioned for D's duly accounting to E. D makes default to the extent of 70,000 rupees. A, B and C have to pay each the full penalty of his bond.*

CHAPTER IX.

OF BAILMENT.

148. A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor." The person to whom they are delivered is called the "bailee."

Explanation.—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment.

149. The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

NOTES.

Sec. 148.—"For some purpose", meaning of. *See* 18 N.L.J. 97. Use of property bailed by bailee not necessary to constitute bailment. 18 N.L.J. 97. It is the pawnor and not an assignee from him that can give directions to the pawnee as regards the delivery or disposal of the pledged property. The directions must be definite and reasonable in order to be binding on the pledgee. 65 I.C. 65=1922 N. 127. Where *A* lent some ornaments to *B* to be used by the latter in a religious procession the transaction is a bailment. In such a case there is an implied contract for return of the articles in a reasonable time. 126 I.C. 682=1930 O. 395. Liability of goldsmith. 15 I.C. 431=5 Bur. L.T. 106. In case of deposit of money there is no bailment. 13 B. 338; 32 M. 68. The relationship is that of borrower and lender. (*Ibid.*) On this section, *see also* 1939 Cal. 746.

BAILMENT.—Meaning of. 23 S.L.R. 13. As to essentials of bailment, *see* 16 Mys.L.J. 368. Bailment distinguished from sale or exchange. *See* 2 A. 756. Delivery of goods for safe custody creates bailment not agency. *See* 1937 All. 255, cited under S. 237, *infra*.

Sec. 148, Expl.—A bailment under S. 148 is made when one person delivers goods to another for some purpose under an agreement that they shall be returned after the purpose is accomplished. A seller of goods cannot be regarded as a bailee of the goods sold, unless there is a contract to that effect for the buyer does not deliver the goods to the seller for some purpose under an agreement for their return. So also under the Explanation to S. 148, the seller can become a bailee only if he contracts to hold them as bailee. But in the absence of such a contract he is not a bailee. 11 O.W.N. 958=1934 O. 380. After the Court had

passed a re-delivery order the relation of bailor and bailee is established between the judgment-debtor and the decree-holder by virtue of explanation to S. 148. 1929 L. 386.

Secs. 148 and 149: BAILMENT OF GOODS—ESSENTIALS.—It is an essential element of Ss. 148 and 149 that there must be the putting into possession of the bailee or his agent of the goods in question. Where all that was done was that the bank received a document of title to the goods and the bank received the document in order that the document might be handed to the consignee by the bank and the consignee would pay a sum of money to the bank. *Held*, that there was no bailment of goods. 148 I.C. 644=1934 A. 568. *See also* 1937 M.W.N. 1042.

Secs. 148 and 151.—*See* 18 Lah. 380=39 P.L.R. 845=1937 Lah. 572 (Stolen property recovered from the accused and kept with a person in charge of Court records and property—Such person embezzling such property—Secretary of State not liable). Where silver entrusted to another is not to be returned *in specie* but has to be returned in the shape of a finished article, the intention of the parties is that the same silver would be used for the purpose, and the transaction is one of bailment. The bailee is absolved from liability for the loss of such silver by theft, if he is not guilty of carelessness or negligence. 1936 O.W.N. 334=1936 O. 264.

Sec. 149.—By law the duty of a Railway Company is that of a common carrier and the Railway Company cannot refuse carriage of goods. Liability of railway is that of bailee. Rules restricting liability imposed by Railways Act are invalid. 20 A.L.J. 31=44 A. 218. The mere fact that the loading clerk of a railway filled up what is called the serial

150. The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and, if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Illustrations.

(a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

(b) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

Care to be taken by bailee.

NOTES.

number in the forwarding note without doing anything further would not amount to the delivery of goods to the railway by the consignor. 45 A. 235=21 A.L.J. 474.

Sec. 151: LIABILITY OF BAILEE—EXTENT.—S. 151 makes no reference to the distinction recognised in *English law* between a *gratuitous bailee* and a bailee for hire and omitting all reference to skill lays down for both one standard, *viz.*, as much care as a man of ordinary prudence would take of his own goods in similar circumstances. Bailees are liable for negligence on the part of their agents or servants committed in the course of their employment about the use and custody of the thing bailed but not on account of an unauthorised act done outside the course of their employment. 1934 C. 151=37 C.W.N. 1109. Where a bank merely takes possession of a document of title the responsibility of the bank is for the safe custody of the document of title and not for the safe custody of the goods. The deposit of such a document with the bank will give the bank certain rights in regard to that document but it does not produce the legal effect that the bank becomes in possession of the immovable property. 148 I.C. 644=1934 A. 568. The liability of a *hotel-keeper* to his guests is governed by S. 151 and his liability is that of a bailee. 20 A.L.J. 728=44 A. 735. The English Common Law does not regulate the liability of hotel-keepers in this country. 44 A. 735. As to the standard of care required of a bailee under Ss. 151 and 152, see 1933 A. 158. Pressure of work or unavoidable accident cannot help to avoid liability. 85 I.C. 786=1925 C. 737. Whether it can be inferred from the facts found that ordinary prudence has been exercised, is a question of law and justifies an interference in second appeal. 25 I.C. 939. The position of a *Railway Company* is that of a bailee and is

governed by S. 151. 38 I.C. 143. Where four hens put in a crate were consigned to a Railway Company and were put in a closed van by the Railway Company on account of which they died. *Held*, Railway Company was liable. 38 I.C. 143. As to liability of common carriers, see 34 A. 656; 18 C. 620; 38 C. 28; 28 M. 700; 6 C. 227. As to liability of Railway Company, see also 37 B. 1; 17 B. 417; 30 C. 252; 39 B. 191; 39 A. 418; 23 O.C. 96=56 I.C. 714. *Burden of proving* that loss or destruction of goods entrusted to a Railway Company is not due to the negligence of the Railway Company lies on the Company. 91 I.C. 963=1926 L. 217. Common carrier—Liability for goods for carriage—*Demurrage charges*—When leviable. 41 I.C. 387=22 C.W.N. 310. A consignee is liable for *demurrage charges* and has no right to the price of the goods if he unjustifiably refuses to take delivery of goods. But demurrage cannot be charged for the period subsequent to a notice to the consignee that the goods will be sold away at auction in case he fails to remove them. 41 I.C. 387=22 C.W.N. 310. A carrier by a sea cannot contract out of liability for the negligence of himself or of his servants. The English Common Law is applicable: the law as it stood before the Carriers Act, 1830, must be applied. 52 I.C. 296=12 Bur.L.T. 173. Bill of lading—Liability for loss of goods contracted out—Legality. See 29 Bom.L.R. 1551. Licensee of a ferry is a common carrier. The responsibility of a common carrier is not within the Contract Act but he is regulated by the Carriers Act and the English Law. 50 I.C. 562; 133 I.C. 77=1931 S. 124. The liability of a Railway Company for loss of goods consigned for carriage is governed by the test laid in the sections. The Railway Company is not in the position of insurers as common carriers. 38 I.C. 702=25 C.L.J. 77. See also

152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

Bailee when not liable or
loss, etc., of thing bailed.

NOTES.

39 C. 311; 16 C.W.N. 329=12 I.C. 596=14 C.L.J. 472 (Damage to goods). Railway Company—Goods destroyed by fire—Liability. 39 B. 191=25 I.C. 241. Mere happening of accident is not proof of negligence. 3 A. 398. Railway—Liability as carrier—Exemption—Risk note Form B. 2 P. 442=72 I.C. 440. The onus is upon the bailee to show that he is exonerated from liability for loss by means of a special risk-note relieving him from such liability. 2 P. 442. A bailee is responsible for proper care of goods entrusted to him. The burden of proof lies on him to show that such care as a man of ordinary prudence would have exercised, was duly exercised by him. 74 I.C. 18=1923 R. 74 (2). Money deposited for *safe custody in Bank*—Failure of Bank—Liability of depositor—Amount of care. 36 I.C. 31. Bailment—Suit against bailee for damages—Negligence, proof of—Onus on plaintiff—Duty of defendant. 20 Bom.L.R. 735=27 C.L.J. 615 (P.C.). The obligation of a bailee includes not only the duty of taking all reasonable precautions to obviate these risks but also the duty of taking all proper measures for the protection of the goods when such risks had already occurred. 14 Bom.L.R. 165=14 I.C. 793 (2)=37 B. 1. Degree of care varies with the quality of goods. 27 C.W.N. 1017=80 I.C. 279=1924 C. 92. In a case of highly perishable articles he should take special precautions. 9 I.C. 470=4 Bur.L.T. 26.

LIMITATION.—The defendant borrowed from the plaintiff his car for private use and while it was in his use it met with an accident which resulted in considerable damage to the car. The plaintiff sued to recover the repair charges and interest by way of damages. *Held*, that the case was one of bailment and that the claim for damages was governed by Art. 115 and not Art. 36. Limitation Act. 145 I.C. 1001=1933 O. 518.

Secs. 151 and 152: BAILEE—STANDARD OF CARE—LOSS BY UNPRECEDENTED FLOODS—LIABILITY OF BAILEE.—The standard of diligence required of a bailee under Ss. 151 and 152, is that of the average prudent man; where the bailee has taken the same care of the property entrusted to him as a reasonably careful man may be expected to take of his own goods of the same bulk, quality and volume as the goods bailed, he is not responsible for the loss, destruction or deterioration to the thing bailed. No caste-iron standard can be laid down for the measure of the care due from him and the nature and amount of care must vary with the facts of each case. Where there is an unprecedented flood in the town, as a result of which part of the goods bailed is deteriorated, other things being equal, the

bailee is not responsible for such loss, but the bailor has to suffer it. 142 I.C. 691=1933 A. 158. It is open to a bailee to contract himself out of the obligations imposed by S. 151 of the Contract Act. The Act does not prohibit contracting out of S. 151. There is no reason why a man should not be at liberty to agree to keep property belonging to another on the terms that such property is to be entirely at the risk of the owner. The only liability of a bailee is for negligence under S. 151, and therefore any words absolving him from risk must cover the consequences of negligence. But where the true contract as made at the time of acceptance of the offer is that the bailee is to keep or hold the property for a reasonable time as an ordinary bailee, it is not open to the latter to alter that contract until a reasonable period has expired and to add a new term to the contract by providing that he is not to be under the ordinary liability attaching to a bailee and that the property is kept at the owner's risk. 41 Bom.L.R. 6=1939 Bom. 101. On these sections, *see also* 159 I.C. 591=1935 S. 218; 1937 Sind 207; 1937 A.M.L.J. 56.

Secs. 151 and 167.—Bailee's responsibility—Rival claims to goods bailed—Remedy of bailee—Bailee aware of passing of title in goods bailed to third person—Subsequent delivery to bailor—Bailee is liable to the third person. 1940 Rang.L.R. 361=1940 Rang. 249.

Sec. 152.—A bailee for hire is bound to return the article hired at the end of the period for which it is hired. But there is an implied warranty that the thing is fit for the purpose for which it is hired and if there is a breach of this warranty, the bailee is not bound to pay the hire and return the articles but can give notice of the same to the bailor. 45 B. 1017=61 I.C. 570. Where a pawnbroker issued a pawn ticket on certain jewellery being deposited with him, and the pawn ticket contained a clause exempting the pawnbroker from all liability in case of destruction of property under certain circumstances, on a suit being brought by the owner for the recovery of price, *held*, that a bailee can contract himself out of liability. It is not clearly deducible from the terms of S. 152 that a bailee may only make a special contract increasing his responsibility and that he cannot make a special contract reducing it. 7 R. 339=1929 R. 145. 'Loss'—Meaning of. *See* 10 L. 460=112 I.C. 736. The owner of a lighter carrying goods is liable for the loss of and damage to goods as bailee under S. 152 if in using the lighter he did not take the amount of care described in S. 151. 42 I.C. 636. On this section, *see also* 29 Bom.L.R. 1551.

Termination of bailment by bailee's act inconsistent with conditions.

153. A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Illustration.

A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.

Liability of bailee making unauthorised use of goods bailed.

154. If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Illustrations.

(a) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse.

(b) A hires a horse in Calcutta from B expressly to march to Benares. A rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

Effect of mixture, with bailor's consent of his goods with bailee's.

155. If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

156. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Illustration.

A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark: A is entitled to have his 100 bales returned, and B is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage.

157. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Effect of mixture, without bailor's consent, when the goods cannot be separated.

Illustration.

A bails a barrel of Cape flour worth Rs. 45 to B. B, without A's consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. B must compensate A for the loss of his flour.

158. Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

Re-payment by bailor of necessary expenses.

NOTES.

Sec. 153.—See 19 C. 332; 5 Luck. 220.

Sec. 154: CAR ENTRUSTED FOR SAFE CUSTODY—BAILEE'S LIABILITY FOR UNAUTHORISED USE.—Where a car entrusted for safe custody is used by the bailee for his private purposes in contravention of the agreement, the bailee is liable for the damage arising from such use under S. 154. 35 P.L.R.

C.C.M.—246

705.

BAILEE—RIGHT TO SUE THIRD PARTY FOR DAMAGES FOR NEGLIGENCE.—A bailee is not the agent of the bailor and can sue to recover full damages from a third party who does not claim under the bailor for loss due to negligence of the person. 35 Bom.L.R. 1007 = 1933 B. 465. On this section, see also 5 Luck. 220.

159. The lender of a thing for use may at any time require its return, if the loan was gratuitous even though he lent it for a specified time or purpose. But if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

160. It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

161. If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

NOTES.

Sec. 160.—A bailee who has given up possession of goods bailed with the consent of the bailor cannot thereafter maintain a suit for recovery of the goods bailed. 19 Cr.L.J. 220=43 I.C. 796. Under S. 160 it is the duty of the Railway Company to deliver the goods in accordance with the directions of the consignor, provided those directions are reasonable. When the consignor enters on the railway receipt that another person is to be the consignee, this section will be applicable to directions for delivery given by the consignee. 27 A.L.J. 1169=1929 A. 960=52 A. 126. Receipt from consignee of goods is good evidence of complete delivery. 39 C. 311. Bailment—Conversion of goods—Measure of damages. 34 I.C. 297; 9 Bur. L.T. 224. See also 83 I.C. 151=1924 C. 1056; 7 Mys.L.J. 86.

Secs. 160 and 148.—When a Government Promissory note is deposited with the Collector of Excise by a company owing a private bonded warehouse to secure their liability to pay duty in respect of dutiable liquors imported by them, the Government becomes the bailee of the note within the meaning of S. 148. Under S. 160, the Government are under a duty to return it without demand on the cancellation of the company's excise licence, when the company is not under any liability to Government in respect of the bonded warehouse, although the note had not been endorsed to the company at the time of the deposit. The Government being bailees, are not at liberty to refuse to return it pleading the interest of the person in whose name the endorsement stands. I.L.R. (1939) 2 Cal. 52=1939 Cal. 746.

Secs. 160 and 161: BAILEE'S RESPONSIBILITY FOR WRONGFUL DETENTION.—Where a car is entrusted for safe custody, it is the duty of the bailee under S. 160 to return or deliver the car according to the bailor's directions without demand as soon as the time for which it is bailed expires. Where the bailee

not only does not do so, but creates all sorts of obstacles, based on flimsy grounds to deprive the bailor of the use of the car, wrongful detention is fully proved and consequently under S. 161, the bailee is responsible for any loss or deterioration of the car from the time he does not return or deliver it when demanded. 35 P.L.R. 705.

Sec. 161.—[See also notes under S. 160.] The responsibility of a railway administration in India is no less than it would be in England, and as regards delivery, the liability of a Railway Company is expressly governed by S. 161. Refusal to grant delivery except upon an unjust or unreasonable condition amounts to a default within the meaning of that section, and the Railway Company would be liable for such refusal. 1931 N. 29. The moment the default of the bailee is established and the responsibility falls to be determined under S. 161, the burden shifts to him to prove that the loss, for which he is sought to be made responsible by the bailor, occurred prior to the commencement of default on his part. When the goods are solely under the control of the bailee the fact as to when loss, destruction or deterioration occurred is a matter specially within his knowledge and therefore the burden of proving that the loss occurred at a particular time and not subsequently must be on him. 1932 A.L.J. 788=1932 A. 584. In the absence of evidence as to the execution of risk-note Form A, the railway is liable for delay in delivery. 65 I.C. 471=20 A.L.J. 114. Contract Act is not a complete Code with reference to the law of bailments. Bailments are of two kinds *voluntary and involuntary*. Where a depository dies and the subject of the deposit passes into the hands of his heir, the latter becomes an involuntary bailee. A depository is a bailee within Chapter IX of the Act. 69 I.C. 900=26 C.W.N. 772. Contract between Railway Company and owner

Termination of gratuitous bailment by death.

162. A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

Bailor entitled to increase or profit from goods bailed.

163. In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Illustration.

A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

Bailor's responsibility to bailee.

164. The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions respecting them.

Bailment by several joint owners.

165. If several joint owners of goods bail them the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

Bailee not responsible on re-delivery to bailor without title.

166. If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.

Right of third person claiming goods bailed.

167. If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

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of goods containing conditions as to the route to be adopted for transit—Breach of conditions—Liability of Railway Company as bailee. *See* 8 Pat.L.T. 651. As to measure of damages, *see* 7 Mys.L.J. 86. The responsibility of the *commissioners of the Rangoon Port* for the goods in their possession was held to be that of a bailee as defined by Ss. 151, 152 and 161 of the Contract Act, 1931 R. 95. Elephant—Hire for term of one year—Death in the hands of bailee before term—Liability for damages—Negligence of bailee—Onus of proof. *See* 45 L.W. 158=1937 Mad. 411=(1937) 2 M.L.J. 329.

Sec. 162.—The liability does not come to an end with the death of the bailee and can be enforced against his estate. The provisions of the Contract Act embodied in Chapter IX relating to bailment are not exhaustive; and the object of S. 162 is simply to bring out the general principle of law on the surface that the heir of a bailee, when the bailment is gratuitous, does not occupy on the death of such bailee the character of a bailee. The section does not do away with the principle of law that such an heir occupies the character of a constructive trustee in regard to the subject-matter of the bailment. 5 L. 220.

Sec. 163.—*See* 49 B. 253=27 Bom.L.R.

455=48 M.L.J. 648 (P.C.).

Sec. 165.—*See* 20 M.L.J. 709.

Sec. 166.—To a suit by the real owner of goods for their delivery, the fact that the pledgee (defendant) has parted with the goods pledged to or to the order of the person by whom they were deposited without notice of any claim by any other person is a complete defence. 37 B. 122=40 I.A. 1=24 M.L.J. 176 (P.C.). *See also* 1923 Bom. 155 (wrong delivery in good faith).

Sec. 167.—The remedy of a bailee, from whom the goods bailed are demanded by rival claimants, is to file an inter-pleader suit against the claimants and thereby protect himself. But if he fails to do that and retains the goods for the bailor or delivers it to him, he must stand or fall by the bailor's title. Where paddy was sent to a mill for milling and the mill owner was informed that the rice had been sold to a third person but later on the bailor sent a notice to the bailee asking him not to deliver the rice to the third person and the bailee delivers the rice belonging to the third person to the bailor, it is clearly a conversion and the bailee is responsible to the third person for damages. 1940 Rang. L. R. 361=1940 Rang. 249. As to wrong delivery in good faith, *see* 24 Bom.L.R. 513=67 I.C. 761=1923 Bom. 155.

168. The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

169. When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

(1) when the thing is in danger of perishing or of losing the greater part of its value, or,

(2) when the lawful charges of the finder in respect of the thing found, amount to two-thirds of its value.

170. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

Illustrations.

(a) A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

(b) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give a three months' credit for the price. B is not entitled to retain the coat until he is paid.

171. Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

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Sec. 170: APPLICABILITY—SELLER RETAINING GOODS SOLD—IF COMES UNDER THE SECTION.—S. 170 only applies to cases in which goods have been given to a bailee for some purpose in relation to which the bailee has to use special skill. The case of a seller of goods who keeps the things sold because the price has not been paid does not come within the purview of S. 170. 151 I.C. 117 = 11 O.W.N. 958 = 1934 O. 380. Though according to S. 170, the bailee has a right to retain goods until he receives due remuneration for the services he has rendered in respect of them, there is nothing in the section which enables him to sell the goods and recover his dues. Hence a person entrusted with cattle for grazing cannot sell them for the recovery of the grazing charges due. 1940 N.L.J. 412 = 1940 Nag. 273. On this section, see 6 A. 139; 8 C. 312; 13 B. 314.

Sec. 171: DISTINCTION BETWEEN THE GENERAL LIEN OF A BAILEE (BANKER, ETC.) AND THE RIGHTS OF A CREDITOR, who advances money to accommodate his customers to buy goods and deposit them with him on what is called the godown system is that one is a mere right of retention and in the

other special property in the chattel is created. 8 L. 373 = 1927 L. 408.

A *Nattukottai Chetty* is a 'banker' within S. 171 and is therefore entitled to banker's lien on goods bailed to him. 43 M. 747 = 39 M.L.J. 135.

LIEN OF BANKERS.—See 33 M. 53; 19 M. 234. Money can be the subject of a banker's lien but not the money held by the bank under a special contract. 95 I.C. 358 = 1926 S. 225 = 21 S.L.R. 385. When moneys are held in one account, and the payer in respect of those moneys owes debts to the banks on another account, the banker's lien gives the bank a charge on all the moneys their hands belonging to this particular customer so that they can be transferred into whatever account they choose to set off or liquidate the debt which is in existence. But money in a trustee account at a bank cannot be used to set off debts on a private account in the trustee's name. 151 I.C. 1018 = 1934 Rang. 66. *Factor*, who is. See 1 Luck. 133 = 92 I.C. 744 = 1926 O. 202.

ATTORNEYS' LIEN—KINDS OF PASSIVE LIEN.—The rights of an attorney in India are the same as the rights of a solicitor in England, except in so far as the latter have been

Bailments of Pledges.

172. The bailment of goods as security for payment of a debt or performance of a promise is called "pledge." The bailor is in this case called the "pawnor." The bailee is called the "pawnee." The bailee is called the "pawnee."

"Pledge," "pawnor" and "pawnee" defined.

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diminished or increased by statute. A solicitor in England is entitled to three kinds of lien to protect his right to recover his costs from his client, namely: (i) a passive or retaining lien; (ii) a common law lien on property recovered or preserved by his efforts; (iii) a statutory lien enforceable by a charging order. Indian statutory law contains no provision for the last mentioned lien but the other two kinds of lien are available in India. The lien on property recovered or preserved by the efforts of the solicitor is a particular lien and not a general lien and it is not available for the general balance of account between the attorney and his client but extends only to the costs of recovering or preserving the property in suit. The *passive or retaining lien* is not affected or curtailed by S. 171. This lien enures in favour of the solicitor in respect of all deeds, papers or other personal chattels which come into his possession in the course of his professional employment. This is a general lien but with reference to moneys recovered by the solicitor for his client, he has no such general lien. Whether he obtains possession of the money which is the fruit of his exertion or whether it is still in deposit in Court, in either case, his lien or right to be paid out of those funds is confined to the costs incurred in respect of those funds, subject only to this, that he has the ordinary rights of set off which one creditor has against another. 60 C. 1442 = 149 I.C. 331 = 1934 C. 341.

LIEN OF WHARFINGERS.—See 8 C. 312; 1930 L. 576. Equitable lien of barrister and attorney on money paid into Court. 29 I. C. 870 = 8 L.B.R. 70. See also 4 B. 353; 6 C. 7. A factor is an agent entrusted with the possession of goods for sale. 29 I.C. 462 = 1915 M.W.N. 519. Factor—Agent for sale of goods making advances against goods—Agreement to recoupe advances from sale proceeds—Suit by agent for refund of advances before actual sale. 55 I.C. 671 = 11 L.W. 1.

RIGHT OF SALE.—A bailee has no right to sell the goods bailed, unless such right is conferred upon him by agreement of the parties or by any special statute; on the other hand, a sale of the goods bailed to him in the exercise of his right of lien over the goods causes the loss of the lien. 122 I.C. 388 = 1930 S. 36.

Sec. 172.—The method provided by S. 172 of the Contract Act for the hypothecation of chattels is not the only method for creating security thereon. They may be hypothecated without transferring their posses-

sion. In such cases the only question that arises is whether there was an intention to create a security and if there was intention to create security, equity gives effect to it. 44 I.C. 211 = 22 C.W.N. 758. See also 59 C. 667; 10 Mys.L.J. 16. A hypothecation not merely of movables existing on the premises at the time but also in respect of movables which might be subsequently acquired and brought there is valid, though it is not governed by the T. P. Act or by the Contract Act. 59 C. 1372. An oral or written hypothecation is permitted under the law in India. 9 R. 182 = 1931 R. 201. In a pledge the property should be actually or constructively delivered to the pawnee. Title deeds of property are not goods that may be pledged within the meaning of S. 172. 33 I.C. 891 = 22 C.W.N. 297. The delivery which is necessary for a pledge need not be simultaneous with the lending of the money. It may be actual or manual, symbolical or constructive, simultaneous or subsequent. 59 C. 667 = 36 C.W.N. 263. As to pledge of shares or negotiable securities, see 12 Bom.L.R. 800. Profits accruing from immovable property cannot be pledged. See 1939 Lah. 15 = 41 P.L.R. 239. As to pledge of goods retained in the godowns of the pledgor who agreed not to remove them or encumber them without the consent of the pledgee, see 50 B. 547 = 96 I.C. 417 = 1926 B. 427. A pledge or pawn according to S. 172 lies midway between a loan and a mortgage which wholly passes the property in the thing conveyed. 33 I.C. 891 = 22 C. W.N. 297. Hypothecation of animals—Enforceability against third parties—Offspring of animals—Accession. 10 P.R. 1915 = 28 I.C. 230. Neither the T. P. Act nor the Contract Act recognizes the non-possessory hypothecation of movables. And the rights and remedies of the parties must be regulated by the Courts according to general law of contract. 10 I.C. 869 = 7 N.L.R. 72. A *bona fide* incumbrancer without notice in possession of movable property will be preferred to the prior incumbrancer. A person alleging notice must prove it. 28 I.C. 462 = 7 L.B.R. 336. As to distinction between pledge and mortgage, see 59 C. 667.

Secs. 172 and 176.—The rights of a creditor who accommodates his customers by storing goods for the purchase of which he has advanced money are higher than those of an ordinary bailee who has a general lien under S. 171 of the Act in so far that in the former case there is an implication that the security shall if necessary be made

173. The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

Pawnee's right of retainer.
Pawnee not to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances.

174. The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

Pawnee's right as to extraordinary expenses incurred.

175. The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

176. If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged on giving the pawnor reasonable notice of the sale.

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effectual to discharge the obligation. The position of the creditor is analogous to that of a pledgee. (8 L. 373, Ref.) 31 P.L.R. 365=1930 L. 576.

Secs. 172 and 178.—As the law stands at present in India, a mere deposit of share certificates would not be enough to create a valid pledge. In order to constitute a valid pledge there should be such delivery of possession to the pledgee by virtue of which he can effectively exercise the power of sale for realising the debt. Though share certificates would not be "goods" within the meaning of Ss. 172 and 178 of the Contract Act, the Act is not exhaustive. The principle that an assignment is necessary is recognised in S. 178. I.L.R. (1941) Mad. 419=1941 Mad. 394=(1941) 1 M.L.J. 178.

Sec. 174.—Rights of creditor in case of pledge. See 120 I.C. 834=53 B. 819. Pledge—Unlawful withholding of goods—Refusal to deliver—Action. 41 A. 643=55 I.C. 45. In the case of a pledge the creditor has two rights which are concurrent, the right to proceed against the property not being merely accessory to the right to proceed against the debtor personally. 31 Bom.L.R. 988=1929 B. 471. Subsequent advances on pledge of other articles—Lien against article ordinarily pledged—Subsequent conduct of parties, if material. See 115 I.C. 389. When there was a mortgage of certain shop goods then lying on the premises and the mortgagor undertook to keep on the premises stock to the extent of the debt replacing sold goods by new goods, it is not a mere licence but an equitable mortgage of the substituted goods and there is complete assignment of after-acquired property. It is not necessary that an equitable assignment should be

enforced by a suit for specific performance. 17 I.C. 31=6 S.L.R. 97. The only condition is that the goods on coming into existence should be capable of identification as to things assigned. (*Ibid.*)

Sec. 176.—Conditions necessary for exercise of pawnee's right of sale. See 8 L. 373=101 I.C. 725=1927 L. 408. As to rights of pawnee, see 104 I.C. 641. Notice of sale—Reasonableness of. 40 A. 522=45 I.C. 462=16 A.L.J. 390. See also 59 C. 667=36 C.W.N. 263. The rights of a pledgee under this section either to sue on the debt or sell the property pledged are concurrent rights. 33 I.C. 891=22 C.W.N. 297. See also 32 C. 27; 27 M. 528; 22 C. 21. A pledgee is not entitled to sell the goods before the amount of the loan becomes due and before effecting a sale he must give reasonable notice to the pledgor. 39 I.C. 169 (6 W.R. 81, Ref.) See also 114 I.C. 820; 1929 M.W.N. 167. A notice to be valid under S. 176 must be a reasonable notice, and it must refer to the debt for which the goods were pledged and for recovering which the pledged goods are to be sold. Otherwise it will not be a proper notice as contemplated by S. 176. 38 Bom.L.R. 982. When there is an improper or wrongful sale by the pawnee, without a proper notice of sale as required by S. 176 the pawnee becomes liable in damages for conversion to the pawnor, but the sale is not avoided thereby or liable to be set aside. The correct measure of the damages to which the pawnor is entitled in such cases is the loss which he has actually sustained, taking into account the pawnee's interests in the goods sold at the time of the conversion. Account sales are *prima facie* evidences of the amount realised by the sale of the goods in foreign markets, in the absence of proof that the account sales

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

177. If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

¹[178. Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

LEG. REF.

¹ Ss. 178 and 178-A were substituted by S. 2 of Act IV of 1930.

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are incorrect. A mere objection that they are not correct is not enough. Mere offers to purchase the goods made by others are also not conclusive as to the rates of prices. 38 Bom.L.R. 982. Certain jewels were deposited as collateral security with the creditor for two promissory notes. The promisee sold the jewels without proper notice to the debtor and filed a suit on the promissory notes. *Held*, that as the sale was without justification, the debtor was entitled to claim deduction from the amount due on the promissory notes of a reasonable value of the jewels deposited, which should be taken to be the value at the date of suit. 146 I.C. 422=1933 R. 76. If pledgee sells through Court, he can purchase at Court-sale. 19 C. 322. This section requires a notice only when the pawnee wishes to exercise his opinion of selling the pledged goods. If he chooses to bring a suit upon the debts no notice is apparently required by that section. 48 I.C. 970; 146 I.C. 194=1933 L. 536.

Sec. 177.—A pledgor cannot compel the pledgee to exercise the power of sale as a means of satisfying or discharging a decree which the latter has obtained against him. Rights of pledgor enumerated. 30 L.W. 898=122 I.C. 37=1930 M. 364. If a pledgor brings a suit for redemption without first tendering the money to the pledgee and it turns out that the suit was unnecessary because the pledgee was always ready and willing to deliver up the property pledged without suit if the debt had been paid the plaintiff will no doubt be made to pay the costs of the defendant but his suit cannot be dismissed. But if it turns out that in the circumstances which pre-

ceded the suit it would have been perfectly useless to tender the money to the pledgee as for instance where the pledgee declares in advance his inability to return the pledged property in such a case if the pledgee was at fault in putting it beyond his power to return the goods, the pledgor cannot be defeated on account of his not going through a useless ceremony of tender. 1930 M. 364.

Sec. 178.—Scope and application of section. See 40 M. 678=34 I.C. 751=30 M. L.J. 587; 30 Bom.L.R. 470=1928 B. 225; 159 I.C. 662=1935 C. 769. S. 178 contemplates documents which have a lawful owner other than the pledgor. 56 C. 367=119 I. C. 23=1929 C. 497. S. 178 has been enacted in order to protect those persons who in good faith deal with persons whom they know to be mercantile agents, but of the details of whose agency they are not and cannot be expected to be aware. It is relied upon only in cases where the pledgee is aware that the pledgor is a mercantile agent. The agent referred to is an agent such as the pledgee might well suppose had power to pledge, but if the pledgee did not know him to be an agent at all he cannot have any reason to suppose that he had power to pledge. If he takes goods from a person of whom he knows nothing whatsoever and if it turns out that the person's pledging of the goods with him was a criminal offence and that the pledgor was a mercantile agent, then he can have no claim to retain the property. 176 I.C. 703=1938 Rang. 243. The words 'good faith' in S. 178, Contract Act, before its amendment bear the same meaning as is given in sub-S. (20) of S. 3 of General Clauses Act, though in terms that sub-section may not apply to any Act earlier in date than the General Clauses Act. The general rule of English law is also to the same effect. 182 I.C. 25=1938 Mad. 545. A Railway receipt for goods consigned is a

Explanation.—In this section, the expressions ‘mercantile agent’ and ‘documents of title’ shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930.

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document of title to goods. 40 B. 630=31 M.L.J. 541=43 I.A. 164 (P.C.). *See also* 30 I.C. 950=38 M. 664; 56 M. 177=143 I.C. 641=1933 M. 207=64 M.L.J. 320. Under S. 178, a pledgee may get a better title to the goods or documents pledged than the pledgor had himself provided the circumstances set out in the section are satisfied. The burden of proving the existence of those circumstances is upon the party setting up the validity of the pledge. 67 C.L.J. 276. In interpreting S. 178, Courts always drew a distinction between juridical possession and mere custody. In the new S. 178 the pledgee is only protected when the pledge is made by a mercantile agent. 1937 A.M.L.J. 73. If a person has authority to sell goods owned by another, he is a mercantile agent of that another and once it is proved that he has the consent of the owner to sell the goods, it is immaterial whether he has obtained that consent by fraud or not, and if he pledges the goods to a third party, the pledge under S. 178 is valid, and the right of the pledgee to hold the goods pledged to him is secure even though the mercantile agent is convicted under S. 420, Penal Code, for cheating. 1937 R. 146. A pledge of the documents, *e.g.*, railway receipts, amounts to a pledge of the goods. The pledge is not affected by the handing over of the railway receipts by the pledgee to the pledgor for the limited purpose of obtaining delivery of the goods. It is only for that purposes that the pledgor has the temporary possession, or rather custody, of the railway receipts, and the goods are in the possession, order and disposition of the pledgee. 152 I.C. 730=1934 P.C. 246=68 M.L.J. 260 (P.C.). The railway receipts are documents of title within S. 178 of the Act and the pledging of the railway receipts has the same effect as a pledging of the goods represented by them. Even if the documents of title (railway receipts) are regarded as merely tokens of an authority to receive possession, their transfer for value by way of security for advances must at least raise an equity as between transferor and transferee entitling the latter to an order restraining the former from himself claiming delivery of the relative goods without producing the receipts. 1934 P.C. 246=58 M. 181=68 M.L.J. 260 (P.C.). A railway receipt is a document of title and a pledge of the railway receipt operates as a pledge of the goods, though by the general law a pledge of documents is not *prima facie* deemed to be a pledge of the goods. The pledgee does not lose his right of property as pledgee by parting with the custody of the railway receipts or by entrusting

them to the pledgor or his agents or mandatories for the special purpose of convenient dealing with the goods by collecting them from the Port Trust and putting them into the pledgee's godowns. Such a procedure is the usual course of business and is either necessary or at least convenient for the conduct of the business. 65 I.A. 75=I.L.R. (1938) Mad. 360=42 C.W.N. 321=1938 P.C. 52=(1939) 1 M.L.J. 268 (P.C.). Insolvents depositing with Bank—Railway receipts with letter of hypothecation—Creation of equitable charge. 152 I.C. 730=11 O.W.N. 1511=1934 P.C. 246. *See also* 64 M.L.J. 320. “Goods” include shares in joint stock companies. 8 I.C. 193=12 Bom.L.R. 870. *See also* 30 A. 165. But *see* 37 I.C. 707; 24 C.L.J. 835. As to pledge of share certificates obtained by misrepresentation, *see* 92 I.C. 9=1925 B. 314. *See also* 7 R. 556=1929 R. 320; 9 R. 182=1931 R. 201. Wife delivering shares to husband for safe custody—Pledge of shares by husband with bank—Bank has no right to enforce charge against shares. *See* 1937 All. 255=1937 A.L.J. 150. Pledge by manager of firm—Conditions of validity, *see* 1931 L. 526. The word “person” is not restricted to mercantile agents. It includes the owner. 56 M. 177=1933 M. 207=64 M.L.J. 320; 58 M. 181=1934 P.C. 246 (P.C.). A broker in jewellery who is given the jewellery by their owners for sale is a mercantile agent. The fact that they were given to broker because of false representation is immaterial. Such broker can make a valid pledge provided the pawnee acts in good faith and had not at the time of the pledge notice that the pawnor had no authority to pledge. 151 I.C. 413=1934 R. 198. The unqualified words “a person who is in possession of any goods or of any bill of lading, *etc.*” are wide enough to cover the owner as well as any mercantile agent. 58 M. 181=68 M.L.J. 260=1934 P.C. 246 (P.C.). The words “a person who is in possession” as used in S. 178, before its amendment includes an owner as well as a mercantile agent and are not limited either to the latter or to persons other than the actual owner of the goods. 67 C.L.J. 276 (Case before amending Act of 1930). A pledgee of goods who without notice of the title of the real owner delivers goods to or to the order of depositor is not guilty of a conversion. 37 B. 122=40 I.A. 1=24 M.L.J. 176 (P.C.). Shipping—Issue of Bill of Lading to shipper named in Mate's receipts—Same done contrary to course of business—Liability of shipping company for damages for conversion. 53 C.L.J. 111=1931 C. 373. S. 179 does not limit the scope of S. 178 but saves a pledgee at least to the extent of the pledgor's own interest

178-A. When the pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or section 19-A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.

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notwithstanding the presence of invalidating conditions falling under one of the provisions to S. 178. 42 B. 205=40 I.C. 148. A party is bound by pledge of his goods by another who is in possession of them, where he not only approves the other's conduct but urges the other to pledge them. (*Ibid.*) Consignment of goods—Pledging receipt. Pledgee, if he acquires title—Fraud. 54 I. C. 224=23 C.W.N. 907. Fraud, meaning of. See 27 Bom.L.R. 514=1925 B. 314; 1938 Mad. 545; 1937 Sind 33. Pledge of goods—Pawnor being in possession—Third party's fraud—Right of prior hypothecatee. 60 C. 262. 'Possession' means "judicial possession". 1 R. 199=2 Bur.L.J. 241; 1923 S. 54; 50 I.C. 476=23 C.W.N. 352. See also 12 L. 304 and 33 Bom.L.R. 848=1937 A.M.L.J. 73. The word 'possession' as used in this section does not include the possession by a gratuitous bailee and so a pledge by him of the thing is invalid. The pledgee must return the thing so pledged, to the original depositor. 61 I.C. 305; 14 S. L.R. 175. What is contemplated in S. 178 is juridical possession as distinguished from bare custody. A gratuitous bailee who merely took the jewel from the owner merely for inspection and return, cannot be deemed to have been in possession of it within the meaning of S. 178 to enable him to make a valid pledge of it. Where therefore the jewel is obtained from the lawful owner by means of the offence of cheating, and the subsequent consent of the lawful owner to the pledgor's retention of the jewel as per the contract of sale on credit is also obtained by means of fraud amounting to cheating, the condition mentioned in proviso 2 to S. 178 not being satisfied, the pledge in favour of the pledgee is invalid. 1934 M. 132=66 M.L.J. 361. It is impossible even if it were permissible or desirable, to limit or restrict the natural meaning of the word 'possession' in Ss. 178 and 108 in any way which would be consistent with other sections of the Act, or could be based upon any clear, consistent and comprehensive principle. The extent of the sections should be limited only by giving to the word 'possession' its fullest and widest meaning, both natural or ordinary and technical or artificial, and including both actual possession and possession in law, subject to the provisos therein contained. Where there was a contract of sale of ready ascertained goods upon credit, and both the property in the goods and the right to possession passed

to the buyers at the date of the contract but the goods, part of which were paid for, remained in the possession of the sellers who pledged some of them to a third party, the pledgee having no notice of the buyer's interest in the goods. *Held*, that the pledge and even if there was a sale, the sale came within the scope of Ss. 178 and 108 respectively and as such passed a good title to the third party. 56 C. 367=1929 C. 497. See also 31 Bom.L.R. 414=118 I.C. 796; 1 R. 199. The assignment of the railway receipts has the effect of a pledge of the goods themselves; the effect of a pledge of the railway receipt as a document is to give to the pledgee as against either the insolvent or the Official Assignee the right to receive the goods from the carrier. 56 M. 177=1933 M. 207=64 M.L.J. 320. A pledgee from a hire purchaser acquires no good title to the goods pledged. 50 I.C. 476=23 C.W.N. 352. (12 B.L.R. 42, Foll.; 34 P.R. 1902, Dist.) Government securities cannot be pledged except by endorsement by the owner. 33 I.C. 891=22 C.W.N. 297. Agent disposing of sewing machine—Assistance of Criminal Court not to be given. 1 Bur.L.J. 45=1923 R. 68 (1). Requirements of the section—Juridical possession—Pledgee in possession—Suit by rightful owner—Limitation. 40 M. 678=30 M.L.J. 587. As to burden of proving circumstances making the pledge valid being on the person asserting them, see 67 C.L.J. 276. Fraudulent representation of pledgor—Pledgee induced to part with the articles in order to find purchaser—Articles used to effect fresh pledge—Rights of first pledgee not affected. 120 I.C. 911=7 R. 556=1929 R. 320. See also 60 C. 262=1933 C. 366; 1937 S. 33. Where, by way of security for the repayment of a debt, the goodwill and stock-in-trade of a business were mortgaged with power to the mortgagee to realise his dues by sale of the mortgaged properties and the mortgagee not having exercised his power of sale, the movables forming part of the stock-in-trade were again pledged with another person who secured possession, the pledge is valid and entitled to priority over the mortgage. 36 C.W.N. 263.

Secs. 178 and 178-A.—The reason for the insertion of these new sections has been explained as follows in the Statement of Objects and Reasons:—"The object of this Bill is to give effect to the recommendation of the Special Committee, appointed by the Government of India to examine and draft

Pledge where pawnor has only a limited interest.

179. Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

Suits by Bailees or Bailors against wrongdoers.

180. If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Apportionment of relief or compensation obtained by such suits.

181. Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

CHAPTER X.

AGENCY.

Appointment and Authority of Agents.

182. An "agent" is a person employed to do any act for another or to

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the Indian Sale of Goods Bill, that S. 178 should be amended so as to make it consistent with the amendment proposed by the Committee in S. 108. Both the sections are cognate and are based on the same principle; and there has been considerable conflict of decisions regarding their scope. The Special Committee has proposed to remove this conflict in S. 108 by restricting its provisions to sales by persons who are in possession of the subject-matter of the sale as mercantile agents only, and the present Bill amends S. 178 on the same lines."—(*Statement of Objects and Reasons*.) The following is the Report of the Select Committee on the Bill:—This Bill is supplementary to the Indian Sale of Goods Bill. On the lines of the amendment made in Cl. 27 of that Bill we have substituted the words "a mercantile agent" for the words "where an agent. . . . to security of goods". We have also substituted the words "documents of title to goods" for the words "bill of lading, dock order thereby represented". As the expressions "mercantile agent" and "documents of title" are not defined in the Indian Contract Act, 1872, in which this section will remain, we have added an Explanation stating that those expressions will have the meanings assigned to them in the Indian Sale of Goods Act, 1930. We have also inserted a new section as S. 178-A to provide for the case of a pledge by a person in possession under a voidable contract." *Jewels entrusted merely for safe custody cannot be subject of a valid pledge by the deposittee even in cases arising after the Contract (Amendment) Act of 1930.* 1942 M.W.N. 25=(1942) 1 M.L.J. 44. The plaintiff brought a suit for recovery of certain articles or their value, Rs. 60 on the ground that they belonged to her (plaintiff) and that the first defendant got possession of the articles by stealth. It was found that they had been pledged with the first defendant by the second defendant,

plaintiff's husband, but that the articles belonged to the plaintiffs. It was not shown that the second defendant had any authority from his wife, the plaintiff, to pledge the articles. Nor was he a mercantile agent. *Held*, that the first defendant could not claim to recover the amount due on the pledge from the plaintiff on the ground that she was a *bona fide* pledgee, and the pledge did not confer any right on her, and the plaintiff was therefore entitled to a decree. 45 Mys. H.C.R. 342=18 Mys.L.J. 457.

Secs. 178 and 179: RELATIVE SCOPE.—S. 179 is an enabling section and must be read with S. 178. 190 I.C. 790=1940 Sind 177.

Sec. 179.—*See* 42 B. 205. Where there was a contract of sale of goods on credit and the property in goods and rights to possession passed to the vendee but vendor retained possession and pledged the goods to a third party without notice of the vendee's interest in them. *Held*, that the pledgees obtained no right or interest under S. 179 (42 B. 205, not foll.). 56 C. 367=119 I.C. 23=1929 C. 497. *See also* 52 M. 465=30 L.W. 36=116 I.C. 827. Where there is a mortgage of movable property, and the movable property is allowed by the mortgagee to remain in possession of the mortgagor as ostensible owner, and the property is again mortgaged to a third party and sold, the first mortgagee cannot recover from the second mortgagee unless he can show that the second mortgagee had notice of the prior mortgage. S. 179, Contract Act, has no application to such a case. 190 I.C. 790=1940 Sind 177.

Sec. 180.—Under S. 180 either a bailor or bailee of a chattel may maintain an action in respect of it against a wrongdoer, the latter by virtue of possession, the former by virtue of his property. 43 C. 733=21 C.W.N. 632.

Sec. 182.—The Contract Act does not draw fine distinction between different classes of agents, but the Act is not exhaustive and so far as the law relating to agency is concerned

"Agent" and "principal" defined. represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal."

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it merely lays down general principles. 176 I.C. 675=1938 Nag. 254. Principal and agent—Relationship of. 63 I.C. 521=13 L.W. 537 (P.C.). Agency need not be created expressly by any written document and can be inferred from the circumstances and the conduct of the parties. 132 I.C. 43=1931 A.L.J. 225=1931 A. 372. *Per Pal, J.*—The definition of an agent in S. 182 of the Contract Act does not limit the employment of an agent to one by the principal only. It will include an employment by any authority authorised by law to make the employment. 73 C.L.J. 356=1941 Cal. 643. Definition of agent given in S. 182 is very wide and embraces a servant pure and simple. All the agents therefore cannot be placed in the same category. 176 I.C. 675=1938 Nag. 254. Relationship of principal and agent distinguished from that of sub-contractor. 130 I.C. 54=1930 L. 1062.

'PERSON'—INCLUDES JOINT HINDU FAMILY.—There is no doubt that the word 'person' used in S. 182 and other cognate sections of the Contract Act includes a joint Hindu family and therefore an agent can be employed on behalf of such family. 150 I.C. 151=1934 A.L.J. 453=1934 A. 553.

TESTS OF AGENCY.—See 12 C.W.N. 28. No consideration is required to support agency. 3 C. 300. Benamidar is not agent. 5 B.L.R. 237; nor committee of lunatic. 20 B. 61; nor guardian of minor. 20 B. 61; nor manager of joint Hindu family. 22 A. 307; 26 M. 544. Minor may be agent. 3 Bom.L.R. 624. Every act of an agent in the course of his employment on behalf of his principal and within the apparent scope of his authority, binds the principal unless the agent in fact is unauthorized to do that act and the person dealing with him has notice of the same. 24 I.C. 209. See also 43 C. 833=34 I.C. 807. The use of the word 'agent' in a general way, loosely without specifying the purpose of the agency does not help to determine whether a person is an agent. 21 I.C. 322=14 M.L.T. 249. Commission agents are agents within S. 182, but are not agents pure and simple. They are agents up to a point and to that extent they stand in a position of active confidence towards their principals, but beyond that they are not agents in the real sense of the term and the relationship between the parties from then on is one of debtor and creditor. 176 I.C. 675=1938 Nag. 254. Where a person receives goods from another as a commission agent and then sells them for him, he is an agent up to a certain point that is up to the date of the sale. Thereafter whether he still continues as an agent or the relationship is that of a debtor and creditor depends on whether the commission agent when he sells has authority to sell in his own name and whether he has authority in his own right to pass a valid title. If he has authority to sell and also authority to pass

a valid title in his own right he is acting as a principal *vis à vis* the purchasers and not merely as an agent and therefore from that point on, he is debtor of the erstwhile principal and not merely an agent. Whether this is so or not must depend on facts in each particular case. 176 I.C. 675=1938 Nag. 254. Unless authority to act is conferred and accepted, mere settlement of the terms of remuneration does not constitute a contract of agency. A commission agent is not in law, the agent of all persons and firms, whose business he occasionally transacts. 50 I.C. 146; 12 S.L.R. 93. The agency is only with reference to specific sales or purchases made under the directions of the principal. (*Ibid.*) In order to entitle a broker to his commission, he must prove either that the transaction has been completed or that, if it is not, the non-completion was due to default on the part of the principal. See 24 Bom.L.R. 847=1922 Bom. 433, and cases referred to therein. A broker is the agent of the person for whom he acts. Unlike the factor he is not entrusted with the custody and the apparent ownership of the goods, but he is merely to effect business on commission on the sale resulting from his efforts. Where the contract is not in writing, terms are to be inferred from conduct of the parties. 39 A. 81=36 I.C. 371. *Per Woodroffe, J.*—A broker is the agent of both parties and his contract is one of employment only so long as he adheres strictly to his position as a broker by confining himself to the business of negotiation. 42 C. 1050=19 C.W.N. 623. Broker—Liability of, in principal's contracts—Calcutta jute market—Custom of. 50 C. 12=1923 C. 419. Sub-broker receiving money from constituents and misappropriating—Payment to broker for other transactions—Suit for money. 25 Bom.L.R. 1014=48 B. 20. An Honorary Treasurer of a Subscription Committee is not its agent and not liable for gross negligence in not cashing a cheque passed by a donor. 36 A. 268=23 I.C. 600. The definition of an agent in S. 182, is wide enough and covers a person employed to sell unredeemed articles from a pawn shop on behalf of the employer. Such a person although a servant or a shop assistant, is an agent of the employer in the matter of selling such goods. 176 I.C. 703=39 Cr.L.J. 784=1938 Rang. 243. *Del credere* agents—Certified brokers of the Bombay Native Stock and Share Brokers' Association are such. 23 Bom.L.R. 1144=46 B. 489. *Pakka adatia*—Position of. 52 I.C. 519=21 Bom.L.R. 783; 19 I.C. 29; 15 Bom.L.R. 85. A *pakka adatia* is a speculative transaction and not a wager. The rights and liabilities of *pakka adatia* are well settled and he has a right to be indemnified by the seller. 42 B. 373=34 M.L.J. 305=45 I.A. 29 (P.C.). Agency *pakka adatia*—Relation which constituents. 37 B. 347=17 I.C. 152.

183. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ
 Who may employ agent. an agent.
184. As between the principal and third persons any person may become
 Who may be an agent. an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.
185. No consideration is necessary to create an
 Consideration not necessary. agency.
186. The authority of an agent may be expressed
 Agent's authority may be expressed or implied. or implied.
187. An authority is said to be express when it is given by words spoken or

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According to the ordinary practice in Bombay the *pakka adatias* would be entitled to call for margin if the raise or fall in the market justified such a demand. But the onus lies on the *pakka adatia* to establish the circumstances which justify the exercise of such powers. 29 Bom.L.R. 147=1927 B. 125 [28 Bom.L.R. 1488 (P.C.), Rel. on.] Ajahat gumasta collecting fees for Deshmukh of village—Agent not trustee of Deshmukh. See 41 Bom.L.R. 215=I.L.R. (1939) Bom. 154=1939 Bom. 126. A broker can claim commission if he brings about a sale, but he can also claim it if he brings about the transaction to the stage of an agreement to sell and then the transaction fails because the purchaser draws back. 60 I.C. 727. Broker—Contract falling through owing to default of principal—Right to brokerage. 12 Bur.L.T. 68=51 I.C. 582. Broker—Commission—Right to—Completion of transaction—Failure of one of the parties to complete the contract—Effect of. 24 Bom.L.R. 847=1922 B. 433. See also 1935 Pesh. 56; 56 C. 262=33 C. W.N. 179; 1930 A. 545. A partner who does an act for the firm is an agent for the firm, but he is not an agent for the partners. 10 I.C. 250=153 P.L.R. 1911. A person contracting to purchase property and promising damages on default is not an agent of the promisee. 50 I.C. 69=9 L.W. 312. There is nothing in the Contract Act to prevent a servant from being an agent if he is employed as such. 123 I.C. 228=1930 S. 142. Commission—Suit for—Limitation. 39 A. 81=36 I.C. 371; 73 I.C. 143=1923 L. 473. The question of agency is a mixed question of fact and law very largely depending on the evidence in the particular case. 1930 M.W. N. 729.

Sec. 183.—Cf. S. 11, *supra*. See 29 C.W. N. 422=86 I.C. 571=1925 C. 609.

Sec. 184.—Under S. 184 a minor can act as an agent of a firm and any contracts entered into by such a minor as an agent are binding on the firm. And they are equally binding on the minor if he did not give notice of the repudiation within a reasonable time after attaining majority. 45 I.C. 17=17 P.L.R. 1918. See also 3 Bom.L.R. 627. A minor agent is not responsible for loss arising from

the negligence of his guardian. An infant cannot be made liable for a tort arising out of contract where the contract is not binding upon him. 43 I.C. 923.

Sec. 185.—No consideration is necessary to create an agency. 114 I.C. 321=1929 L. 182.

Sec. 186: SCOPE AND APPLICABILITY OF SEC.—Under S. 186, Contract Act, the authority of an agent may be express or implied. Where it is not expressed, the question whether the agent had or had not authority to act in a particular matter on behalf of the principal has to be decided according to the circumstances of each case. 11 O.W.N. 880. If an agent endowed with very wide powers and authorized to buy and sell property, to deal with Government and to pay revenue, contracts a loan on behalf of his principal, which the latter did not repudiate when it came to his knowledge, the principal is bound by the debt and must pay it. 39 I.C. 225=1 Pat.L.W. 346. The binding character of a contract entered into by an agent depends on the measure of the authority that may be implied by the facts and circumstances of the case. It is not enough to show that the agent was generally permitted to carry on the management of the debutter properties on behalf of his mother, the shebait, who never interfered with the acts of her son in whom she had full confidence. Where the question is if a contract to lease debutter properties is binding, it must be shown that the contract is one of a class of acts delegated to the agent or that the particular contract in question was authorized either expressly or impliedly by the shebait. 36 C.W.N. 1108. If a married couple live together and the husband acts alone in dealing with joint property, he acts as the wife's agent in respect of her interest as well as his own, but the presumption is rebuttable. 10 I.C. 919=4 Bur. L.T. 115. (3 L.B.R. 66, Rel.) What constitutes agency. See 1925 C. 541.

Secs. 186 and 187.—155 I.C. 180=1935 O. W.N. 490=1935 O. 305.

Sec. 187.—Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it must be shown on a fair

Definitions of express and written. An authority is said to be implied when it is implied authority, to be informed from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Illustration.

A owns a shop in Serampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

188. An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.
Extent of agent's authority.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.

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construction of the whole instrument, that the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. 43 C. 527=43 I.A. 48=30 M.L.J. 232 (P.C.) [(1893) A.C. 170, Foll.] See also 24 B. 360; 21 M. 274. The mere fact that the principal did not receive the benefit of the transaction does not rid him of liability. In the case of a Nattukottai Chetti money-lending business an agent who has authority to borrow and to lend to others, has an implied authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to the customers of the firm. 43 C. 527 (P.C.), *supra*. Husband when liable for wife's debts. 9 A. 147. A toll contractor of a Municipality though he is referred to as a "lessee" of tolls under the Municipal Regulation, collects the tolls for and on behalf of the Municipality under the express authority vested in him by the Municipality, and is an agent of the Municipality within the meaning of S. 182 of the Contract Act. The Municipality can therefore be sued by a person from whom tolls have been wrongfully and unauthorisedly levied and recovered through the contractor. It cannot be contended in such a case that there is no privity of contract between the Municipality and the person from whom the tolls are levied. 15 Mys.L.J. 489. A person claiming against the principal for an act of his agent must show that the act done was within the scope of the authority or ostensible authority held or exercised by the agent and this can be shown by practice as well as by a written instrument. In a suit for the price of goods supplied on credit to the defendant through his servants, the plaintiff, therefore, must show in the absence of express written authority a course of dealing by which it was a practice for goods to be supplied to him through his servants in the course of their employment. If he shows such a practice, it will be no answer for the defendant to say that particular items of goods did not reach him once the plaintiff has established that they were supplied to his servants for his use. 1937 P.W.N. 36=1937 Pat. 526. Where

in a communal trouble an agreement was arrived at and it was signed by certain representatives of both the factions and subsequently the members of the community also acted upon the same, *held*, that the representative character of the signatories could be inferred. 27 A.L.J. 1083=1929 A. 519.

Secs. 187 and 188.—Where the agent's authority is defined in writing, it is doubtful if S. 187 of the Contract Act can be relied upon for it is well settled that where an Act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. The limits of necessary implication are indicated by S. 188 of the Contract Act. Where there is no justification for the borrowing by the agent on the ground of necessity or with reference to the usual course of business the principal cannot be held liable on the footing that in borrowing the agent has acted within the limits of his authority. But there is a well-established rule of equity based on the theory of unjust enrichment, namely, where by any wrongful or unauthorized act of the agent the money or property of a third person comes to the hands of the principal or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or the value of the property. The absence of other funds in the hands of the agent at the time of the borrowing is not a necessary condition of the creditor's right to relief against the principal. This equitable rule is not excluded by the Contract Act. 1938 Mad. 966=(1938) 2 M.L.J. 688. Contract by power of attorney agent in respect of property of principal and for consideration benefiting principal—Deed reciting that it is executed as authorised agent of another—Signature not as agent—No personal liability. 46 L.W. 851.

Sec. 188: AUTHORITY OF AGENT.—Authority of Agent—Construction of. 39 C. 568=13 I.C. 705=16 C.W.N. 593. (On appeal

Illustrations.

(a) *A* is employed by *B*, residing in London, to recover at Bombay a debt due to *B*. *A* may adopt any legal process necessary for the purpose of recovering the debt and may give a valid discharge for the same.

(b) *A* constitutes *B* his agent to carry on his business of a ship builder. *B* may purchase timber and other materials, and hire workmen, for the purposes of carrying on the business.

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from 10 I.C. 895). Authority of agent in money-lending business to purchase shares. 1927 M.W.N. 118; to raise loans for purposes of principal's business. 2 Luck. 253=1927 O. 44; to sue on behalf of undisclosed principal. 99 I.C. 687=52 M.L.J. 33=1927 M. 204. Authority of agent—Power-of-attorney—Construction of—Limitation of authority. 2 P.L.J. 600=41 I.C. 175. *See also* 7 Bur.L.T. 126=23 I.C. 516. One of the Articles of Association of a Company provided that the Board of Directors could not delegate their power to borrow. Another Article gave extensive powers to the managing agent to conduct and manage the business and affairs of the Company and enter into contracts and do things necessary or desirable in the management of the affairs of the Company. The agent effected a mortgage in order to meet the urgent requirements of the Company. Subsequently the reports of the Directors showed the loan as a secured debt. *Held*, (1) that the articles should be read together and that the power of entering into contracts did not include a power to contract loan, (2) that the managing Agent had, however, under the general law, the power to contract the loan in question being faced with an emergency, and (3) that the Directors had ratified the loan by means of their report and that the Company could not escape liability on the ground that their managing Agent had no authority to raise the loan. 134 I.C. 244=1931 A.L.J. 1038. Authority of agent—Principal and agent—Acts of agent beyond scope—When principal liable—Third parties. 30 I.C. 968=10 S.L.R. 72. *See also* 134 I.C. 244=1931 A.L.J. 1038. An agent not authorized to compromise cannot bind his principal by any compromise effected by him. 96 P.R. 1914=24 I.C. 630. An agent authorized by a power-of-attorney only to collect debts has no authority to realize their value, or any part of it by selling them. 35 M.L.J. 581=41 M. 923. If the power-of-attorney does not authorize the agent to carry on a business except with limitations, any act done by him in excess of such power will not bind the principal. 41 I.C. 224=6 L.W. 417. The plaintiff from whom money was borrowed by the defendant's agent without authority, is entitled to receive his amount to the extent of the benefit received by the principal. 32 I.C. 763=1915 M.W.N. 761. An agreement by an agent to pay reasonable interest for goods purchased on credit is binding on principal. 26 I.C. 365. (1 C.L.J. 199, Foll.) An agent who has power to sign his name does not necessarily mean that he has full powers necessary for a disposition of property. 10 M.L.T. 304=12 I.C. 393.

POWER OF ATTORNEY.—A power of attor-

ney given to an agent to collect outstandings includes also a power to collect debts due under decrees, even if they were obtained before the date of the power. 15 M.L.T. 337=23 I.C. 99. Power-of-attorney should be construed strictly. 23 M.L.J. 595=17 I.C. 139. A power enabling an agent to carry on the business of a firm does not entitle him to sue for dissolution of the firm. A suit so instituted should not be dismissed but should be allowed to be amended by requiring the principal himself to sign the plaint. 25 I.C. 140=7 Bur.L.T. 202.

CONNECTED ACTS.—An agent authorized to receive money for the principal may be presumed to be also authorized to do every lawful and necessary thing connected with it. 37 I.C. 442=3 O.L.J. 623 [43 C. 527 (P.C.) Ref.]. Where a person has been authorised to receive refund of octroi duty from the Municipal Board cannot be deemed to have also the authority to adopt any legal process for recovering the amount. A right to receive is different from a right to recover. 1939 A.L.J. 897=1939 A.W.R. (H.C.) 631=1939 All. 623.

INSURANCE.—A commission agent purchasing goods insuring them under instructions from the merchant, has an insurable interest in the goods and can recover the money under the policy in case of loss. 36 B. 484=12 I.C. 897. It is quite possible that an agent might make himself responsible for loss or damage to goods belonging to his principal. There is nothing in law which would prevent an agent undertaking to be an insurer of goods consigned to his care provided that there is consideration for that insurance and this consideration would have to be something outside the terms of the employment at the ordinary rate. 1930 R. 332 (2).

LANDLORD AND AGENT.—Where the agent of a landlord has no authority to create pecuniary liability on his behalf, no personal decree could be passed against the landlord. 16 I.C. 990. The question of the authority of an agent to bind his landlord has to be decided on the facts of each case. 35 I.C. 81.

POST OFFICE.—Where the person entitled to payment, requests the payment by means of a money order, the Post Office is the agent of that person and not of the sender. (Cf.) Postal rules which allow the sender of a money order or other article to recall it before actual delivery. 33 I.C. 723=14 A.L.J. 236.

ILLEGAL OR VOID CONTRACT.—Agent receiving money on principal's behalf under illegal or void contract is liable to account to the principal; also an agent making a profit without making full disclosure to his principal is liable to account to him for the same. 19 I.C. 161=15 C.W.N. 408.

189. An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Agent's authority in an emergency.

Illustrations.

(a) An agent for sale may have goods repaired if it be necessary.

(b) A consigns provisions to B at Calcutta, with directions to send them immediately to C at Cuttack. B may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

Sub-Agents.

190. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or from the nature of the agency, a sub-agent must, be employed.

"Sub-agent" defined.

191. A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

192. Where a sub-agent is properly appointed the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts as if he were an agent originally appointed by the principal.

Representation of principal by sub-agent properly appointed.

Agent's responsibility for sub-agents.

The agent is responsible to the principal for the acts of the sub-agent :

Sub-agent's responsibility.

The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

193. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons ; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

Agent's responsibility for sub-agent appointed without authority.

194. Where an agent, holding an express or implied authority to name another

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Sec. 189.—S. 189 is meant to protect the agent, if for the purposes of safeguarding the interests of his principal, the agent does certain acts without any express instructions from the principal. In such a case the agent is exempted from all liability, if his acts are the acts of a man of ordinary prudence and are performed at the time of an emergency. The agents are ordinarily expected to carry out the instructions of their principals in all respects. If, however, the goods are perishable or perishing, the agent is entitled to deviate from his instructions as to the time or price at which they are to be sold. If the principal thereafter sues the agent for damages as a result of his selling the goods without the principal's instructions, the agent is protected under S. 189 of the Act. 42 P. L.R. 393=1940 Lah. 412. Power to enter into forward contracts. See 10 I.C. 895. (On appeal, 13 I.C. 705=39 C. 568.)

Sec. 190.—As to appointment of sub-agent, see 1 Bur.L.J. 219=1923 R. 84.

Sec. 192.—Agent liable to the principal for the sub-agent's fraud. 43 I.C. 699=19 Bom. L.R. 948. See also 1930 P.C. 274 (P.C.). A sub-agent is not liable to account to the principal except in case of fraud or wilful wrong. I.L.R. (1937) 2 Cal. 124. There is no privity of contract between the principal and the sub-agent under S. 192. 26 I.C. 822; 27 M. L.J. 501. Every agent who employs a sub-agent is liable to the principal for money received by the sub-agent to the principal's use, and is responsible to the principal for the negligence and other breaches of duty of the sub-agent in the course of his employment. [Mackercy v. Ramsays, (1843) 9 C. & F. 818 and Meyerstein v. Eastern Agency Co., (1885) 1 T.L.R. 595, Rel. on.] 1930 P.C. 274. See also 1930 S. 247.

Sec. 193.—See 19 Bom.L.R. 948; 17 B. 307.

Sec. 194.—Generally an agent cannot without authority from his principal devolve upon another obligations to the principal which he has himself undertaken to fulfil. But in

Relation between principal and person duly appointed by agent to act in business of agency.

person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations.

(a) *A* directs *B*, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. *B* names *C*, an auctioneer, to conduct the sale. *C* is not a sub-agent, but is *A*'s agent for the conduct of the sale.

(b) *A* authorizes *B*, a merchant in Calcutta, to recover the moneys due to *A* from *C* and Co., *B* instructs *D*, a solicitor, to take legal proceedings against *C* & Co. for the recovery of the money. *D* is not a sub-agent but is solicitor for *A*.

195. In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and if he does this he is not responsible to the principal for the acts or negligence of the agent so selected.

Agent's duty in naming such person.

Illustrations.

(a) *A* instructs *B*, a merchant, to buy a ship for him. *B* employs a ship surveyor of good reputation to choose a ship for *A*. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. *B* is not, but the surveyor is, responsible to *A*.

(b) *A* consigns goods to *B*, a merchant, for sale. *B*, in due course, employs an auctioneer in good credit to sell the goods of *A*, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. *B* is not responsible to *A* for the proceeds.

Ratification.

Right of person as to acts done for him without his authority. Effect of ratification.

196. Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

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special circumstances it is permissible for the agent to appoint a substitute who would be responsible to the principal in the same way as the agent himself. Where a banking concern is appointed an agent with very wide powers in the matter of letting out certain buildings in the city, it can well be inferred that the concern had authority to appoint another to act for the principal and the person so appointed is accountable to the principal. 1939 A.L.J. 37=1939 All. 188. In spite of the existence of S. 194 of the Contract Act, branch banks do not recognise nor carry out instructions given by clients of other branches unless they have been definitely instructed to do so; as an act of courtesy, one branch may try to oblige the client of another branch by making enquiries, etc. For practical purposes and so far as their obligations are concerned the branches do not recognise any liability whatsoever to carry out instructions from the clients of other branches unless these be properly conveyed through the branch bank with which the client deals. This is a universal practice and the Court should take cognisance of it. 102 I.C. 788=1927 L. 562 (2). On this section, see also 120 I.C. 284=1929 L. 536; 121 I.C. 636=1930 C. 10; 14 P. 560.

Secs. 194 and 195.—Appointment of sub-agent—Principal nominating person and having control—Liability of agent when no discretion is given to him in nominating sub-

agent. 1930 C. 10=56 C. 686.

Sec. 196.—Effective ratification necessarily involves knowledge of all the material facts on the part of him who ratifies. 1930 P.C. 278 (P.C.). S. 196 refers to contracts which have been entered into by persons on behalf of others without their knowledge or authority but not to contracts which have been expressly forbidden by law. An option of ratification under the section can be held to be capable of being exercised within a reasonable time of the act purported to be ratified and not after the expiry of the period for which the option was open or long after the expiry of the period, if any, for which the contract was to relate. I.L.R. (1939) Mad. 928=50 L.W. 440=1939 Mad. 957. The right of a principal to ratify an unauthorised act of his agent under S. 196 is confined to cases where the agent purports to act on the principal's behalf and not where the agent acts on his own behalf without authority, or contrary to principal's directions and on behalf of the principal. 30 M.L.J. 497=34 I.C. 760. See also 68 I.C. 787=1923 L. 100; 33 P.R. 1913=16 I.C. 950; 28 I.C. 135=28 M.L.J. 199 [35 M. 177; (1910) A.C. 230, Foll.] See also 6 B. 463; 35 I.A. 48; 3 A. 832; 7 M.L.A. 476; 48 I. C. 959. To constitute a binding adoption of acts *a priori* unauthorised, these conditions must exist: (1) the acts must have been done for and in the name of the supposed principal and (2) there must be a full knowledge

Ratification may be expressed or implied.

197. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Illustrations.

(a) A, without authority, buys goods for B. Afterwards B sells them to C on his own account; B's conduct implies a ratification of the purchase made for him by A.

(b) A, without B's authority, lends B's money to C. Afterwards B accepts interests on the money from C. B's conduct implies a ratification of the loan.

Knowledge requisite for valid ratification.

198. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

Effect of ratifying unauthorised act forming part of a transaction.

199. A person ratifying any unauthorised act done on his behalf ratifies the whole of the transaction of which such act formed a part.

200. An act done by one person on behalf of another, without such other

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of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were. Ratification relates back to the time of inception of the transaction and has a complete retroactive efficacy. 63 C.L.J. 86=1936 C. 87. Guardian's lease—Ratification, receipt of rent whether amounts to. See 46 C.L.J. 441=103 I.C. 522=1927 C. 796. There can be no ratification of a void transaction. 9 M.L.J. 104; 100 I.C. 839=1927 N. 214; 34 C.W.N. 135=1929 C. 612. A mortgage executed by a general agent holding a power-of-attorney, which did not authorize to execute mortgages is operative if acted upon, and ratified by the principal and cannot be treated as being void *ab initio*. 19 A.L.J. 827=44 A. 77. Contracts made by agents of corporations how far binding—Doctrine of part-performance when applies. 23 C.L.J. 26=20 C.W.N. 370=43 C. 790. A principal cannot ratify a transaction in part and repudiate it in part. Before a principal is bound by ratification it must be proved he had knowledge of all essential facts of the transaction. 25 I.C. 274=19 C.W.N. 56. The question of the gumastah's power to bind his landlord is one which must be decided on the particular facts of each case. 10 I.C. 456=15 C.W.N. 953. Where the unauthorized act of the agent is ratified by the principal the ratification takes effect retrospectively so as to validate the transaction originally entered into. 8 Mys.L.J. 240.

Sec. 197.—Ratification implies an intention to ratify on the part of the principal; and any act of his can be relied upon as amounting to ratification, only if done after he had full knowledge of the material facts ratified. Thus what the principal says under a mistaken impression cannot amount to ratification. 102 I.C. 561=1927 M. 478; 1930 P.C. 278=60 M.L.J. 149 (P.C.). See also 155 I.C. 180=1935 O.W.N. 490=1935 O. 305. Ratification cannot be inferred from a mere omission to repudiate in terms an unauthorized transaction. 52 I.C. 414=10 L.W. 33. See also 24 C. 469. As to where principal's ratification may be presumed where the

agent exceeds his authority and embarks on unauthorized transactions, see 9 L.W. 251=49 I.C. 758. Where an agent contrary to instructions makes advances against security the principal may realize the security and hold the agent liable for the balance and such intermeddling does not amount to ratification. 9 L.W. 251. The application of the principles governing the relationship of English agents to their principals should not be extended to Chetty's agents in India whose position approximates to that of a trustee. 49 I.C. 758=25 M.L.T. 286=1919 M.W.N. 72. Ratification of an act in excess of authority on the agent's part by principal may be inferred from his mere silence or acquiescence. 31 I.C. 216=29 M.L.J. 55; 28 M.L.J. 199. Act of Nattukottai Chetti agent in excess of his authority—Acts of the principal to mitigate the loss—Effect of section. 1927 M. W.N. 118=102 I.C. 561=1927 M. 478. Ratification of an unauthorized act of an agent is complete only when the fact is communicated to the other party to the contract. Till then the principal has an option to withdraw. 38 M. 997=14 M.L.T. 454. Acts relied on inconsistent with denial of liability may give rise to inference of ratification. 48 I.C. 959. A mere *ex post facto* submission to what has taken place, is no ratification of it. 7 O.L.J. 429=58 I.C. 165.

Sec. 198.—As to the applicability of the doctrine of ratification, see 42 C.W.N. 8=1937 P.C. 296; 1938 Nag. 482; 1941 Mad. 6. Mortgage of movables—Object of the sections and the effect of parol mortgage. 37 I.C. 231=18 Bom.L.R. 587.

Sec. 199.—In spite of an agent's liability to render all the accounts of all his transactions to the principal, the principal cannot see him on one of his several transactions without adjusting all the rights and liabilities of the parties in others. 40 C. 335=17 C.W.N. 67.

Sec. 200.—The provisions of the Contract Act relating to agency are not meant to be exhaustive. Neither S. 200 nor the other provisions of the Act relating to ratification affect the general principle of the law of agency that the general rule as to ratification would not apply when it would affect the rights of other parties. A ratification

Ratification of unauthorised act cannot injure third person.

person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

illustrations.

(a) *A*, not being authorized thereto by *B*, demands on behalf of *B*, the delivery of a chattel, the property of *B*, from *C*, who is in possession of it. This demand cannot be ratified by *B*, so as to make *C* liable for damages for his refusal to deliver.

(b) *A* holds a lease from *B*, terminable on three months' notice. *C*, an unauthorized person, gives notice of termination to *A*. The notice cannot be ratified by *B*, so as to be binding on *A*.

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does not relate back when persons other than the contracting party have acquired interests prior to ratification. 1941 Mad. 6=51 L.W. 453=(1940) 2 M.L.J. 726. A notice to quit given by one of two joint Receivers on behalf of both without the authority of the other is not valid and cannot be rendered so by subsequent ratification by the other Receiver. 34 I.C. 221=23 C.L.J. 453. Where the only objection to the grant of a melcharth is that it was granted without proper authority, it can be subsequently ratified by the person who has power to grant it. 73 I.C. 376; 1924 M. 245. See also 27 B. 515.

Sec. 201.—In the case of an employment of an under-broker by broker for a fixed term, if the services of broker are dispensed with in the interval, the dependent contract of under-brokerage is also dissolved and the under-broker is not entitled to sue the broker for damages for wrongful dismissal unless the broker had brought about the termination of the head agency purposely. 47 C. 290=46 I.A. 314=24 C.W.N. 577 (P.C.). There is termination of agency after the death of the principal and a suit against agent for accounts must be brought within 3 years under Art. 89, Limitation Act. 26 C. W.N. 320=65 I.C. 219=1922 C. 53. Principal and Agent—Agent of joint coparceners—Effect of death of one. 41 I.C. 288=21 C.W.N. 620. See also 38 I.C. 278=20 C.W.N. 708; 16 I.C. 852=17 C.L.J. 201. Where one of two joint agents dies, upon his death, the agency terminates, only so far as he is concerned, but continues as regards the surviving agent. 38 I.C. 278=20 C.W.N. 708. See also 41 I.C. 288=21 C.W.N. 620; 16 I.C. 852=17 C.L.J. 201. Where an agency has been created by two principals, the death of one of them terminates the agency merely as regards himself but does not necessarily operate as such also as regards his joint principal. The true rule, is that in each case the Court must determine the true intention of the parties to the contract from the terms thereof and from the surrounding circumstances. 1937 Nag. 314. Where there are two or more principals and they are joint and several if one of them dies the agency terminates only as regards the representatives of the deceased principal, but it continues as regards the surviving principal. So the period of limitation for the suit against agent for rendition of accounts does not begin to run as against the surviving principal from the death of the deceased principal,

41 C.W.N. 27=1936 C. 650. Agency terminated by fulfilment of instructions. 79 P. R. 1915=31 I.C. 215. As to what constitutes completion of business, see also 12 A. 541; 26 C. 715; 7 B. 518 (business of pleader). Question of termination of agency is one of fact. The usage among money-lending Nattukottai Chetties and the terms of the contract between the parties can be admitted to decide the question. 31 M.L.J. 687=36 I. C. 812. An agency will not terminate on the expiry of the period contracted for between the principal and agent, if the agent is allowed to continue as agent. No fresh agency is created but the old agency is continued. 31 M.L.J. 685=56 I.C. 804. An agency terminates when the agent hands over charge to another in obedience to a telegram from his principal revoking his authority but his liability in respect of acts done as agent continues. 39 M. 376=28 M.L.J. 140. Where there is no revocation of authority or any renunciation of the business of the agency by the agent there is no termination of the agency. 132 I.C. 43=1931 A.L. J. 225=1931 A. 372. On this point, see also 39 M. 693=31 I.C. 583=29 M.L.J. 788. Imperfect partition of village—Lambardar's powers whether affected. 19 I.C. 549=9 N.L. R. 46. Mortgagee put into possession so as to appropriate profits towards interest—Power to resume possession. 12 Bur.L.T. 46=47 I. C. 133=9 L.B.R. 172. On this section, see also 20 M. 97; 5 B. 253. When once the Court takes charge of the property in a suit by the appointment of a Receiver or otherwise, rights of management or service which other persons may possess by virtue of any contract with the original owners will cease. But this is not an absolute rule of law but will depend upon the circumstances of each case. Where the agent of the original owner is appointed as the receiver and he works as an agent of his master notwithstanding his appointment as receiver, his agency does not cease. 1936 M.W.N. 932=1936 M. 980. Where three persons who are the partners of a firm execute a power-of-attorney in favour of another constituting the latter the agent of the firm and giving him power to take any legal action or proceeding in connection with the firm and to sign any plaint, etc., on behalf of the firm, the fact that one of the partners subsequently becomes an insolvent does not have the effect of terminating the agency so created. No such intention can be read into the document. I.L.R. (1937) N. 28.

Revocation of Authority.

201. An agency is terminated by the principal revoking his authority ; or
 Termination of agency. by the agent renouncing the business of the agency ;
 or by the business of the agency being completed ; or
 by either the principal or agent dying or becoming of unsound mind ; or by the
 principal being adjudicated an insolvent under the provisions of any Act for the time
 being in force for the relief of insolvent debtors.

202. Where the agent has himself an interest in the property which forms
 Termination of agency, the subject-matter of the agency, the agency, cannot,
 where agent has an interest in in the absence of an express contract, be terminated to
 subject-matter. the prejudice of such interest.

Illustrations.

(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price, the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

203. The principal may, save as is otherwise provided by the last preceding
 When principal may revoke section, revoke the authority given to his agent at any
 agent's authority. time before the authority has been exercised so as to
 bind the principal.

204. The principal cannot revoke the authority given to his agent after the
 Revocation where authority authority has been partly exercised so far as regards
 has been partly exercised. such acts and obligations as arise from acts already done
 in the agency.

Illustrations.

(a) A authorizes B to buy 1000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

(b) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in A's name and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

205. Where there is an express or implied contract that the agency should be

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Secs. 201 and 202.—Applicability—Hindu reversioners—Document by, in favour of stranger authorising him to file a suit for possession of estate and to conduct it—Provision for division of estate between them and stranger after recovery in suit in case of success—Death of one reversioner—Effect—Suit by stranger on behalf of all not maintainable—Agency not coupled with interest—Right transferred is mere right to suit, which is inoperative and invalid. 47 L. W. 492=1938 Mad. 542=(1938) 1 M.L.J. 610.

Sec. 202: "INTEREST"—MEANING.—An agent who is entrusted with goods for sale and entitled to keep for himself as remuneration an excess of the purchase-money over specified rates has not got such an interest as is contemplated by S. 202. 136 I.C. 878=1932 N. 34. Agency created by an ordinary power-of-attorney for the management of an endowment can be revoked even though the endowment is made for the spiritual benefit of the person creating the endowment and the members of the family including the agent, for such spiritual benefit cannot amount to an interest within the meaning of this section. 121 I.C. 598=1930 M.

231. A junior member of Malabar Tarwad is entitled to be maintained out of Tarwad property and so one interested in the rents due to the Tarwad. If he has been given a power-of-attorney to collect the rents his interest in the property being antecedent to his authority, it is "an authority coupled with interest" the termination of which, to the prejudice of the interest, is illegal. (5 C. 895, Ref.) 34 L.W. 786=61 M.L.J. 852. Power-of-attorney executed by pensioner in favour of creditor—Authority to agent to draw out pension and to appropriate part towards debt—Agency one complied with interest not revocable. See 6 Mys.L.J. 101=42 Mys.H.C.R. 715.

Sec. 203.—Principal and agent—Authority conferred by two or more persons jointly—Revocation by one—Legality. 22 I.C. 90=18 C.L.J. 621. On this section, see also 24 B. 403; 17 B. 542.

Sec. 204.—See 112 I.C. 486.

Sec. 205.—Suit for damages for revocation of agency by principal—Damage. 15 S.L.R. 140=1922 S. 25. See also 5 B. 253. An agreement to serve as an agent may be rescinded like any other agreement and an agent is liable for compensation if he renounces the agency without sufficient cause,

Compensation for revocation by principal, or renunciation by agent.

206. Reasonable notice

Notice of revocation or renunciation.

Revocation and renunciation may be expressed or implied.

continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

207. Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Illustration.

A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

When termination of agent's authority takes effect as to agent, and as to third persons.

208. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or so far as regards third persons, before it becomes known to them.

Illustrations.

(a) *A directs B to sell goods for him, and agrees to give B five per cent. commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A, and B is entitled to five rupees as to his commission.*

(b) *A, at Madras, by letter directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B, the money, with which B absconds. C's payment is good as against A.*

(c) *A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.*

209. When an agency is terminated by the principal dying or becoming of

Agent's duty on termination of agency by principal's death or insanity.

unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interest entrusted to him.

210. The termination of the authority of an agent causes the termination

Termination of sub-agent's authority.

(subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

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within the specified period when the agency is to last for any particular period. 31 I.C. 450=9 S.L.R. 77. On this section, see also 119 I.C. 837=1929 A. 87.

Sec. 206.—What S. 206 means is that when there is not express or implied contract that the agency should continue for any fixed period, reasonable notice must be given of the revocation or renunciation of the agency, etc. 58 C. 1153=35 C.W.N. 361=1931 C. 676. Renunciation of agency occurs, when agent abandons his employment or sets up adverse title. 30 C. 609. See also 15 C. 692.

Sec. 208.—If the authority of an agent to admit execution of a document is revoked before registration, but such revocation is not known either to the grantee of the document or to the registering officer the document is not invalidated, although it is regis-

tered by the agent after the revocation of his authority. (30 C. 265, Foll.); 151 I.C. 173=1934 R. 104. Where a Burmese Buddhist wife admits that her husband acted as her agent in the first of a series of transactions it is not open to her to assert, in absence of evidence to the contrary, that did he not act as her agent in subsequent transactions unless his authority was revoked expressly to the knowledge of the other parties to the transaction. 1934 R. 341; 35 B. 302.

Sec. 209.—Even after the death of the principal, the agent can enter into transactions necessary to protect the interest of the heirs of the deceased and such authority continues still it is revoked by the heirs. 60 I.C. 739; 3 L.L.J. 265. As to survivorship of agency, see 30 C. 265; 17 C.L.J. 201.

Agent's Duty to Principal.

211. An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Agent's duty in conducting principal's business.

Illustrations.

(a) *A*, an agent engaged in carrying on for *B* a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. *A* must make good to *B*, the interest usually obtained by such investments.

(b) *B*, a broker, in whose business it is not the custom to sell on credit, sells goods of *A* on credit to *C*, whose credit at the time was very high. *C*, before payment, becomes insolvent. *B* must make good the loss to *A*.

212. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation

Skill and diligence required from agent.

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Sec. 211.—An agent who negligently omits to comply with the clear instructions of his principal must be regarded as guilty of gross negligence and whether he acts as gratuitous agent or not he is responsible to the principal for any loss caused by that negligence. 134 I.C. 577=1931 L. 302. Neglect of duty does not cease by repetition to be neglect of duty and if there be any doctrine of lulling to sleep, it must depend upon and can only be another way of expressing estoppel or ratification. 1930 P.C. 278. Principal and agent—Negligence—Claim of principal barred by limitation—Liability of agent. 52 I.C. 71. In the absence of custom of trade or express or implied authority of the principal payment to a broker is no payment to the principal. 40 I.C. 799. Principal and agent—Joint property of brothers—Some managing property—Relationship—Duty of manager. 29 I.C. 905. Where an agent has caused loss to the principal by not carrying out his directions, and by supplying goods contrary to his directions, the agent or his legal representatives are liable for the value of the goods so supplied. 66 I.C. 445. See also 134 I.C. 577=1931 L. 302. As to when nominal damages are awarded, see 20 B. 633. Commission agent transacting with himself under fictitious name—English and Indian law compared. 37 I.C. 241=10 S.L.R. 86. When a commission agent's transaction with himself involves no opposition between his own interests and his duty to principal, the transaction becomes binding on the principal, though the agent cannot claim commission in such a case. (*Ibid.*) Even under the Indian Law the usage to be binding requires specific pleading and strict proof of its existence. (*Ibid.*) As to effect of agent's infringement of principal's instructions, see 86 I.C. 567=1924 L. 332; 134 I.C. 577=1931 L. 302. Commission agent authorised

to sell goods at a particular place has no discretion to take the goods to another place for sale. 1927 M.W.N. 578. Right of principal over secret profit made by agent—Doctrine of tracing. 1927 M.W.N. 118. On this section, see also 1929 L. 591; 1929 L. 666; 112 I.C. 642.

UNDISCLOSED PRINCIPAL—RIGHT TO PROCEED AGAINST AGENT FOR DAMAGES.—Although S. 231 gives to an undisclosed principal an option to proceed for damages against the party contracting with the agent, there is nothing in that section which can be said to debar him from seeking his remedy against the agent under S. 211, if he can bring his case within the purview of that section. 61 C. 504=152 I.C. 33=1934 C. 721. Where in the case of a contract entered into by an agent for an undisclosed principal, the other contracting party refuses to perform the contract for the reason that the agent has failed to carry out the conditions of a separate contract made with him, S. 211 is not applicable, and the proper section under which the principal can proceed is under S. 231 for damages against the other contracting party. 61 C. 504.

SUB-AGENT.—If an agent appoints a sub-agent he is bound to exercise the same amount of discretion as an ordinary prudent man would exercise. 129 I.C. 287.

Sec. 212.—See 18 C. 574; 13 C.W.N. 59; 1925 M. 46=47 M.L.J. 312; 43 C.L.J. 479=97 I.C. 200=1926 C. 988. Agent guilty of negligence must make compensation to principal for direct consequences of neglect. 120 I.C. 529=1929 L. 280. A commission agent who was authorized to realise amounts on behalf of his principal collected as much as he could from a merchant who had dealings with his principal and gave credit for the balance. The merchant became an insolvent subsequently. Held, that under the circumstances the agent was not negligent but that he had acted as

to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Illustrations.

(a) *A*, a merchant in Calcutta, has an agent, *B*, in London to whom a sum of money is paid on *A*'s account, with orders to remit. *B* retains the money for a considerable time. *A*, in consequence of not receiving the money, becomes insolvent. *B* is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss as e.g., by variation of rate of exchange—but not further.

(b) *A*, an agent for the sale of goods, having authority to sell on credit, sells to *B*, on credit, without making the proper and usual enquiries as to the solvency of *B*. *B* at the time of such sale, is insolvent. *A* must make compensation to his principal in respect of any loss thereby sustained.

(c) *A*, an insurance-broker, employed by *B* to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. *A* is bound to make good the loss to *B*.

(d) *A*, a merchant in England, directs *B*, his agent at Bombay, who accepts the agency to send him 100 bales of cotton by a certain ship. *B* having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. *B* is bound to make good to *A* the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

Agent's accounts.

213. An agent is bound to render proper accounts to his principal on demand.

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prudently and wisely on his principal's behalf as he would have done in his own case. 1933 L. 841=149 I.C. 688.

Sec. 213.—A principal is entitled to a final account between himself and the agent on the termination of the agency and the agent can rely upon casual accounts settled between themselves as being *prima facie* correct. 13 I.C. 642; 1925 L. 100. Agent must support his accounts by proper vouchers. 6 C. 754; 43 C. 248; 52 C. 766=90 I.C. 944. Agent's duty is analogous to that of trustee. 7 C. 627. Where a person employs an agent to do acts for him at a particular place, the legitimate inference is that the contract is to be performed at that place. S. 213 of the Contract Act cannot be read as laying down that the agent should render accounts at the principal's place. The principal has to demand accounts at the agent's place of business. A suit by a principal against his agent for accounts should therefore be instituted at a Court having jurisdiction over the place of business of the agent. 1940 Mad. 588=(1940) 1 M. L.J. 558. The mere fact that the principal wrote the word 'seen' on the account book does not imply that the agent had rendered account and the principal had satisfied himself of the correctness of the entries in the book which he had seen. It is the duty of the agent to prove what had happened on the occasion in question. 1934 A.L.J. 453=1934 A. 553. There is no corresponding obligation to account on the part of the principal. 7 C. 654; 1925 L. 100. While the principal is under no statutory obligation to render accounts to his agent, he does become an accounting party in special circumstances or under trade usage or a definite contract. The right to claim a statement of accounts is an unusual form of relief only granted in certain specific cases and is only

to be claimed when the relationship between the parties is such that this is the only relief which will enable the claimant to satisfactorily assert his legal rights. (60 P.R. 1899; 1925 L. 100 and 1927 L. 701, Ref.) Where the plaintiffs who were insurance agents were to be remunerated by a commission calculated on the premia paid on all policies effected or introduced through them. *Held*, as the plaintiffs cannot certainly know which of these policies have lapsed, matured or been forfeited they are entitled to call on the defendants for rendition of accounts as this is the only relief which will enable the plaintiffs to satisfactorily assert their rights. 144 I.C. 505=1933 L. 483. Accounts, suit for—Legal representative of agent—Liability to account—Onus. 47 I.C. 371=28 C.L.J. 492. The death of an agent during the pendency of a suit against him for accounts does not exonerate his legal representative from all liability to the principal. 49 I.C. 371. Rendering an account of his agency and account for money received by him, is not confined merely by rendering of accounts of what has been done with the money, but includes also the payment of any balance which might be found due upon taking accounts. 21 C.W.N. 591=40 I.C. 359=25 C.L.J. 335. The obligation of an agent towards his principal does not terminate merely in submission of account papers. 43 C. 248=19 C.W.N. 1070. He is bound to explain those papers and if on accounts taken it is found that he has in his hands money which belongs to his principal, he is bound to pay that sum. (*Ibid.*) The liability to render an account cannot be enforced against the legal representatives of an agent. The liability is personal, and the legal representatives need not render account in the same sense in which the agent himself might have been called upon to do. 17 C.W.N. 5=16 I.C. 742=16 C.L.J. 282. See also 47

Agent's duty to communicate with principal.

214. It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

215. If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

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I.C. 371=28 C.L.J. 492. The remedy of the principal after the death of his agent is to sue the representatives for any loss he may have suffered by the negligence, misconduct, misfeasance or malfeasance of his agent. 17 C.W.N. 5=16 I.C. 742. Agent's heirs—Liability to account. 16 C.W.N. 1042=16 I.C. 414=16 C.L.J. 288. In a suit for accounts against the agent, the mere production by the agent of his accounts would not amount to proof of same. 11 I.C. 161=15 C.W.N. 930. The audit of a company's accounts does not preclude it from calling upon the agents for rendition, though it closes the account between the shareholders and the directorate in the absence of fraud or mistake in connection with the audit. 42 I.C. 375=86 P.L.R. 1917. Where money is advanced to an agent for work to be done on the understanding that a bill is to be sent subsequently the agent must account for the money. 62 I.C. 503=13 L.W. 366. Suit by principal against agent for moneys unaccounted for is maintainable. 44 M. 214=39 M.L.J. 586. An agent is bound to pay interest on the sum of money retained by him and due to the principal from the date of demand therefor by the principal. 33 M.L.J. 468=6 L.W. 520=42 I.C. 219. An agent by retaining money due to the principal cannot be held to have committed a fraud. 33 M.L.J. 468. A secretary of a fund is only an agent and not a trustee though he himself is a director and recovers amounts due to the fund. 33 M.L.J. 468. Where the defendant has been let into possession of property as agent of the plaintiff, it is not open to the defendant in a suit for accounts against him to challenge the title of the plaintiff (his principal) to receive the moneys which have been realised by the defendant who was appointed as the agent for this purpose by the plaintiff. The mere fact that the defendant is under a suspicion and is working under the supervision of other agents deputed by the principal would not relieve him from liability to account. An agent under suspicion or under supervision is still an agent and must be held liable to account on proof that *prima facie* he has made realisations himself even in the period of suspicion or while subject to supervision. 196 I.C. 641=1941 P.W.N. 565.

AGENT OF SEVERAL PRINCIPALS—LIABILITY

TO ACCOUNT.—When an agent is appointed by more than one principal he is liable to them jointly. He is not bound to account to them separately to any one of them and if he does so, he is not thereby absolved from his liability to others. 145 I.C. 178=1933 L. 93.

Sec. 214.—Principle of section. 105 I.C. 836=4 O.W.N. 1061.

An agent authorized to buy and sell at the best rates cannot defer carrying out the order till communicating the rate of the day to the principal. 50 I.C. 146=12 S.L.R. 93. Commission agent authorised to sell goods at a particular place has no discretion to take them to another place for sale. 1927 M.W.N. 578.

Sec. 215.—Section is only an enabling one. See 34 B. 292; 15 M. 889; 43 M.L.J. 444. Section based on principle that no one can have an interest against his duty. 7 Bom. H.C.R. 90; 29 B. 730; 1927 S. 195. An agent stands in a fiduciary relation towards his principal. He cannot enter into any transaction in which his personal interest conflicts with his duty towards his principal. He cannot make any secret profit for himself while selling his principal's property or making settlement for damages on behalf of his principal. 9 L. 7. When an agent uses his debt due to his principal to obtain property for himself, he realizes that debt on the principal's behalf and is liable to account for the same. 25 I.C. 88=12 A.L.J. 463. Dealing by agent in the business of the agency without the knowledge of the principal—Contract is voidable at the option of principal—English and Indian law. 43 M.L.J. 444; 45 M. 1005=1922 M. 497. See also 42 I.C. 357 (M.); 102 I.C. 366=1927 S. 195; 7 R. 61; 22 S.L.R. 409. Even apart from S. 215 the dishonest concealment by the plaintiff of the identity of the contracting party constitutes fraud and entitles the defendants to avoid the contract. 43 M.L.J. 444=45 M. 1005. Where the plaintiff's company were managing agents of the defendant's company to which the former supplied goods, the plaintiff's company was held not entitled to make any profits on the goods supplied to their principal, the defendant company. 26 I.C. 478=8 L.B.R. 102. Breach of duty by agent would entail loss of his remuneration. 26 B. 689. As to liability of executor, see 22 C. 14.

AGENT DEALING AS PRINCIPAL—BURDEN OF PROVING THAT TRANSACTION IS NOT DISADVANTAGEOUS

Illustrations.

(a) *A* directs *B* to sell *A*'s estate. *B* buys the estate for himself in the name of *C*. *A*, on discovering that *B* has bought the estate for himself, may repudiate the sale, if he can show that *B* has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) *A* directs *B* to sell *A*'s estate. *B*, on looking over the estate before selling it, finds a mine on the estate which is unknown to *A*. *B* informs *A* that he wishes to buy the estate for himself, but conceals the discovery of the mine. *A* allows *B* to buy, in ignorance of the existence of the mine. *A* on discovering that *B* knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

Principal's right to benefit gained by agent dealing on his own account in business of agency.

216. If an agent, without the knowledge of principal deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Illustration.

A directs *B*, his agent, to buy a certain house for him. *B* tells *A* it cannot be bought, and buys the house for himself. *A* may, on discovering that *B* has bought the house, compel him to sell it to *A* at the price he gave for it.

217. An agent may retain out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

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DISADVANTAGEOUS TO PRINCIPAL.—An agent who, while acting as an agent, himself deals as a principal without the knowledge of the other party is acting contrary to the spirit of Ss. 211 and 214. If there be a question upon whom the burden of proof must lie, that burden ought to be laid upon the party who has to justify an apparent deviation from the ordinary rule by which he ought to be guided. Therefore the burden of proving that the transaction is not disadvantageous to the principal lies upon the agent. A transaction which necessarily puts the agent's duty in conflict with the interest of his principal must be presumed to be disadvantageous to a principal who is not informed of the fact. 1935 S. 38.

Sec. 216: SCOPE OF SECTION EXPLAINED.—S. 216 in effect imposes in the nature of a penalty upon an agent, who acts improperly by converting himself into a principal, without making due disclosure, and the operation of the section does not depend in any way upon the principal having suffered any loss. This liability of the agent to account for the profits is not limited to the case where the agent acquires the goods after the date of the agency. The agent is liable even if he acquired the goods in question before the date of the agency. What is the measure of damages in such a case? Where the goods dealt with by the agent are goods having a ready value in the market, the profit which the agent makes out of the transaction must be the difference between the price at which he sells the goods to the principal, and the market value at that date. The true principal is that the profit made by the agent is the difference between the price at which he supplies the principal, and the true value of the goods at that date; and where goods have a market value, that market value must

be taken as the true value. If one were dealing with goods which had no market value, then it would be necessary by other means to ascertain the true value, and in such a case it might be that the price at which the agent had himself brought shortly before the date of the transaction could be taken to represent the value. But the difference between the price at which the agent bought and the price at which he sold to the principal is not the measure of the profit which he makes by selling his own goods since he may have made a legitimate profit on his original purchase before any question of agency arose. 150 I.C. 467=36 Bom. L.R. 68=1934 B. 86. It is the duty of an agent not merely to do nothing to injure the interests of his principal, but to do all in his power to further them. He should not place himself in a position in which his interests might be adverse to that of the principal. 41 A. 635=52 I.C. 373. Secret profits made by agent, right of principal over—Doctrine of tracing. See 1927 M.W.N. 118. No broker, unless specially authorized, is entitled to get commission from both sides. 146 I.C. 595=1933 R. 184. A principal can have a decree for an account of profits of property outside British India purchased by an agent in execution of a mortgage decree passed in favour of the principal; but a principal is not entitled to a mandatory injunction directing the agent to execute a re-conveyance to the principal. 31 I.C. 216=29 M.L.J. 581. Agent's duty to carry out a sale for a particular sum—Acceptance by agent of secret commission from vendor—Failure to communicate with principal—Effect of. 22 I.C. 597=1 L.W. 181. See also 34 I.C. 760=30 M.L.J. 497. Suit for accounts and suit for damages—Difference between. 38 M.L.T. 256 (H.C.). Agency for sale of sugar—Agent depositing

Agent's duty to pay sums received for principal.

218. Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

When agent's remuneration becomes due.

219. In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such Act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

Agent not entitled to remuneration for business mis-conducted.

220. An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.

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moneys with principal—Insolvency of principal—Right of agent to set-off. 15 L.W. 201 (P.C.). See also 133 I.C. 881=32 P.L.R. 819. Claims and cross-claims—Business of principal—Company transferred to another company—Business conducted as before—Set-off. 24 C.W.N. 1004 (P.C.). Agent is entitled to a lien or retainer upon moneys of his principal which are in his hands, for all expenses properly incurred. In cases of exercise of lien or retainer no question of time-limit arises at all. 1923 R. 84 (39 M. 365, Foll.). Pleader's lien—Entrustment of shares for sale in private capacity—Appropriation for fees—Consent of client. 5 S.L.R. 222=15 I.C. 785=13 Cr.L.J. 513. He stands in fiduciary relation to his client and it is for him to show that the client consented to the appropriation without undue influence on his part. 5 S.L.R. 222=15 I.C. 785=13 Cr.L.J. 513 (32 B. 37 at 44, 45, Ref.).

Sec. 218.—See 30 C. 1011; 25 A. 639; 19 M.L.J. 759; 30 M.L.J. 497; 34 I.C. 760=30 Bom.L.R. 486.

Sec. 219: BROKERAGE—WHEN BECOMES DUE.—The broker's duty is simply to bring the parties together, to arrange a transaction and to get the contract completed. The performance of the contract is a matter between the promisor and promisee. The due fulfilment of conditions is not the *sine qua non* for the earning of the commission. He need not look to the fulfilment of the conditions. 1935 Pesh. 56=156 I.C. 131. See also 24 Bom.L.R. 847=1922 B. 433. When an agent is employed for commission to sell certain property at a certain price and the agent succeeds in finding a purchaser at that price but the principal declines to sell, the agent is entitled to reasonable remuneration for his work and labour. 14 I.C. 981=15 C.L.J. 312; 56 C. 262=33 C.W.N. 179. See also 1930 A. 545. So also where sale goes off owing to caprice or default of vendor. 8 M.L.T. 40. See also 20 B. 124. Where a person is proved to have acted as a broker, he is entitled to his com-

mission; and even if he fails to prove the rate of commission agreed upon, a reasonable amount ought to be awarded to him as such commission. 146 I.C. 761=34 P.L.R. 1030=1933 L. 784. Broker—Contract to procure loan—Loan procured but on conditions—Agent, if entitled to commission. 11 I.C. 820=15 C.L.J. 40=16 C.W.N. 753. When the contract provides for the agent's commission on payment for the goods by the purchasers, the agent is not entitled to remuneration on cancelled contracts, and the doctrine of *quantum meruit* cannot be invoked. 29 Bom.L.R. 375=1927 B. 225 [(1923) 1 K.B. 110, Foll.].

Where a contract is arrived at between a house-owner and a broker for finding a purchaser, the house-owner agreeing to pay Rs. 5 per cent. on the purchase-money as remuneration, the broker is entitled to receive his fee when the sale of the house has actually taken place in favour of the purchaser, upon his finding the purchaser, even though the negotiations or completion of the sale between the buyer and seller may not have taken place through the direct intervention of the broker or commission agent. The test in such cases is whether the vendor and the purchaser were brought together by the agent acting in the matter either for one or the other or for both. Applicability of principle of *quantum meruit* considered. 1930 A.L.J. 673=124 I.C. 35=1930 A. 545.

Sec. 220.—There is no warrant for holding that an agent's claim to remuneration is not affected by his misconduct unless it is also shown that the principal has incurred loss thereby. Nor is it correct to hold that even where loss had been caused to the principal it would be sufficient if the agent is directed to make good the loss; the fact that the agent makes good the loss would not entitle him to his full remuneration. To so hold would be to ignore the provisions of S. 220 of the Contract Act. It is clear that the payment of damages caused by the misconduct of the agent is in addition to the forfeiture of commission or

Illustrations.

(a) *A* employs *B* to recover 1,00,000 rupees from *C*, and to lay it out on good security. *B* recovers the 1,00,000 rupees and lays out 90,000 rupees on goods security, but lays out of 10,000 rupees on security which he ought to have known to be bad, whereby *A* loses 2,000 rupees. *B* is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees and he must make good the 2,000 rupees to *B*.

(b) *A* employs *B* to recover 1,000 rupees from *C*. Through *B*'s misconduct the money is not recovered. *B* is entitled to no remuneration for his services, and must make good the loss.

221. In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether movable or immovable, of the principal received by him until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

Agent's lien on principal's property.

Principal's Duty to Agent.

Agent to be indemnified against consequences of lawful acts.

222. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

NOTES.

remuneration, and the forfeiture of commission is the result of misconduct and not of loss arising from misconduct. A principal is entitled to have an honest agent and it is only the honest agent who is entitled to any commission. If the agent does not perform his appropriate duties, or if he is guilty of gross negligence or gross misconduct, or gross unskilfulness in the business of his agency, he would not only become liable to his principal for any damages which he may sustain thereby, but also forfeit all his commissions. 1940 Mad. 299=1939 M.W.N. 1046. A conveyance purporting to have been executed by two persons as agents of a woman whose name nowhere appears in the document and where the agents themselves have not signed it as such, is not one which would bind the woman. 12 I.C. 206=4 Bur.L.T. 255. It cannot be gainsaid that it is misconduct on an agent's part to deal on his own account in the business of the agency without first obtaining the consent of his principal and acquainting him with all material circumstances. An agent is, therefore, not entitled under S. 220 to any remuneration in respect of a contract of sale in which he himself is the undisclosed principal although purporting to act as agent. The fact that the principal did not repudiate the contract although he knew before performance that the agent was in fact the buyer is immaterial, as the principal cannot thereby be held to have acknowledged the claims of the agent both as an agent and purchaser. S. 63 is inapplicable to such a case as owing to the limitations imposed by S. 215 on the principal's right to repudiate, there could be no question of his electing to accept a satisfaction from the agent other than the performance of the contract according to its terms. 41 C.W.N. 460=I.L.R. (1937) 1 Cal. 757=169 I.C. 827.

Sec. 221: AGENT'S LIEN—REQUISITES FOR—PROPERTY HELD FOR SPECIAL PURPOSE.—Property held by an agent for a special purpose cannot be subjected to a lien the existence of which is inconsistent with such purpose. In order that an agent may have a valid lien on property in his hands, the following conditions *inter alia* must be satisfied: (1) there should be no arrangement inconsistent with the retention of such property in the exercise of his lien; (2) the property on which the right to lien is claimed should belong to the principal to the knowledge of the agent; (3) it should have been received by the agent in his capacity as agent during the course of his ordinary duties as agent; and (4) the agent should be holding the property for and on behalf of his principal and not for and on account of any known third party. 1933 S. 235, See 31 M. 123; 89 I.C. 409.

Sec. 222.—S. 222 is founded on the well-recognised principle that every agent has a right against his principal founded upon an implied contract to be indemnified against all losses and liabilities and to reimburse all expenses incurred by him in the exercise of his authority. Where an agent by contracting renders himself liable for the price of goods bought on behalf of his principal, the property in the goods as between the principal and agent vests in the agent and does not pass to the principal until he pays for the goods and the agent has the same rights with regard to the disposal of the goods and with regard to stopping them in transit as he would have had if the relation between him and his principal had been that of seller and buyer. If therefore the principal refuses to pay, the agent is entitled to re-sell the goods and hold the principal liable for any deficiency arising from the sale. The deficiency would be the measure of the loss sustained by the agent in the transaction, in

Illustrations.

(a) *B*, at Singapur, under instructions from *A* of Calcutta, contracts with *C* to deliver certain goods to him. *A* does not send the goods to *B*, and *C* sues *B* for breach of contract. *B* informs *A* of the suit, and *A* authorizes him to defend the suit. *B* defends the suit, and is compelled to pay damages and costs, and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

(b) *B*, a broker at Calcutta, by the orders of *A*, a merchant there, contracts with *C* for the purchase of 10 casks of oil for *A*. Afterwards *A* refuses to receive the oil, and *C* sues *B*. *B* informs *A*, who repudiates the contract altogether. *B* defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

223. Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.

Agent to be indemnified against consequences of act done in good faith.

Illustrations.

(a) *A*, a decree-holder and entitled to execution of *B*'s goods, requires the officer of the Court to seize certain goods, representing them to be the goods of *B*. The officer seizes the goods, and is sued by *C*, the true owner of the goods. *A* is liable to indemnify the officer for the sum which he is compelled to pay to *C*, in consequence of obeying *A*'s directions.

(b) *B*, at the request of *A*, sells goods in the possession of *A*, but which *A* had no right to dispose of. *B* does not know this, and hands over the proceeds of the sale to *A*. Afterwards *C*, the true owner of the goods, sues *B* and recovers the value of the goods and costs. *A* is liable to indemnify *B* for what he has been compelled to pay to *C* and for *B*'s own expenses.

224. Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

Non-liability of employer of agent to do a criminal act.

Illustrations.

(a) *A* employs *B* to beat *C*, and agrees to indemnify him against all consequences of the Act. *B* thereupon beats *C*, and has to pay damages to *C* for so doing. *A* is not liable to indemnify *B* for those damages.

NOTES.

respect of which he is entitled to be indemnified and reimbursed. 140 I.C. 624=34 Bom.L.R. 1268=1932 B. 593. Under S. 222 before an agent can successfully maintain any claim for indemnity against his principal, he must establish the fact that he has actually incurred a loss. 1935 S. 38. In the absence of a stipulation, money spent by a commission agent during a business trip on boarding and lodging cannot be considered to be incidental to carrying on the business of the principal who is not bound to pay the bill. 19 I.C. 248=206 P.L.R. 1913. See also 31 Bom.L.R. 508. An agent can recover moneys paid out by him on behalf of his principal even on waging contracts and a set-off or adjustment in accounts of third parties should be treated on the same footing as cash payments. (79 P.R. 1908 and 1928 L. 420, Foll.) 138 I.C. 241=33 P.L.R. 450=1932 L. 356. Where an agent enters into a contract with another person on behalf of his principal, and being required to pay the amount of the loss arising out of the transaction executes a sarkat in favour of the other party, undertaking to make good the loss, he is entitled to recover the said loss from the principal under S. 222, Contract Act. The execution of sarkat by the agent in favour of the other party is as good as a cash payment to him.

31 N.L.R. (Supp.) 154=161 I.C. 787=1936 N. 37. Contract C.I.F.—Contract to ship goods on account and risk of buyer—Outbreak of war—Right of commission agent. 35 M.L.J. 184=41 M. 1060. Agreement to pay single sum for remuneration—Remuneration, if can be split up. 22 I.C. 597=1 L.W. 181.

Sec. 223.—The liability of a principal and agent is not joint but alternative. A person dealing with a principal through his agent may sue either or he may sue both of them alternatively, but he cannot obtain judgment against both jointly. 49 M. 900=97 I.C. 475=1926 M. 1213=51 M.L.J. 311. As to decree to be passed in a suit against both agent and principal, see 1926 O. 41. An agent, on general grounds is entitled to reimbursement and indemnity by his principal but only on the condition that he has acted within the scope of his directions. 59 I.C. 971=3 L.L.J. 141; 23 P.R. 1915, *infra*. Suit to enforce that right is governed by Art. 83 of the Limitation Act. 26 I.C. 145=23 P.R. 1915. If an agent exercises reasonable skill and diligence, he is not responsible to the principal for an error of judgment which causes loss to the principal. 31 I.C. 450=9 S.L.R. 77.

Secs. 223 and 224.—Money sent by agent for unlawful purposes on authority of principal—Right to recover. 88 I.C.

(b) *B*, the proprietor of a newspaper, publishes, at *A*'s request, a libel upon *C* in the paper, and *A* agrees to indemnify *B* against the consequences of the publication, and all costs and damages of any action in respect thereof. *B* is sued by *C* and has to pay damages, and also incurs expenses. *A* is not liable to *B* upon the indemnity.

Compensation to agent for injury caused by principal's neglect.

225. The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Illustration.

A employs *B* as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and *B* is in consequence hurt. *A* must make compensation to *B*.

Effect of agency on contract with third persons.

226. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

Enforcement and consequences of agent's contracts.

Illustrations.

(a) *A* buys goods from *B*, knowing that he is an agent for their sale, but not knowing who is the principal. *B*'s principal is the person entitled to claim from *A* the price of the goods, and *A* cannot, in a suit by the principal, set-off against that claim a debt due to himself from *B*.

(b) *A*, being *B*'s agent with authority to receive money on his behalf, receives from *C* a sum of money due to *B*. *C* is discharged of his obligation to pay the sum in question to *B*.

227. When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority, is binding as between him and his principal.

Principal how far bound when agent exceeds authority.

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980; 1926 S. 40=20 S.L.R. 100. Act, though unlawful, not criminal, effect of. See 20 S.L.R. 100=1926 S. 40.

Sec. 226.—Agent acting beyond scope of authority—Principal's liability. 35 I. C. 208=14 A.L.J. 601. The plaintiff took a contract from the Military authorities for the supply of mutton. He deposited according to the rules a certain sum of money in one of the banks specified in the contract and obtained a receipt. Subsequently, the bank became insolvent and the plaintiff sued the Military authorities represented by the Secretary of State for recovery of the amount over and above that rateably obtained from the bank. *Held*, that the bank was under those circumstances the agent of the defendants and that the latter was liable for the amount claimed in their capacity as principals. 133 I.C. 881=32 P.L.R. 819. See also 15 L.W. 201 (P.C.). As a general rule, the agent has no authority to borrow money on account of his principal so as to render the latter liable to the lender unless the principal has given express authority or previous sanction or has subsequently adopted and ratified the loan. 36 I.C. 968=10 S.L.R. 72. If an agent is acting in collusion with a third party without the principal's consent and the act is detrimental to the interest of the principal, the latter is not bound. 56 I.C. 631. Payment to an agent is payment to the principal.

pal. 13 I.C. 955=36 P.L.R. 1912. An agent cannot sue or be sued in respect of a sale to him on behalf of the principal. 20 I.C. 844=25 M.L.J. 32. Where an agent signs a pro-note for a business belonging to a minor, the holder must be fixed with notice of the contents of the power-of-attorney under which the agent acts and of the extent of his authority and of the fact that the business belonged to a minor. 21 M.L.J. 620=35 M. 692=14 I.C. 389. Agent—Power to sell property—Recital of authority unnecessary. 23 O.C. 353=59 I.C. 596. One of several joint-debtors cannot be an agent of their creditor so far as joint-debtors are concerned and a payment to that debtor is not a payment to the creditor. 11 I.C. 864=4 Bur.L.T. 197. Where an agent fraudulently, in furtherance of his own interests, and contrary to instruction enters into a contract the principal will be bound only if third persons dealing with the agent have acted in good faith. 36 I.C. 968=10 S.L.R. 72; 45 I.C. 856. The onus of proving good faith lies on such third persons claiming against the principal. 36 I.C. 968=10 S.L.R. 72. (9 Bom.L. R. 388, Ref.)

Sec. 227.—Where an agent authorized to stand surety for one person stands surety for two persons in addition, outside the scope of his authority, the unauthorised act of the agent is clearly separable from his act in standing surety for the person autho-

Illustration.

A, being owner of a ship and cargo, authorizes *B* to procure an insurance for 4,000 rupees on the ship. *B* procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. *A* is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

Principal not bound when excess of agent's authority is not separable.

228. Where an agent does more than he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Illustration.

A authorizes *B* to buy 500 sheep for him. *B* buys 500 sheep and 200 lambs for one sum of 6,000 rupees. *A* may repudiate the whole transaction.

229. Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

Consequences of notice given to agent.

Illustrations.

(a) *A* is employed by *B* to buy from *C* certain goods, of which *C* is the apparent owner, and buys them accordingly. In the course of this treaty for the sale, *A* learns that the goods really belonged to *D*, but *B* is ignorant of that fact. *B* is not entitled to set-off a debt owing to him from *C* against the price of the goods.

(b) *A* is employed by *B* to buy from *C* goods of which *C* is the apparent owner. *A* was before he was so employed, a servant of *C*, and then learnt that the goods really belonged to *D*, but *B* is ignorant of the fact. In spite of the knowledge of his agent, *B* may set-off against price of the goods a debt owing to him from *C*.

Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.

230 In the absence of any contract to that effect, an agent, cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

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rized and the principal's liability will be restricted to that person only under S. 277. 1937 Rang. 499. Agent acting in the course of the business—Principal liable to third parties suffering damage. 43 A. 623=19 A.L.J. 654.

Sec. 228.—For obtaining Court-fee for a memorandum of appeal and for other petty expenses the authorised agent of the Mahant of a math borrowed Rs. 400 from the plaintiff for which he gave a hand note. The money was utilised for the purpose of the appeal and the Mahant himself took an active part in the prosecution of that litigation. It was found that the litigation had nothing to do with the math but was instituted purely to satisfy the personal grudge of the Mahant. *Held*, that the Mahant was personally liable for the debts incurred by his authorised agent on his behalf, incurred for the personal purposes of the Mahant; the signature on the hand-note being that of an agent for a disclosed principal and the agency having been previously authorised and also subsequently ratified, the agent was not liable on the handnote. 149 I.C. 898=1934 P. 435. On this section, see also 10 B.H.C.R. 319; 8 B.H.C.R. 19.

Sec. 229.—Principle of section. 25 A.

1; 28 I.C. 488=59 P.L.R. 1915; 119 I.C. 754=1929 L. 500. Constructive notice of a fact which the agent knows cannot be imputed to the principal when it was not to the interest of the agent to disclose the fact to the principal and which the agent did not in fact disclose. See 46 I.A. 250=44 B. 139=24 C.W.N. 469=54 I.C. 121 (P.C.). See also 56 C. 367=119 I.C. 23=1929 C. 497; 12 B.H.C.R. 262. Knowledge of agent prior to agency would not bind the principal. 89 I.C. 625=1925 N. 398. If the agent, acting on his principal's behalf in some transaction in which his knowledge would otherwise be imputed to his principal, takes part in any fraud or misfeasance against the principal, the principal is not bound by the agent's knowledge. 36 B. 564=14 I.C. 353.

Sec. 230.—Presumption under the section, when arises. See 25 N.L.R. 81=116 I.C. 669=1929 N. 170. The question whether an agent, who has made a contract on behalf of his principal, is to be taken to have contracted personally, or merely on behalf of the principal, and if personally, what is the extent of his liability on the contract, depends on what appears to have been the intention of the parties, to be deduced from the nature and terms of the particular contract and the surrounding circumstances.

Presumption of contract to contrary.

Such a contract shall be presumed to exist in the following cases :—

- (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad ;
- (2) where the agent does not disclose the name of his principal ;
- (3) where the principal, though disclosed, cannot be sued.

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73 C.L.J. 356=1941 Cal. 643. Under S. 230 of the Contract Act, an agent is not entitled to sue the purchaser personally when the order is not placed through him, even though he has by a separate contract made with the principal undertaken to pay the principal for all goods supplied by him and not paid for by the purchaser. Nor is the agent entitled to claim the benefit of S. 69 as he is not a person interested in the payment of the price to the principal. 39 P.L.R. 457=1937 Lah. 607. Agent of foreign state, personal liability of. See 113 I. C. 345. Personal liability of agent acting for foreign principal. See 32 Bom.L.R. 1336. Where the defendant as manager of the Banaili Raj got some work done by the plaintiff and the name of the Raja was not disclosed, there is no personal liability against the defendant for the work done by him for the Raj. 24 I.C. 415. See also 89 I.C. 380=1925 O. 641. The mere fact that a committee is not a registered body and has no independent existence in law, cannot make the servants of the committee personally liable. Although the Association as such cannot be sued, its members will be jointly liable. (14 P.R. 1891, Rel. on.) 145 I.C. 178=1933 L. 93. Evidence of custom or usage incidental to contract. 35 I.C. 3=20 C.W.N. 365. It is well settled that an agent can perform acts on behalf of his principal either disclosing or concealing the fact that he is an agent. There is nothing in S. 92, Evidence Act, to prevent an agent in a suit for compensation from his principal from proving that contracts entered into by him were on the principal's behalf. The equitable right of the agent to be indemnified cannot however be so exercised as to make a profit out of the indemnity. 26 S.L.R. 85. A broker who gives to the buyer a note in the form "bought by your order and for your account from our principals" is not more than intermediary and was not an agent of the undisclosed principal for sale to make him liable under the section. 19 C.W.N. 623=42 C. 1050. Auctioneer is different from an ordinary agent, and can sue in his name for price of goods sold at auction. 20 S.L.R. 287=92 I.C. 394=1926 S. 6. See also 1941 A.W.R. (H.C.) 365. An agent is not personally bound by a contract entered into by him on behalf of his principal in the absence of any contract to that effect. 73 I.C. 885=1923 L. 296. The presumption in

S. 230 (1) is rebuttable. 67 I.C. 157. The mere fact that the principal is abroad does not absolve the personal liability of the agent if the other contracting party looked to him alone for performance. 67 I.C. 157. See also 65 I.C. 473; 32 Bom.L.R. 1336. To make an agent personally liable under a contract it must be clearly established that the agent had not disclosed the name of his principal. 65 I.C. 473. An agent who describes himself as such, may still be contracting in his personal capacity but failure to specify his capacity, as an agent in signing a contract does not raise any such presumption when the terms of the contract itself are clearly to the contrary. 65 I.C. 468=2 L.L.J. 374. When an agent enters into a contract he may sue thereon in his own name, if he has an interest in the contract. 55 I.C. 992 (24 M. 130, foll.) 27 Bom.L.R. 1168=1925 B. 547. Agent receiving goods on behalf of principal—Agent's liability for price. 39 I.C. 793=143 P.L.R. 1917. See also 24 I.C. 1007; 27 M. 315. Ordinarily the words "Pacca Arhtia" convey that the so-called agent is acting as a principal on behalf of the person with whom he buys or sells the commodities in question. There can therefore be no question of the application of S. 230 of the Contract Act in his case. 177 I.C. 985=1938 Lah. 253. Hindu joint family business—Loan advanced by manager—Suit by manager alone without stating that suit is on behalf of family—Maintainability. See (1938) 1 M.L.J. 526. On a contract signed by the agent without disclosing his principal the agent is personally liable. Though an agent has authority to borrow money for the business of the firm, yet if the power-of-attorney expressly prohibits the agent from borrowing money, the principal is not liable. The fact that the money borrowed was applied for the purposes of the firm may give rise to a cause of action between the principal and the agent *inter se* but would not enable the third party to sue the principal on that account because as between them there is no privity of contract. (2 L. 253, Dist.; 14 C.P.L.R. 22, Foll.) 27 N.L.R. 324. See also 130 I.C. 548=1931 S. 4. An agent is not entitled to personally enforce a contract entered into by him on behalf of his principal, nor is he personally bound by such contract. 52 I.C. 179. See also 119 I.C. 731=1929 L. 590. A person contracting with an agent for an undisclosed principal can sue either the agent or the principal or both. 59 I.C. 965; 2 L.L.J. 374=65 I.C. 468; 39 C. 802=18 C.

231. If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

Rights of parties to a contract made by agent not disclosed.

If the principal discloses himself before the contract is completed the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

232. Where one man makes a contract with another, neither knowing nor

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W.N. 263. Where the plaintiff merely discloses a contract between the plaintiffs and the agent of a disclosed principal, the agent cannot be sued. If there is a matter of doubt as to the liability of the agent or the principal in a contract the usual course is to sue both defendants alleging that the principal was the principal and in the alternative suing the agent for breach of the warranty of authority. 150 I.C. 671=1934 P. 269. On this section, see also 30 L.W. 1028=1929 P.C. 254=57 M.L.J. 628 (P.C.). Under the ordinary law of contract enacted in S. 230 of the Contract Act, if an agent acts on behalf of his principal, the principal being disclosed, a creditor who lends money to the agent is entitled to sue the principal. But the law under the Negotiable Instruments Act, is an exception to that rule. S. 28 of the Negotiable Instruments Act requires that to make the principal liable it must be clearly indicated on the face of the instrument that the agent is acting on behalf of such principal. Where a promissory note is executed by the agent alone, and there is no suggestion of any indication on the face of the note that the principal is the real debtor, the creditor, in order to bind the principal and make him liable, must sue on the loan and not on the instrument. But when the suit is based on the note, and the agent neither alleges nor proves any facts which would entitle him to take advantage of the exception under S. 28 of the Negotiable Instruments Act, e.g., inducement by the plaintiff to sign the bill on the footing that he (the agent) would not be liable, the agent cannot escape liability. 18 Pat.L.T. 337=1937 P.W.N. 344=1937 Pat. 428, on this section, see also 1939 Lah. 825. Where an agent enters into a contract as such, if he has an interest in the contract, he may sue in his own name, the agent being in such a case virtually a principal to the extent of his interest in the contract. 1938 Lah. 673. Where a judgment-debtor against whom the decree-holder had obtained six decrees paid some money to the decree-holder's pleader in part payment of the decrees and had the execution stayed for a certain period, but on failure of the judgment-debtor to pay the decretal dues in full within that period writs of attachment were executed against

him resulting in payment of five of the decrees in full, and the pleader thereafter certified in Court the money paid to him as having satisfied the sixth decree in which the judgment-debtor was only one of two judgment-debtors, in a suit by the judgment-debtor against the pleader for the recovery of the amount paid to him. Held, (i) that the money having been paid to the pleader as agent on behalf of the principal, viz., decree-holder, the suit was not maintainable against the pleader alone; (ii) that the money having been paid in part payment of the decrees, the pleader did not act wrongly in appropriating it to the unsatisfied decree. 42 C.W.N. 1263.

Sec. 231.—Under S. 231 a principal can, as against the agent claim the full benefit of the contract entered by the agent in his own name, and as against the party contracting with the agent, the principal is bound by the equities arising between the agent and the contracting party. 26 I.C. 822=27 M.L.J. 501 (3 I.C. 801, Ref. to). See also 40 C. 335; 10 Bom.L.R. 306 (Partners). Where in the case of a contract entered into by an agent for an undisclosed principal, the other contracting party refuses to perform the contract for the reason that the agent has failed to carry out the conditions of a separate contract made with him, S. 211 of the Contract Act is not applicable, and the proper section under which the principal can proceed is under S. 231 for damages against the other contracting party. 61 C. 504=152 I.C. 33=1934 C. 721. Although S. 231 of the Contract Act gives to an undisclosed principal an option to proceed for damages against the party contracting with the agent, there is nothing in that section which can be said to debar him from seeking his remedy against the agent under S. 211, if he can bring his case within the purview of that section. 61 C. 504=152 I.C. 33=1934 C. 721. Where a railway receipt for goods consigned for transit is in the name of an agent, the real owner is entitled to sue for their value, if the goods are lost. 92 I.C. 1007. An agent contracting in his own name without mentioning the agency can sue and be sued upon the contract. 26 I.C. 822=27 M.L.J. 501. See also 35 M. 692=21 M.L.J. 620; 1925 C. 29; 46 C.L.J. 362.

Sec. 232.—See 4 B. 447.

Performance of contract with agent supposed to be principal.

the agent and the other party to the contract.

having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between

Illustration.

A, who owes 500 rupees to B, sells 1,000 rupees' worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set-off A's debt.

Right of person dealing with agent personally liable.

233. In cases where the agent is personally liable a person dealing with him may hold either him or his principal, or both of them liable.

Illustration.

A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

234. When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

Consequences of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.

235. A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

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Sec. 233.—Section gives the party who is dealing with an agent who is personally liable a double form of election. He can sue both the principal and agent jointly or sue one of them. If he sues one, a suit against the other will be barred. 40 I.C. 194 = 19 Bom.L.R. 370. The liability of a principal and agent is not joint but alternative. A person dealing with a principal through his agent may at his election sue either, or he may sue both of them alternatively in a case where he is not sure against whom his remedy lies but he cannot get judgment against both of them jointly, as that would turn a liability which is mutually exclusive into a joint liability. (51 M. L.J. 311, Foll.) 10 Mys.L.J. 284. See also 39 C.W.N. 461. S. 233 enacts substantive law and not adjective law defining procedure by which the liability may be enforced. 40 I.C. 194 = 19 Bom.L.R. 370. See also 31 M. 45; 18 C. 31; 90 I.C. 487. In cases where the agent is personally liable the law allows a plaintiff to sue both the principal and agent and to get judgment against both of them jointly for the amount sued for. I.L.R. (1939) Mad. 282 = 49 L. W. 343 = 1939 Mad. 520 = (1939) 1 M.L.J. 509.

Sec. 234.—See 4 B. 477; 6 B. 326; 9 A. 681; 7 M. 392; 2 A. 307.

Sec. 235.—The basis of an action under S. 235 is the implied warranty by the professing agent that he had the authority to

act. The measure of damages must accordingly in substance be what benefit the other party would have had from the contract if the representation that he was the authorised agent had been true. 42 C.W.N. 116 = I.L.R. (1938) 1 Cal. 463 = 1938 Cal. 151. Where a Mahomedan son, who is not the authorised agent of his father, by mortgaging his father's land holds himself out to be an agent. S. 235 of the Act, and not S. 230, applies and the limitation for a suit for compensation starts from the date on which the father obtains a decree in a suit for possession of the mortgaged property. 151 I.C. 58 = 1934 Pesh. 49. Applicability of section. See 49 C.L.J. 191. Schoolmaster appointed by Secretary of School Committee—Services dispensed with—Reasonable notice—Three months' pay in lieu of. See 49 C.L.J. 191.

Agent untruly representing his authority—Acting beyond his scope—Liability of. 13 I.C. 94 = 34 A. 168. See also 8 M.L.T. 353. Liability of agent when principal repudiates. 1924 O. 184 = 72 I.C. 1011.

Sec. 236: SCOPE OF SECTION.—S. 236 is not restricted to cases where the agent purports to act for a named principal. If a person purports to act as agent for an undisclosed principal and there is no undisclosed principal in fact, S. 236 applies and he cannot sue on the contract. (34 C. 628, Rel. on.) 1933 S. 207. S. 236 does not enact that the contract in circumstances mentioned in that section is void; it provides

Person falsely contracting as agent not entitled to performance.

236. A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

237. When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Liability of principal inducing belief that agent's unauthorized acts were authorized.

has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Illustrations.

(a) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

238. Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made, or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

Effect, on agreement, of misrepresentation or fraud by agent.

course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made, or committed by the principals; but misrepresentations

Illustrations.

(a) A being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

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that the alleged agent cannot require its performance. It follows that since the contract is enforceable by one of the parties and not enforceable by the other, it is a voidable contract. So where B signed an indent in favour of A whom he knew to be only an agent and the indent contained a clause providing for reference of disputes to arbitration, in pursuance of which a reference was subsequently made, and an arbitrator was appointed, *held*, that though the contract was voidable at the option of B, having treated it as valid and taken the chance of an award in his favour, he was estopped from avoiding the contract and objecting to the reference. 1933 S. 207. A person with whom a contract is made as an agent when he is not so, cannot sue under S. 236. 39 C. 802=18 C.W.N. 263. See also 34 C. 628.

Sec. 237.—See 18 Bom.L.R. 317; 6 C. W.N. 229. S. 237 has no application unless the relationship of principal and agent is proved to exist between the parties. If illustration (b) to that section should come into operation, the person handing over the negotiable instrument must be a principal and the person who receives it must be an agent. Where a wife hands over certain shares to her husband for safe custody, the husband can in no sense be said to be the agent of the wife, and if the husband pledges them with a bank, without having any authority to do

so, S. 237 cannot avail the bank in order to entitle the bank to enforce its charge against the shares. A custodian of goods for safe custody is a bailee of the goods and not an agent of the true owner for the purpose of dealing with the goods. 1937 A.L.J. 150=1937 A. 255. Servant of firm ordering goods from another firm—Selling firm having no knowledge and making no inquiry—No right to proceed against other firm. 1937 S. 151=169 I.C. 423.

Sec. 237, Ill. (a).—Where a licensed auctioneer sells a house by auction to third person for an amount less than is authorized by the owner of the house and the owner admits the authority given for sale of the house, thus inducing the third person to believe that the auction sale was within the scope of the auctioneer's authority the owner, as principal, is bound by the auction sale and is liable to the third person for the breach of contract although the auctioneer might have practised fraud in selling at a lower price. 121 I.C. 511=1929 L. 822.

Sec. 238.—It is enough if the fraud is committed by the agent in the course of his business for his principal, i.e., in matters falling within the scope of his authority. 50 C. 258=27 C.W.N. 18; 36 A. 416=24 I.C. 29. Principal and agent—Criminal liability. 42 C. 1094=33 I.C. 289=19 C. W.N. 1239. Forgery and fraud by agent—Principal not bound. 15 S.L.R. 93.

(b) *A*, the captain of *B*'s ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between *B* and the pretended consignor.

[CHAPTER XI.—Sections 239-266.—Of Partnership.] Repealed, Act IX of 1932, S. 73, and Sch. II.

SCHEDULE.

Enactments repealed.

[Repealed by S. 3 and Sch. II of the Repealing and Amending Act, 1914 (X of 1914).]

THE CONVEYANCE OF LAND ACT (XXXI OF 1854).¹

Year.	No.	Short title.	Amendment.
1854	XXXI	The Conveyance of Land Act, 1854.	Repealed in part, XIV of 1870; XIV of 1874; XII of 1876. Repealed in part (locally). IV of 1882.

[16th December, 1854.]

An Act ²[* * * *] *to simplify the modes of conveying land in cases to which the English Law is applicable.*

WHEREAS it is expedient, in cases to which the English law applies, ²[* * * *] to simplify the modes of conveying land, and to exempt the purchasers of trust property from the liability to see to the application of the purchase money; It is enacted as follows:—

1. [Real actions, fines and recoveries abolished.] Rep. by the Repealing Act, 1870 (XIV of 1870).

2. Every tenant in tail or other owner of an estate of inheritance less than an estate in fee-simple, either at law or in equity, in any lands or hereditaments, not being under any disability, shall have power to dispose of such lands and hereditaments against the issue tail, and all persons whose estates are to take effect after the determination or in defeasance of his own, or to enlarge his said estate into an estate in fee-simple, by any deed declaring an intention so to dispose of the said lands or hereditaments, or to enlarge his estate therein; and every tenant in tail or other owner of an estate of inheritance less than an estate in fee-simple, who shall be under the disability of coverture, shall have power to dispose of or enlarge her said estate in manner aforesaid, by any deed declaring her intention so to do, and acknowledged by her as hereinafter mentioned:

Provided that every disposition under this section shall be subject to the rights of all persons in respect of estates prior to the estate tail or other estate of inheritance which is the subject of such disposition, and the rights of all other persons, except those against whom such disposition is by this Act authorized to be made.

LEG. REF.

¹ Short title, "The Conveyance of Land Act, 1854." See the Indian Short Titles Act (XIV of 1897). The Act has been declared to be in force in the whole of British India, except as regards the Scheduled Districts, by

the Laws Local Extent Act (XV of 1874), S. 3.

² The words "to abolish real actions and also fines and common recoveries and" were repealed by the Repealing Act XVI of 1874.

3. Every married woman who, either alone; or jointly with her husband is possessed of or entitled to any estate or interest in or any power to be exercised over, any lands or hereditaments, which, but for the passing of this Act, she might have disposed of or extinguished by levying a fine, or suffering a recovery, or by joining in either of such assurances, shall have power by deed, to be acknowledged by her as hereinafter mentioned, to dispose of, release, surrender or extinguish any such estate, interest or power, as fully and effectually as if she were an unmarried woman.¹

Married woman, with husband's concurrence, may dispose of her estate by deed acknowledged.

Secs. 2 and 3 to apply to money subject to be invested in land.

4. The provisions of the last two preceding sections shall, so far as circumstances will admit, apply to money subject to be invested in lands or other hereditaments.

5. No deed to be executed by a married woman under the provisions hereinbefore contained shall, so far as regards the interest of such married woman, be valid or effectual unless her husband concur therein, nor unless the deed be acknowledged in manner hereinafter prescribed before a Judge of one of Her Majesty's Supreme Courts, or before a Judge or other sworn officer of the East India Company exercising civil jurisdiction in the place wherein such deed shall be acknowledged, or before some Commissioner appointed either especially for the occasion, or appointed as a permanent Commissioner by one of Her Majesty's said Courts to take such acknowledgments.²

6. If the husband of any married woman, desirous of enlarging, passing or destroying any estate, interest or power, by a deed to be acknowledged by her under this Act, shall be a lunatic, idiot or of unsound mind, whether he shall have been found such by inquisition or not, or from any other cause, shall be incapable of executing a deed, or if his residence shall not be known, or if he shall be in prison, or living apart from his wife either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatever, it shall be lawful for any of Her Majesty's said Courts, by an order to be made in a summary way upon the application of such married woman, and upon such evidence as to the Court shall seem meet, to dispense with the concurrence of her husband in the deed so to be acknowledged; and any deed to be executed or acknowledged by her in pursuance of such order shall (but without prejudice to the rights of her husband as then existing, independently of this Act), be as valid and effectual as if he had concurred therein.³

7. It shall be lawful for any of Her Majesty's said Courts to appoint by its order, under the seal of the Court, to be published in the Official Gazette or otherwise as the Court shall direct, permanent commissioners, either by name, or office, and to appoint from time to time, under special commissions, special commissioners, any one of whom shall be

LEG. REF.

NOTES.

¹ Cf. the Fines and Recoveries Act, 1833 (3 & 4 Will. IV, c. 74), S. 77.

² Cf. the Fines and Recoveries Act, 1833 (3 & 4 Will. IV, c. 74), S. 79.

³ Cf. the Fines and Recoveries Act, 1833 (3 & 4 Will. IV, c. 74), S. 91.

Sec. 7.—For order appointing the Sub-Judge of the Nilgiris to be permanent Commissioner for the purposes of taking the acknowledgment of deeds by married women resident in the Nilgiri District, see Mad. List of Loc. R. & O., Vol. 1.

authorized and empowered unless the act is directed to be done before more than one to take the acknowledgment of any deed by any married woman, who, by reason of her place of residence, or ill-health, or other sufficient cause, shall be unable to make such acknowledgment before one of the Judges or other officers described in the preceding section.

8. Every such Judge, officer or commissioner as aforesaid, before he shall receive the acknowledgment by any married woman of any deed to be acknowledged by her under this Act, shall examine her apart from her husband touching her knowledge of such deed, and shall ascertain whether she understands its object, and freely and voluntarily consents to the same, and unless she appears to understand its object, and freely and voluntarily to consent to such deed, he shall not permit her to acknowledge the same, and in such case such deed, so far as relates to the execution thereof by such married woman, shall be void.¹

9. Every Judge, officer or commissioner taking such acknowledgment under this Act shall, at the time of taking the same, sign a memorandum to be endorsed on or written at the foot, or in the margin of such deed, which memorandum shall be to the following effect, namely, "this deed, marked (), was this day produced before me and acknowledged by therein named to be her act and deed, previous to which acknowledgment the said was examined by me separately and apart from her husband, touching her knowledge of the contents of the said deed, and her consent thereto and appeared to understand the same and declared the same to be freely and voluntarily executed by her."²

10. Every deed executed by a married woman and hereby required to be acknowledged shall, so far as regards the interest of such married woman, take effect only from the time of the acknowledgment thereof.

11. It shall not be necessary for any person producing a deed so acknowledged in any Court of Justice to prove the handwriting or authority of the Judge or other officer, or the commissioner taking such acknowledgment, but if such memorandum purports to have been in substance regularly made and signed, the deed shall be presumed to have been duly acknowledged by the party until the contrary is shown.

12. Nothing in this Act contained shall abridge, extend or affect the powers of alienation or disposition which any married woman might have exercised over any property or rights, otherwise than by levying a fine or suffering a recovery, or by joining in one of such assurances before the passing of this Act.

13. In any deed or will executed after this Act comes into operation, and disposing of immovable property situate in [British India]³ wherein contingent estates are limited without the appointment of any trustees to preserve such contingent estates the same shall be, to all intents and purposes, as effectually protected by the law as if such trustees had been duly appointed.

LEG. REF.

¹ Cf. the Fines and Recoveries Act, 1833 (3 & 4 Will. IV, c. 74); S. 80.
² Cf. the Fines and Recoveries Act, 1833 (3 & 4 Will. IV, c. 74); S. 84.

³ Substituted for "the territories under the Government of India" by Government of India (Adaptation of Indian Laws) Order, 1937.

14. Any estate or interest in immovable property, situate within the said territories, whether in possession, remainder or reversion, may, in addition to any other mode of conveyance or release which is now valid, be conveyed, passed or released by a simple deed, whether such deed operate under the ¹Statute of Uses or not.

Estates may be conveyed, etc., by simple deed.

15. No conveyance of any kind shall operate to destroy, impair or affect any estate or interest which the conveying party has no right to destroy, impair or affect or beyond the extent to which he may impair or affect the same.

No conveyance to operate tortiously.

16. It shall not be necessary in any deed relating to immovable property situate within the said territories, to be executed after the passing of this Act, to add words of limitation to heirs, when the intention is to give the absolute interest to a person and his heirs general; but a gift, grant or other conveyance of immovable property to, or in favour of, any person shall be taken to give him the entire and absolute interest in the nature of an estate in fee-simple, unless such construction is rendered inadmissible by the other contents of the deed; and when in any deed or will executed after the passing of this Act any property is given to a person for life or for other freehold interest, and afterwards in the same deed, or will, is limited to his heirs or heir special, the estates shall not unite, but the limitation to the heirs shall be a limitation of an estate to be taken by the heirs by purchase.

Words of limitation not necessary in a deed to give estate by inheritance.

Estate limited to heirs shall not unite with prior life estate.

Bona fide purchaser not required to see to application of trust money.

²17. When any property is sold, the proceeds of which are subject to any trust, the *bona fide* purchaser of the property shall not in any case be bound to see to the application of the purchase money to the purposes of the trust.

Act to apply only to cases governed by English law.

18. Nothing in this Act contained shall extend to any case to which the English law is not applicable.

19. [Interpretation clause.] Rep. by the Repealing Act, 1874 (XVI of 1874).

THE CO-OPERATIVE SOCIETIES ACT (II OF 1912).

Year.	No.	Short title.	Amendment.
1912	II	The Co-operative Societies Act, 1912.	Rep. in part and amended, Act 38 of 1990. Rep. in part, Act 17 of 1914. Amended (in U. P.), U. P. Act 3 of 1919. Amended (in Madras), Mad. Act 10 of 1920. Repealed in its application to Bombay, Bom. Act 7 of 1925. Repealed in its application to Burma, Bur. Act 6 of 1927. Declared in force— in British Baluchistan (with an addition), Reg. 2 of 1913, S. 3. in the Arakan Hill District, Reg. 1 of 1916, S. 2.

LEG. REF.

¹ See the Real Property Act, 1845 (8 and 9 Vict., c. 106), Ss. 2 and 4; respectively.

² Repealed in places to which the Transfer of Property Act (IV of 1882) extends or is extended by Act IV of 1882, S. 2.

PREFATORY NOTE.—The following is the Statement of Objects and Reasons appended to the Bill:—

1. 'Legislation is called for not only in order to lay down the fundamental conditions which must be observed but also with a view to giving co-operative societies a corporate existence without resort to the elaborate provisions of the Companies Act; but it is thought that legislation should be confined within the narrowest possible limits. The Bill has therefore, been drawn so as to deal only with those points which the Government consider to be essential, and its provisions have been expressed in simple and general terms, a wide rule-making power being reserved to Local Governments, so that what is felt to be of the nature of an experiment may be tried in each province or part of a province on such lines as seem to afford most promise of success.

2. The adequacy of the existing Act was examined at a Conference of Registrars of Co-operative Credit Societies in 1909, and it was held that the Act still remained in many ways unduly restricted, and that it also required certain alterations in detail which had been suggested by experts since 1909. The Conference of Registrars drew up proposals for the amendment of the Act, and after consulting Local Government on the proposals the Government of India have prepared the Bill now published. The chief changes contemplated by the Government of India are four in number:—

(i) The Act of 1904 applies to Societies for the purpose of co-operative credit only and not to Co-operative Societies of other kinds, such as those established for production or distribution. It has in practice been found that the establishment of Credit Societies has led to the founding of other classes of Co-operative Societies also, and it is advisable that the privileges extended by the Act to Co-operative Credit Societies should be extended to those other Societies. It is proposed therefore that the Act as now revised should be made applicable to all classes of Co-operative Societies—[*Vide* clause 1 (i) and clause 4 of the Bill.]

(ii) In the Act of 1904 Societies were classified according as they were "Urban" or "Rural" and the principle was laid down that as a general rule rural societies should be with unlimited liability. This basis for distinction was adopted, mainly because it represented a classification which has already been recommended and put in force in the initiation of Co-operative Credit Societies in certain parts of India, but even at the time it was criticised as unsuitable by experts, and it has in practice been found artificial and inconvenient. The real distinction is between Societies with limited and those with unlimited liability, and it is proposed in the new Bill to maintain this distinction only while retaining the principle that agricultural Credit Societies must as a general rule be with unlimited liability. (*See* cl. 4 of the Bill.)

(iii) The Act of 1904 did not contemplate that societies with unlimited liability should distribute profits. It is still felt that such Societies do not represent the best form of Co-operation for agricultural communities, but this form of Society has, in practice, been for some time in existence in several provinces, and Societies of this character, though not of the orthodox type, are recognized to be capable of useful work. Although therefore it is not intended to give them undue encouragement, it is proposed to legalise their existence and to permit an unlimited Society, with the sanction of the Local Government, to distribute profits. (*See* clause 28 of the Bill.)

(iv) A cardinal principle which is observed in the organisation of Co-operative Societies in Europe is the grouping of such Societies into Unions and then financing by means of Central Banks. This stage of co-operation had not been fully realised or provided for in the Act of 1904, but such grouping of Societies has already been found feasible in most provinces and it is now considered desirable to legalise the formation of Co-operative Credit Societies of which the members shall be other Co-operative Credit Societies. [*Vide* clauses 5 (1), 6 and 10 (3) of the Bill.]

3. In addition to carrying out the main alterations above described the present Bill contains several other changes in detail and it has been found advisable to recast the Bill in order to improve the drafting and to incorporate the changes now contemplated. The chief alterations, other than those above referred to, are the following:—

Clause 3.—It is proposed to make provision for investing in persons, other than Registrars, the power of a Registrar.

Clause 5.—It is proposed to maintain the existing restrictions as to residence or class as obligatory before registration in the case of Credit Societies and to render the existence of ten members obligatory before registration in the case of all kinds of Co-operative Societies other than those, all the members of which are themselves registered Societies. It is proposed further to give the Registrar the power of decision as to the residence qualification and to place persons of the same occupation on the same footing as persons of the same tribe or class.

Clause 8.—The provision giving conclusive authority to the Registrar's certificate of registration is new.

Clause 14.—It is proposed by this clause to give the Registrar power to conduct an audit by deputy. The previous provision that no charge should be made for audit has been omitted.

Clause 16.—It is proposed to extend from one year to 18 months the term of lien on agricultural products and to permit a lien on articles manufactured from raw materials supplied by or with the help of a registered Society.

Clauses 22 and 23 are based on provisions in the English Industrial and Provident Societies Act. Clause 22 makes the register of members *prima facie* evidence of the date of commencement and cessation of membership and clause 23 provides for proof of entries in the books of a registered society.

Clause 26.—This clause allows registered societies to invest good securities, and validates investments made prior to the amendment of the law now suggested.

Clause 27.—It is now proposed to make it clear that a registered society is not precluded from receiving deposits from non-members.

Clause 29.—The provision allowing contributions to charities is new.

Clause 30.—The existing provisions have been altered so as to allow a Registrar to conduct an enquiry by deputy.

Clause 31.—The provision allowing a creditor to require an inspection is new. It is based on a similar provision in the Companies Act.

Clause 35.—The provision allowing the Registrar to cancel registration when the number of members becomes less than ten is new.

Clause 37.—Sub-clauses 2 (*m*) and (*t*) and 3 are new. The two former allow the Local Government to prescribe returns and the procedure on liquidation, and the latter permits of the delegation of the powers of the Local Government.

Clauses 39 and 40.—The existing section 29 has been recast with a view to making clear the distinction in the power of exemption of the Local Government before and after registration.

S. 50 rep. Act XVII of 1924; Am. Act XXXVIII of 1920.

Declared in force in British Baluchistan (with an addition), Reg. II of 1913, S. 3; in Arakan Hill District, Reg. I of 1916, S. 2.

N.B.—The Act is not in force in Madras, Bombay, and Burma and the Punjab as Special Acts relating to this subject have been passed in those provinces.

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THE CO-OPERATIVE SOCIETIES ACT (II OF 1912).¹

[1st March, 1912.]

An Act to amend the Law relating to Co-operative Societies.

WHEREAS it is expedient further to facilitate the formation of Co-operative Societies for the promotion of thrift and self-help among agriculturists, artisans and persons of limited means, and for that purpose to amend the law relating to Co-operative Societies; It is hereby enacted as follows:—

Preliminary.

- Short title and extent. 1. (1) This Act may be called THE CO-OPERATIVE SOCIETIES ACT, 1912; and
 (2) It extends to the whole of British India.

- Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "by-laws" means registered by-laws for the time being in force, and includes a registered amendment of the by-laws:

(b) "committee" means the governing body of a registered society to whom the management of its affairs is entrusted:

(c) "member" includes a person joining in the application for the registration of a society and a person admitted to membership after registration in accordance with the by-laws and any rules:

LEG. REF.

¹ For Statement of Objects and Reasons, see Gazette of India, 1911, Pt. V, p. 95; for Report of Select Committee, see *ibid.*, 1912 Pt. V p. 7; and for Proceedings in Council, see *ibid.*, 1911, Pt. VI, pp. 186, 679 and *ibid.*, 1912, Pt. VI, pp. 3, 31 and 256.

It has been declared in force under S. 3 of the British Baluchistan Laws Regulation (II of 1913) in British Baluchistan, see Bal. Code.

NOTES.

Sec. 1.—Policy of the Act, see 15 A.L.J. 653=42 I.C. 968=40 A. 89. Policy of the Act is to save persons from protracted expensive and sometimes ruinous litigation in Civil Courts. 1935 L. 631. Act should be strictly construed. 1935 L. 631. The right of the subject to have recourse to ordinary Courts of justice should not be unduly surrounded by restrictions. 1935 L. 631.

Bank registered under this Act—40 per cent. of total liability of, required by Government notification issued under S. 60 of Income-tax Act to be kept in fluid form—

Investment of, in Government securities—Interest on—"Income" or "profits" under Ss. 8 and 10 (1) of Income-tax Act—Liability to income-tax. 56 M.L.J. 481 (F.B.). Effect of Government notification exempting profits of co-operative society from income-tax. (*Ibid.*) An award against the representative of a deceased debtor of a society affects only the estate of the deceased in his hands but cannot affect him personally. 146 I.C. 565=1933 L. 376.

Sec. 2 (c).—The term "member" is elastic enough to embrace a joint family within the ambit of its meaning and the fact that some of the members thereof were minors does not invalidate the award passed by the Registrar against the joint family. 142 I.C. 487=1933 N. 211. A joint Hindu family can be a member of a Co-operative Society. 48 L.W. 285=1938 Mad. 809= (1938) 2 M.L.J. 186. The fact that the bye-laws of a co-operative society established under the Co-operative Societies Act of 1912 do not expressly state that the membership of the society is open to a Hindu joint family is no justification for holding that a joint family can in no event become

(d) "officer" includes a chairman, secretary, treasurer, member of committee, or other person empowered under the rules or the by-laws to give directions in regard to the business of the society:

(e) "registered society" means a society registered or deemed to be registered under this Act:

(f) "Registrar" means a person appointed to perform the duties of a Registrar of Co-operative Societies under this Act: and

(g) "rules" means rules made under this Act.

Registration.

3. The Provincial Government may appoint a person to be Registrar of Co-operative Societies for the Province or any portion of it, and may appoint persons to assist such Registrar, and may, by general or special order, confer on any such persons all or any of the powers of a Registrar under this Act.

4. Subject to the provisions hereinafter contained, a society which has as its object the promotion of the economic interests of its members in accordance with co-operative principles, or a society established with the object of facilitating the operations of such a society, may be registered under this Act with or without limited liability:

Provided that unless the Provincial Government by general or special order otherwise directs—

(1) the liability of a society of which a member is a registered society shall be limited;

(2) the liability of a society of which the object is the creation of funds to be lent to its members, and of which the majority of the members are agriculturists, and of which no member is a registered society, shall be unlimited.

Restrictions on interest of member of Society with limited liability and a share capital.

5. Where the liability of the members of a society is limited by shares, no member other than a registered society shall—

(a) hold more than such portion of the share capital of the society, subject to a maximum of one-fifth, as may be prescribed by the rules; or

(b) have or claim any interest in the shares of the society exceeding one thousand rupees.

NOTES.

a member of the society, when there is no provision in the bye-laws to preclude a joint family from becoming a member of the society through one of its coparceners. It is no doubt desirable to have an express provision in the bye-laws stating that a Hindu joint family may join a society through one of its members chosen by all the other adult members of the family and that loans to such a family would be granted only on clear and complete proof that the money is required for some legal necessity of the family that would avoid a good deal of unnecessary litigation. Where it is clearly proved that a member of a joint family joined the society in a representative capacity with the consent of all the adult members of the family, though he may not have been the karta of the family and that the debts incurred by him were for the purpose of and on behalf of the

family, i.e., for the purpose of purchasing properties for the joint family it must be held that the money was borrowed for the necessity and benefit of the entire joint family, because the member represents the entire joint family in his dealings with the society. In such a case the society can proceed against the joint family properties including the properties purchased out of the money borrowed for the debts incurred by the member, although that member is not described in the registers of the company or in the order for contribution as representing his family. 19 Pat.L.T. 328=1938 Pat. 315 (S.B.).

Sec. 4.—Where a decree is passed against a co-operative society as a corporate body the decree-holder cannot pursue his remedy in execution against the shareholders or member of the society in their individual capacity. 1934 M. 181=66 M.L.J. 475.

6. (1) No society, other than a society of which a member is a registered society, shall be registered under this Act which does not consist of at least ten persons above the age of eighteen years and, where the object of the society is the creation of funds to be lent to its members, unless such persons—

- (a) reside in the same town or village or in the same group of villages; or
 (b) save where the Registrar otherwise directs, are members of the same tribe, class, caste or occupation.

(2) The word "limited" shall be the last word in the name of every society with limited liability registered under this Act.

7. When any question arises whether for the purposes of this Act a person is an agriculturist or a non-agriculturist, or whether any person is a resident in a town or village or group of villages, or whether two or more villages shall be considered to form a group, or whether any person belongs to any particular tribe, class, caste or occupation, the question shall be decided by the Registrar, whose decision shall be final.

Power of Registrar to decide certain questions.

8. (1) For purposes of registration an application to register shall be made to the Registrar.

(2) The application shall be signed—

(a) in the case of a society of which no member is a registered society, by at least ten persons qualified in accordance with the requirements of section 6, sub-section (1); and

(b) in the case of a society of which a member is a registered society, by a duly authorized person on behalf of every such registered society, and where all the members of the society are not registered societies, by ten other members, or, when there are less than ten other members, by all of them.

(3) The application shall be accompanied by a copy of the proposed by-laws of the society, and the persons by whom or on whose behalf such application is made shall furnish such information in regard to the society as the Registrar may require.

9. If the Registrar is satisfied that a society has complied with the provisions of this Act and the rules and that its proposed by-laws are not contrary to the Act or to the rules, he may, if he thinks fit, register the society and its by-laws.

NOTES.

Secs. 8 (3) and 43 (5).—There is no rule of law that when there is a conflict between the rule and the bye-law the bye-law should be preferred. Ordinarily the rule, which is as effective as a section of the Act, must be followed in a preference to a bye-law, if there is a conflict between the two. 171 I. C. 395=1938 Lah. 8. Where a bye-law of a Co-operative Society distinctly provides that the profits should be divided, and that a fourth of it should be paid as honorarium to the Secretary, the Secretary is entitled to claim and recover the same without a vote of the general body. Although it is open to the latter to alter the bye-law, it is not open to them to withhold payment of the honorarium. But where the law provides for the payment of an annual lump sum, it is not

open to the Secretary to claim the proportionate amount for a part of the year. The payment contemplated is contingent on the Secretary serving as such for the entire period of a year. 45 L.W. 297=1937 Mad. 379=(1937) 1 M.L.J. 511. Where a bye-law framed by a society provides that one of the objects of the society is to build residential houses and other buildings for private and public use and convenience of the members, the society undertook to construct a house for a member and after the house had been constructed, there was some dispute between the parties as to the amount claimable on account of it by the society. Held, the transaction does not amount to the granting of a loan by the society to one of its members. 1938 L. 8=171 I.C. 395.

10. A certificate of registration signed by the Registrar shall be conclusive evidence that the society therein mentioned is duly registered unless it is proved that the registration of the society has been cancelled.

11. (1) No amendment of the by-laws of a registered society shall be valid until the same has been registered under this Act, for which purpose a copy of the amendment shall be forwarded to the Registrar.

(2) If the Registrar is satisfied that any amendment of the by-laws is not contrary to this Act or to the rules, he may, if he thinks fit, register the amendment.

(3) When the registrar registers an amendment of the by-laws of a registered society, he shall issue to the society a copy of the amendment certified by him, which shall be conclusive evidence that the same is duly registered.

Rights and liabilities of members.

12. No member of a registered society shall exercise the rights of a member unless or until he has made such payment to the society in respect of membership or acquired such interest in the society, as may be prescribed by the rules or by-laws.

13. (1) Where the liability of the members of a registered society is not limited by shares, each member shall, notwithstanding the amount of his interest in the capital, have one vote only as a member in the affairs of the society.

(2) Where the liability of the members of a registered society is limited by shares, each member shall have as many votes as may be prescribed by the by-laws.

(3) A registered society which has invested any part of its funds in the shares of any other registered society may appoint as its proxy, for the purpose of voting in the affairs of such other registered society, any one of its members.

14. (1) The transfer or charge of the share or interest of a member in the capital of a registered society shall be subject to such conditions as to maximum holding as may be prescribed by this Act or by the rules.

(2) In case of a society registered with unlimited liability a member shall not transfer any share held by him or his interest in the capital of the society or any part thereof unless—

(a) he has held such share or interest for not less than one year; and
(b) the transfer or charge is made to the society or to a member of the society.

Duties of registered societies.

15. Every registered society shall have an address, registered in accordance with the rules to which all notices and communications may be sent, and shall send to the Registrar notice of every change thereof.

NOTES.

Sec. 12.—The disputed liability of a member to repay money due to the Society is a dispute "touching the business of the society" within the meaning of R. 12 of the Rules framed under the Co-operative Societies Act; and being a dispute between one member and the other members, it is covered by Cl. (1) of the rule. A Society borrowed money from a Bank and lent it to the appel-

lant who was a member of the Society. An award was obtained by the Bank against the Society, and the latter then made a reference to the Registrar who duly made an award against the appellants and in favour of the society for the amount of the loan. Held, the Registrar had jurisdiction to make the award against the appellant and the latter could not therefore object to the execution of the award. 14 P. 292.

16. Every registered society shall keep a copy of this Act and of the rules governing such society, and of its by-laws, open to inspection free of charge at all reasonable times at the registered address of the society.

Copy of Act, rules and by-laws to be open to inspection.

17. (1) The Registrar shall audit or cause to be audited by some person authorized by him by general or special order in writing in this behalf the accounts of every registered society once at least in every year.

Audit.

(2) The audit under sub-section (1) shall include an examination of over-due debts, if any, and a valuation of the assets and liabilities of the society.

(3) The Registrar, the Collector or any person authorized by general or special order in writing in this behalf by the Registrar shall at all times have access to all the books, accounts, papers and securities of a society, and every officer of the society shall furnish such information in regard to the transactions and working of the society as the person making such inspection may require.

Privileges of registered Societies.

18. The registration of a society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold property, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes of its constitution.

Societies to be bodies corporate.

19. Subject to any prior claim of the ¹[Crown] in respect of land-revenue or any money recoverable as land revenue or of a landlord in respect of rent or any money recoverable as rent, a registered society shall be entitled in priority to other creditors to enforce any outstanding demand due to the society from a member or past member—

Prior claim of society.

(a) in respect of the supply of seed or manure or of the loan of money for the purchase of seed or manure—upon the crops or other agricultural

LEG. REF.

¹ Substituted for "Government" by Government of India (Adaptation of Indian Laws) Order, 1937.

NOTES.

Sec. 18.—A Co-operative Society is a statutory corporation and a legal person, and its debts are distinct from the liability of its members; and the members can only be reached by the creditors of the society in winding up proceedings. An award against the society, which has the force of a decree, cannot be executed against the members. An award ordering that a Co-operative Society "consisting of its members or past members all of whom are jointly and severally liable for the debts of the society pay at once, etc." cannot be construed to be one making the members and past members also liable for the debt; the award cannot be executed against the members. 20 N.L.J. 6. The effect of registering a society is to render it a body corporate, a separate legal entity. Neither under the Companies Act, nor under this Act is there any statutory provision which in any way entitles the creditor of a registered society to proceed against a member for the debts of the society whether the

society is of limited or unlimited liability. Not until there is a winding up can the creditor come face to face with the individual members. The remedy for the creditor is indicated in Ss. 36 and 39 and the exceptional right of the Government under S. 44 to have direct recourse against the members demonstrates the general rule to the contrary. (40 C.L.J. 254, Ref.) 134 I.C. 421=1931 P. 321 (F.B.).

Sec. 19.—The Chairman of a Co-operative Credit Society has no right to sue a member of a society in his own name. The suit should be brought by the society itself under S. 6 (2) of the Co-operative Credit Societies Act. 10 I.C. 570.

Musical instruments are not industrial implements or machinery and do not come within any other part of the class of articles referred to in the section. See 38 I.C. 414= (1916) 2 U.B.R. 133. See also cases referred to therein.

Secs. 19 and 20.—Under S. 73 of the C. P. Code the claim of a Co-operative Society cannot be enforced under S. 19 of the Co-operative Societies Act unless they have a decree or charge under S. 20 of the latter Act. 42 C. 377=18 C.W.N. 1140.

produce of such member or person at any time within eighteen months from the date of such supply or loan;

(b) in respect of the supply of cattle, fodder for cattle, agricultural or industrial implements or machinery, or raw materials for manufacture, or of the loan of money for the purchase of any of the foregoing things—upon any such things so supplied, or purchased in whole or in part from any such loan, or on any articles manufactured from raw materials so supplied or purchased.

20. A registered society shall have a charge upon the share or interest in the capital and on the deposits of a member or past member and upon any dividend, bonus or profits payable to a member or past member in respect of any debt due from such member or past member to the society, and may set off any sum credited or payable to a member or past member in or towards payment of any such debt.

21. Subject to the provisions of section 20, the share or interest of a member in the capital of a registered society shall not be liable to attachment or sale under any decree or order of a Court of Justice in respect of any debt or liability incurred by such member, and neither the Official Assignee under the Presidency Towns Insolvency Act, 1909, nor a Receiver under the Provincial Insolvency Act, 1907, shall be entitled to or have any claim on such share or interest.

22. (1) On the death of a member a registered society may transfer the share or interest of the deceased member to the person nominated in accordance with the rules made in this behalf, or, if there is no person so nominated, to such person as may appear to the committee to be the heir or legal representative of the deceased member, or pay to such nominee, heir or legal representative, as the case may be, a sum representing the value of such member's share or interest, as ascertained in accordance with the rules or by-laws:

Provided that—

(i) in the case of a society with unlimited liability, such nominee, heir or legal representative, as the case may be, may require payment by the society of the value of the share or interest of the deceased member ascertained as aforesaid;

(ii) in the case of a society with limited liability, the society shall transfer the share or interest of the deceased member to such nominee, heir or legal representative, as the case may be, being qualified in accordance with the rules and by-laws for membership of the society, or on his application within one month of the death of the deceased member to any person specified in the application who is so qualified.

NOTES.

Sec. 19 (b).—Fat intended to be purchased and sold at a profit and not for the purpose of manufacturing some other commodity is not "raw material" within S. 19 (b) of the Act. 3 P.W.R. 1917=39 I.C. 373.

Sec. 20.—Share of a member in Co-operative Society is not liable to attachment and sale under S. 20 of the Act. 42 P.L.R. 225=1939 Lab. 305.

Sec. 22 (1), Prov. (ii).—S. 22 of the Act provides that on the death of a member, the share or interest of the deceased member shall be transferred to his nominee or to his legal representative who may be qualified in accordance with the rule or bye-laws of the society. R. 6 of the bye-laws or the appellant

bank provided that "the following are eligible for membership:—(a) persons above 18 years residing or holding property in Bakarganj." R. 17 (b) of the bye-laws provided that "in the case of the death of a preference shareholder his shares may be transferred to his heir or nominee if he is eligible for membership and is duly elected as such." *Held*, that r. 17 (b), in so far as it made election as a condition to membership was in excess of the provisions of S. 22 proviso (ii) and *ultra vires* and was not validated by R. 7 of the bye-laws which referred to election, because the qualifications of members were contained in R. 6 and not R. 7. 151 L. C. 165=38 C.W.N. 459=1934 C. 537.

(2) A registered society may pay all other moneys due to the deceased member from the society to such nominee, heir or legal representative, as the case may be.

(3) All transfers and payments made by a registered society in accordance with the provisions of this section shall be valid and effectual against any demand made upon the society by any other person.

23. The liability of a past member for the debts of a registered society as they existed at the time when he ceased to be a member shall continue for a period of two years from the date of his ceasing to be a member.

Liability of past member.

24. The estate of a deceased member shall be liable for a period of one year from the time of his decease for the debts of a registered society as they existed at the time of his decease.

Liability of the estates of deceased member.

25. Any register or list of members or shares kept by any registered society shall be *prima facie* evidence of any of the following particulars entered therein:—

Register of members.

(a) the date at which the name of any person was entered in such register or list as a member;

(b) the date at which any such person ceased to be a member.

26. A copy of any entry in a book of a registered society regularly kept in the course of business, shall, if certified in such manner as may be prescribed by the rules, be received, in any suit or legal proceeding, as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is admissible.

Proof of entries in societies' books.

Exemption from compulsory registration of instruments relating to shares and debentures of registered society.

27. Nothing in S. 17, sub-section (1), clauses (b) and (c), of the Indian Registration Act, 1908, shall apply to—

(1) any instrument relating to shares in a registered society, notwith-

NOTES.

Sec. 23.—“Debts of a registered society” in S. 23 refer only to those debts which the society owes and not to those which are owed to the society. 18 Lah. 649=1937 Lah. 931. S. 23 governs S. 42 (2) (b). See 1937 Lah. 912. See also 1935 Lah. 330; 1935 Lah. 947. As to the extent of liability of past member for debt due to society, see 1935 L. 947.

SCOPE AND APPLICABILITY OF SECTION.—The words “the debts of a registered society as they existed at the time when he ceased to be a member” occurring in S. 23 clearly refer to the debts due from the society to third persons and it is with regard to these debts that the liability of a past member has been confined in the section to a period of two years from the date of his ceasing to be a member and no further. The debts referred to in the section have no bearing whatever to the debts of the outgoing members due to the society itself. 16 Luck. 658=1941 O.W.N. 404=1941 Oudh 315. The period of two years mentioned in S. 23 is to run backwards not from the date on which the award of the liquidator is made but from the date of the dissolution of the Society,

that is the date on which its registration was cancelled. (1937 Lah. 912, Rel. on.) 43 P.L.R. 305=1941 Lah. 284.

Secs. 23 and 24.—Award against estate of past or deceased member—Jurisdiction of liquidator and of Civil Court. A liquidator has no jurisdiction to award anything against the estate of a past or a deceased member, because of the limitation provided under Ss. 23 and 24. The Civil Court has jurisdiction to go into the question whether the liquidator had jurisdiction to make the award. 41 P.L.R. 269.

Secs. 23 and 42 (2).—A suit by a past member for a declaration that he is not liable to pay certain amounts as contribution due from him on the ground that his liability ceased under S. 23 on the expiration of two years after removal of his name, is not maintainable in a Civil Court, because it has no jurisdiction to go into the matter. Under S. 42 (2), the liquidator has jurisdiction to decide the matter. 1935 L. 330. See also 1935 L. 497; 1937 Lah. 912.

Sec. 24.—The section cannot be called to aid except in liquidation proceedings under S. 42. See 84 I.C. 999=1925 C. 203.

standing that the assets of such society consist in whole or in part of immovable property; or

(2) any debenture issued by any such society and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the society has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(3) any endorsement upon or transfer of any debenture issued by any such society.

Power to exempt from income-tax, stamp-duty and registration fees.

[¹ 28. (1)] The Central Government by notification in the Official Gazette, may, in the case of any registered society or class of registered society, remit [¹ (*)] the income-tax payable in respect of the profits of the society, or of the dividends or other payments received by the members of the society on account of profits.

[¹ (2) The [² (*)] Government, by notification in the Official Gazette, may, in the case of any registered society or class of registered society, remit—

(a) the stamp duty with which, under any law for the time being in force, instruments executed by or on behalf of a registered society or by an officer or member and relating to the business of such society, or any class of such instruments, are respectively chargeable, and

(b) any fee payable under the law of registration for the time being in force.]

³[In this sub-section 'Government' in relation to stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts, and in relation to any stamp duty falling within Item 59 in List I in the Seventh Schedule to the Government of India Act, 1935, means the Central Government, and save as aforesaid means the Provincial Government.]

Property and funds of registered societies.

Restrictions on loans.

29. (1) A registered society shall not make a loan to any person other than a member:

Provided that, with the general or special sanction of the registrar, a registered society may make loans to another registered society.

(2) Save with the sanction of the Registrar, a society with unlimited liability shall not lend money on the security of movable property.

LEG. REF.

¹This section was re-numbered as section 28 (1) and in the same section the letter and brackets "(a)" and the whole of clauses (b) and (c) were omitted and sub-section (2) was added by Act XXXVIII of 1920, Part II.

²The word 'Local' was omitted by Government of India (Adaptation of Indian Laws) Order, 1937.

³Inserted by Government of India (Adaptation of Indian Laws) Order, 1937.

NOTES.

Sec. 29.—A by-law of a Co-operative Society to the effect that the society shall

not sell goods on credit to a non-member cannot have the force of law. It cannot be pleaded in defence by vendee outsider in a suit brought against him for recovery of balance standing against him. 96 I.C. 351 (2)=1926 N. 463. See also 116 I.C. 552 *infra*. The law lays down that a Co-operative Credit Society shall not lend to non-members and consequently a contract for that purpose is undoubtedly illegal and a suit cannot lie to enforce it. *Held*, however, that the amount advanced could be recovered on the basis of the implied promise to repay. 116 I.C. 552=1929 L. 330. See also 96 I.C. 351=1926 N. 463.

(3) The Provincial Government may, by general or special order, prohibit or restrict the lending of money on mortgage of immovable property by any registered society or class of registered societies.

30. A registered society shall receive deposits and loans from persons who are not members only to such extent and under such conditions as may be prescribed by the rules or by-laws.

Restrictions on borrowing.

31. Saves as provided in sections 29 and 30, the transactions of a registered society with persons other than members shall be subject to such prohibitions, and restrictions, if any, as the Provincial Government may, by rules, prescribe.

Restrictions on other transactions with non-members.

Investment of funds.

32. (1) A registered society may invest or deposit its funds—

(a) in the Government Savings Bank, or

(b) in any of the securities specified in section 20 of the Indian Trusts Act, 1882, or

(c) in the shares or on the security of any other registered society, or

(d) with any bank or person carrying on the business of banking approved for this purpose by the Registrar, or

(e) in any other mode permitted by the rules.

(2) Any investments or deposits made before the commencement of this Act which would have been valid if this Act had been in force are hereby ratified and confirmed.

Funds not to be divided by way of profit.

33. No part of the funds of a registered society shall be divided by way of bonus or dividend or otherwise among its members:

Provided that after at least one-fourth of the net profits in any year have been carried to a reserve fund, payments from the remainder of such profits and from any profits of past years available for distribution may be made among the members to such extent and under such conditions as may be prescribed by the rules or by-laws:

Provided also that in the case of a society with unlimited liability no distribution of profits shall be made without the general or special order of the Provincial Government on this behalf.

34. Any registered society may, with the sanction of the Registrar, after one-fourth of the net profits in any year has been carried to a reserve fund, contribute an amount not exceeding ten per cent. of the remaining net profits to any charitable purpose, as defined in section 2 of the Charitable Endowments Act, 1890.

Contribution to charitable purpose.

Inspection of affairs.

35. (1) The Registrar may of his own motion, and shall on the request of the Collector, or on the application of a majority of the committee, or of not less than one-third of the members, hold an inquiry or direct some person authorized by him by order in

Inquiry by Registrar.

NOTES.

Sec. 33.—A resolution passed at an annual general meeting of the shareholders sanctioning the payment of dividend is not in any way illegal or *ultra vires* so long as it does not contravene any of the provisions

of the Co-operative Societies Act or any of its bye-laws, although a considerable portion of the profits out of which the dividend could be paid are unrealised interest income. I.L.R. (1938) 2 Cal. 144=42 C.W.N. 461 =1938 Cal. 394.

writing in this behalf to hold an inquiry into the constitution, working and financial condition of a registered society.

(2) All officers and members of the society shall furnish such information in regard to the affairs of the society as the Registrar or the person authorized by the Registrar may require.

36. (1) The Registrar shall, on the application of a creditor of a registered society, inspect or direct some person authorized by him by order in writing in this behalf to inspect the books of the society:

Inspection of books of indebted society.

Provided that—

(a) the applicant satisfies the Registrar that the debt is a sum then due, and that he has demanded payment thereof and has not received satisfaction within a reasonable time; and

(b) the applicant deposits with the Registrar such sum as security for the costs of the proposed inspection as the Registrar may require.

(2) The Registrar shall communicate the results of any such inspection to the creditor.

37. Where an inquiry is held under section 35, or an inspection is made under section 36, the Registrar may apportion the costs, or such part of the costs as he may think right, between the society, the members or creditor demanding an inquiry or inspection, and the officers or former officers of the society.

38. Any sum awarded by way of costs under section 37 may be recovered, on application to a Magistrate having jurisdiction in the place where the person from whom the money is claimable actually and voluntarily resides or carries on business, by the distress and sale of any movable property within the limits of the jurisdiction of such Magistrate belonging to such person.

Recovery of costs.

Dissolution of society.

39. (1) If the Registrar, after an inquiry has been held under section 35 or after an inspection has been made under section 36 or on receipt of an application made by three-fourths of the members of a registered society, is of opinion that the society ought to be dissolved, he may cancel the registration of the society.

(2) Any member of a society may, within two months from the date of an order made under sub-section (1), appeal from such order.

(3) Where no appeal is presented within two months from the making of an order cancelling the registration of a society, the order shall take effect on the expiry of that period.

(4) Where an appeal is presented within two months, the order shall not take effect until it is confirmed by the appellate authority.

(5) The authority to which appeals under this section shall lie shall be the Provincial Government:

Provided that the Provincial Government may, by notification¹ in the Official Gazette, direct that appeals shall lie to such Revenue-authority as may be specified in the notification.

LEG. REF.

¹ For notification by Chief Commissioner, Central Provinces, that appeals shall lie to the Financial Commissioner, see *Central*

Provinces Gazette, 1912, Pt. I, p. 347. For notification in Madras that appeals shall lie to the Board of Revenue, see *Fort St. George Gazette*, 1923, Pt. I, p. 1651.

40. Where it is a condition of the registration of a society that it should consist of at least ten members, the Registrar may, by order in writing, cancel the registration of the society if at any time it is proved to his satisfaction that the number of the members has been reduced to less than ten.

Cancellation of registration of society.

41. Where the registration of a society is cancelled, the society shall cease to exist as a corporate body—

(a) in the case of cancellation in accordance with the provisions of section 39, from the date the order of cancellation takes effect;

(b) in the case of cancellation in accordance with the provisions of section 40, from the date of the order.

42. (1) Where the registration of a society is cancelled under section 39 or section 40, the Registrar may appoint a competent person to be liquidator of the society.

Winding up.

(2) A liquidator appointed under sub-section (1) shall have power—

(a) to institute and defend suits and other legal proceedings on behalf of the society by his name of office;

NOTES.

Sec. 42.—[See 1935 L. 330 and Notes under S. 23.] The Civil Court cannot interfere with an order passed by a liquidator of a registered Co-operative Society, under S. 42 of the Act, 1912, in order to collect the assets of the Society from persons who, he thinks, are responsible to account to him for the assets. Suit against an auction-purchaser questioning the validity of the sale is not a matter connected with the dissolution of a registered society and does not fall within S. 42. 23 N.L.R. 66=103 I.C. 131=1927 N. 217. No doubt the members of a Co-operative Credit Society are subject to a statutory liability to contribute to the debts of the society; but that liability can only be enforced by the procedure of winding up contained in the Act and not directly by suit of a creditor even after the cancellation of the society. 35 Bom.L.R. 282=1933 B. 191=57 B. 319. An order of the liquidator under S. 42 of the Co-operative Societies Act is final and a Court whose aid is sought for the execution of that order cannot go behind it and investigate its legality. The rules framed under the Act do not provide for any appeal or revision. Where the order of the liquidator was passed after due enquiry and notice but the rules prescribed in the Civil Procedure Code were not literally followed, *held*, that assuming the Court had jurisdiction to interfere with such an order there was merely an irregularity and that it was not a proper case which called for interference. 7 R. 533. Proceedings taken before the liquidator under S. 42 (b) and (d) are to some extent in the nature of quasi-judicial proceedings. Under R. 29 (e) of the Bengal Government Rules the liquidator may issue summonses to persons whose attendance is required either to give evidence or to produce documents. He may compel the atten-

dance of any person to whom a summons has been issued and for that purpose issue a warrant for his arrest. In order to arrive at any conclusion on the question of the determination of the liabilities of any member of a society, some evidence is required by the rules to be taken. Where there is no compliance with the necessary procedure the Court may dismiss the application for execution of the order. 37 C.W.N. 177=145 I.C. 834=1933 C. 631. Liquidation—Members of executive committee asked to pay—Suit by them against ordinary members to recoup themselves—Decree passed without any objection to jurisdiction—No appeal—Objection raised in execution proceedings—Maintainability. See 31 C.W.N. 739; 22 Bom.L.R. 732=44 B. 482.

Cl. (2).—A Civil Court can examine the question whether a liquidator appointed under the Co-operative Societies Act has acted within his powers when he makes a contributory order. The relevant rule limits the power of the liquidator to make a contributory order to a time posterior to the determination of the assets. He cannot make such an order until he has ascertained the assets. He cannot be regarded in law as having ascertained the assets where he is in the course of realising the assets of the individual debtors and until the amount that can be obtained on such realisation is determined. Until then any contributory order made is *ultra vires*. These contributory orders are exceedingly oppressive and should in fairness to the contributories and in the interests of the co-operative society movement generally, only to be resorted to as a last resort. 1941 N.L.J. 412. Where the decretal amount due to a Co-operative Society was realised by the Collector as an arrear of land revenue according to the Co-operative Societies Act, no suit could lie in the Civil Court in respect of such a claim.

(b) to determine the contribution to be made by the members and past members of the society respectively to the assets of the society;

(c) to investigate all claims against the society and, subject to the provisions of this Act, to decide questions of priority arising between claimants;

(d) to determine by what persons and in what proportions the costs of the liquidation are to be borne; and

(e) to give such directions in regard to the collection and distribution of the assets of the society, as may appear to him to be necessary for winding up the affairs of the society.

NOTES.

1937 O.W.N. 298=1937 O. 249. The jurisdiction of Civil Court is ousted only in those cases where the acts of the liquidator are well within the four corners of S. 42. But in cases where his acts are *ultra vires* Civil Courts could go into the question, in order to determine the legality of the order. 18 Lah. 649=1937 Lah. 931. A Civil Court cannot entertain a suit for a declaration that an order of the liquidator under S. 42 (2) of the Act is *ultra vires* and thus cannot be executed. 44 I.C. 353=4 O.L.J. 583. But see 18 Lah. 649=1937 Lah. 931.

Sec. 42 (2) (b).—Where a Co-operative Society is dissolved and certain members are adjudicated as insolvents their liability as members is not provable under the terms of S. 34 (2), Provincial Insolvency Act, if no liquidator was appointed until after the insolvents had been discharged. Under S. 42, it is the liquidator alone who can ascertain and fix the liabilities of the members. Therefore until a liquidator is appointed, it cannot be said that there was any debt or liability certain or contingent which can affect the members. Hence the liquidator is not debarred under the provisions of the Provincial Insolvency Act from fixing the liability as members. 42 P.L.R. 260=1939 Lah. 275. The provisions of the Act provide stringent safeguards to prevent the society from having dealings with strangers. The admission of a member to a society cannot be unilateral on the part of the society. Where a joint family as such has not been mentioned explicitly with its various members as having been brought on the list on the membership of the society, no order of contribution can be passed against the member of the joint family, who are not members of the society. 130 I.C. 820=1931 N. 48. Merely because a person was once a member of a Co-operative Society, it cannot be said that he has no right to ask the Civil Court to decide whether he is under any liability to contribute at all. There is no clear indication in the Co-operative Societies Act that the liquidator can under S. 42 of the Act determine the question of liability to contribute in such a way that his determination will not be subject to be set aside by the Civil Courts. A person who disputes his liability to contribute on the ground that

he ceased to be a member *five years* prior to the dissolution of the Society, but is held liable, is entitled, after payment of the contributions, to sue in the Civil Court for a refund of the amount paid on the ground that he is not liable. S. 42 (6) is no bar to the suit. 59 M. 895=1936 M. 574=70 M. L.J. 604. S. 42 (2) (b) is governed by S. 23 of the same Act and the words 'past member' in S. 42 (2) (b) mean a past member liable for debts under S. 23 of the Act. A person who does not claim to be a past member liable under S. 23 of the Act has a right to have his claim investigated by a Civil Court. 1937 Lah. 912. 'Member' obviously means member at the date of the dissolution of the society in S. 42 (b). 1939 Lah. 275=42 P.L.R. 260. Usually the word contribution means and has reference only to the amount payable by a member as such and does not include debts payable to the society. It is in other words the unpaid portion of the liability of a member. 18 Lah. 649=1937 Lah. 931. A Court called upon to execute an award under S. 42 (2) (b) passed by a liquidator cannot refuse to execute such an award on the ground that the member against whom the award had been made had prior to the award been declared an insolvent and therefore discharged under S. 44 of the Provincial Insolvency Act from the liability to pay any debt, as the matter is not one of lack of inherent jurisdiction on the part of the liquidator but only a question of illegal exercise of jurisdiction. 42 P.L.R. 126=1940 Lah. 280. Where an award obtained by a Bank against a Co-operative Society shows that it was an award against the members of the society, then the Bank could sell the property mortgaged to the society by the members. 1938 N.L.J. 166=1938 N. 308. See also 1937 Rang. 98. Order by liquidator under the section—Nature of—If "decree for money"—Suit to declare null and void—Court-fee. (1937) 1 M.L.J. 640.

Cl. (2) (e): DEBT DUE TO SOCIETY—POWER OF LIQUIDATOR TO MAKE ORDER HAVING FORCE OF DECREE.—S. 42 (2) (e) does not give a liquidator power to make an order having the force of a decree in respect of a debt due to a Co-operative Society in liquidation. 196 I.C. 688=1941 Lah. 355.

(3) Subject to any rules, a liquidator appointed under this section shall, in so far as such powers are necessary for carrying out the purposes of this section, have power to summon and enforce the attendance of witnesses and to compel the production of documents by the same means and (so far as may be) in the same manner as is provided in the case of a Civil Court under the Code of Civil Procedure, 1908.¹

(4) Where an appeal from any order made by a liquidator under this section is provided for by the rules, it shall lie to the Court of the District Judge.

(5) Orders made under this section shall, on application, be enforced as follows:—

(a) when made by a liquidator, by any Civil Court having local jurisdiction in the same manner as a decree of such Court;

(b) when made by the Court of the District Judge on appeal, in the same manner as a decree of such Court made in any suit pending therein.

(6) Save in so far as is hereinbefore expressly provided, no Civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act.

LEG. REF.

¹ In its application to British Baluchistan this sub-section shall be read as if the words "or the British Baluchistan Civil Justice Regulation, 1896, as the case may be" were added. See Schedule I of Regulation II of 1913, Bal. Code.

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Sec. 42 (3).—Although S. 42 (3) gives the same power to the liquidator to enforce same power to the liquidator to enforce attendance of witnesses and production of documents as is given under C.P. Code, that power is subject to the rules framed under the Act. R. 26 (e) of the Rules framed by the Punjab Government restricts the powers of the liquidators to those given in the sub-rule. A liquidator has, therefore, no power to ask a debtor of the society under liquidation summoned by him to furnish security for his appearance or to impose a sentence of imprisonment or fine for his failure to do so. I.L.R. (1939) Lah. 192=1939 Lah. 357..

Cl. (4).—An amount realised by the Collector on a requisition to him by the Registrar of Co-operative Societies is realised by the Collector as arrears of land revenue; and under S. 233 (m) of the U.P. Land Revenue Act, a suit in the Civil Court in respect of such amount is barred. 11 O.W.N. 1060=151 I.C. 414=1934 O. 431.

Cl. (5).—The liquidator cannot order that the debtors are jointly and severally liable for each other's mortgage but may determine the contribution to be made by several debtors to meet the debt. Order passed by liquidator under S. 42 must be enforced by Civil Courts; no appeal lies from the Civil Courts order under this section. 40 A. 89=15 A.L.J. 863. Where the award is against a society, the fact of liquidation of that society cannot make any difference, so far as the executability of that award against the members are concerned. He is the only person competent to collect the assets of the society from its members

and distribute them rateably among the creditors. So he cannot be proceeded against in execution of an award against the society. I.L.R. (1938) Nag. 604=1938 Nag. 434.

Cl. (6).—See 84 I.C. 964=1925 R. 38. See also 84 I.C. 999=1925 C. 203 cited under S. 24. The liquidator is given the power to determine the contribution to be made by a member; but he is not given power to determine whether a particular person is a member or not. And if any one disputes his membership, the dispute can be decided by a Civil Court. (1931 N. 48, Rel. on.) 144 I.C. 264=34 P.L.R. 717=1933 L. 442. There is nothing in S. 42 (6) to prevent the Court from entertaining the application of one of the debtors of a co-operative society which is in liquidation for being declared insolvent. In deciding whether such a debtor should or should not be adjudicated insolvent the Court is not dealing with any matter connected with the dissolution of the society nor will the dissolution be necessarily interfered with by reason of adjudicating such a debtor to be an insolvent. 149 I.C. 96 (1)=1934 P. 290. A Civil Court has no jurisdiction to question the legality of the acts of a liquidator in the matter connected with the dissolution of a registered society. A suit in the Civil Court by a person from whom the amount of contribution determined by the liquidator is realised on the ground that such person is the heir of the member indebted to the society, is barred by reason of S. 42 (6). 151 I.C. 414=11 O.W.N. 1060=1934 O. 43. Where on a registered Co-operative Society being dissolved, the liquidator issues a warrant of attachment, Civil Courts have no jurisdiction to question the same. 94 I.C. 40=1926 N. 379=24 N.L.R. 5. If a liquidator's act or order is shown to be *ultra vires* that is outside the powers conferred on him by law as a liquidator, the Civil Court can then intervene. A liquidator of a society has no power to proceed against anybody and everybody irrespective of the

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43. (1) The Provincial Government may, for the whole or any part of the province and for any registered society or class of such societies, make rules to carry out the purposes of this Act.

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fact that he had even been a member of the society and S. 42 (6) cannot be so construed as to oust the jurisdiction of the Civil Courts in cases where the liquidator passes an order against a person who is not a member of the society. 130 I.C. 820=1931 N. 48. As to jurisdiction of Civil Courts, *see also* 39 Bom.L.R. 249=1937 Bom. 231 (Suit to set aside arbitrator's award on ground of fraud and undue influence); 1937 Rang. 98 (Suit questioning validity of a transfer of property by liquidator); 1940 Rang. 157 (Suit to set aside award of arbitrator given contrary to law of limitation; *see also* 1937 Rang. 363). As to difference between bar of Civil Courts jurisdiction in respect of acts of Registrar, arbitrator and liquidator in Burma, *see* 1937 Rang. 373.

RULES—APPLICABILITY.—There is no procedure for setting aside an *ex parte* decree provided for in the rules. If the Sub-Deputy Registrar thinks it necessary to give an opportunity to the president or other members of the society to show that the decree was in any respect obviously erroneous on the face of it, he can do so. 1932 M.W. N. 18. The Act and the rules made thereunder are intended to provide a speedy remedy for the settlement of disputes and it is for that purpose that such cases have been removed from the jurisdiction of the ordinary Civil Courts. The enforcement of a mortgage under the Act is not subject to but is independent of O. 34 of the C. P. Code. The fact that the procedure of O. 34 was not adopted or that the mortgagor was not allowed a period of six months in accordance with O. 34 does not invalidate the decision of the Registrar which is in effect and substance a final decree for the sale of the mortgaged property. 142 I.C. 487=1933 N. 211.

JURISDICTION OF CIVIL COURT.—By S. 42 (6), Co-operative Societies Act, the liquidator is entitled to determine the contribution to be made by the members and past members of the Society. But if a party denies that he is a member, he is entitled to have that question determined by the Court and the Court has jurisdiction to try the suit. 1937 Cal. 643.

Sec. 43.—Where the defendant dies long before institution of proceedings relating to award under Co-operative Societies Act, the award passed against him is a nullity and therefore cannot be executed. 39 P.L.R. 139=1937 L. 63. An award granted under Co-operative Societies Act is to be executed in the same manner as a decree of Civil Court. 39 P.L.R. 139=1937 L. 63. On a reference made to the Registrar for an award under the Co-operative Societies Act,

the Registrar acts as a Court and he has jurisdiction to decide whether a dispute before him is time barred or not. Once he has decided that rightly or wrongly, it cannot be said that he acted without jurisdiction. 181 I.C. 512=1939 Pat. 500. But *see* 1940 Rang. 157. Where an award made under the Co-operative Societies Act is alleged to have been made without jurisdiction and not according to the terms of the Act, it is open to the person aggrieved to bring a suit to that effect but such objections cannot be taken in the execution proceedings started in pursuance of the award, the objector's remedy being an appeal to the Registrar. 180 I.C. 242=1939 Lah. 40. *See also* 1940 Sind 147.

Cl. (1).—Under R. 13 (7) of the Rules framed by the Government of Assam under S. 43 of the Act, an order of a Registrar or of the Chief Commissioner in appeal is, as between the parties to the dispute, not liable to be called into question in any Civil Court or Revenue Court and is, in all respects, final and conclusive. This presupposes however that the order in question is an order in accordance with the Act and the rules framed thereunder. Where, therefore, the plaintiff calls into question the reference to the Registrar and alleges that there was no compliance by him with the procedure laid down in the rules and he further contends that the rules themselves are *ultra vires* in so far as they oust the jurisdiction of the Civil Court, the Civil Court has jurisdiction to entertain his suit. 41 C.W.N. 670.

RULES—MADRAS RULES—R. 14—POWERS OF REGISTRAR—QUAERE.—If the Registrar of Co-operative Societies acting under R. 14 is competent to pass a mortgage decree and not merely a money decree, i.e., a mortgage decree which can straight away be enforced apart from the procedure contained in O. 34, R. 14, C. P. Code. 1933 M.W. N. 1398=38 L.W. 880. Madras rules, R. 14 (5)—Collector deputing tahsildar to enforce decision—Tahsildar—If proper "Court" for execution—Limitation Act, Art. 182. 70 M.L.J. 31. *See also* 38 Bom.L.R. 927=1936 Bom. 396; 40 Bom.L.R. 889. Statutory Rules under R. 14 (5) (b)—Award under Act—Application to Civil Court to enforce—Limitation. 71 M.L.J. 759. *See also* I.L.R. (1940) 2 Cal. 460.

BENGAL RULES.—The limits within which the rule-making powers of the Local Government could be exercised are contained in sub-S. (1) of S. 43. Sub-S. (2) simply sets out by way of illustration certain matters, on which rules are considered desirable. It does not in any way limit the powers given by sub-S. (1) and the terms

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mentioned therein do not exhaust the list of matters on which rules might be framed by the Local Government. Accordingly R. 28 (3) of the Rules framed by the Local Government which relates to distribution of profits in case of societies with limited liability and which is framed with a view to carry out the purpose of the Act as laid down in S. 33 is not *ultra vires*, although there is no specific item mentioned in S. 43 (2) relating to distribution of profits in case of Societies with limited liability. I.L.R. (1938) 2 Cal. 144=42 C.W.N. 461=1938 Cal. 394. See also 1938 Cal. 327. Where the plaintiff sues a Co-operative Society for recovery of a certain sum alleged to be due to him as dividend on certain preference shares held by him, on a declaration that the constitution of the Board of management was illegal, that it had no authority to call an extraordinary general meeting of the shareholders, and that the resolution passed at the meeting thus convened under which the payment of the said dividend was refused was illegal and *ultra vires*, the matter is not one which is withdrawn from the Courts by R. 22 of the Rules framed by the Local Government under S. 43 of the Act, and a suit is, therefore, maintainable in a Civil Court. I.L.R. (1938) 2 Cal. 144=42 C.W.N. 461=1938 Cal. 394. The different clauses of sub-S. (2) of S. 43 are only illustrative and do not restrict the general rule-making power to implement the avowed objects of the Act conferred by sub-S. (1). Sub-Rr. (2), (5) and (6) of R. 22 framed by the Local Government under the powers conferred by S. 43 of the Act are not *ultra vires*. I.L.R. (1938) 2 Cal. 103=42 C.W.N. 391=1938 Cal. 327. Rule 22 — Award — Execution — Limitation — Starting point. See I.L.R. (1940) 2 Cal. 460. Where a dispute between the committee and a member is referred to arbitration under R. 22, Sub-r. (1) of the Rules framed by the Government of Bengal, the proceedings before the arbitrator are not *ab initio* void for want of jurisdiction merely because a non-member is also a party to the dispute. If the non-member submits to the jurisdiction of the arbitrator, he brings himself within the scope of R. 22, and under sub-R. (6) of that rule the award is not liable to be called into question by him in any Civil or Revenue Court and would be in all respects, final and conclusive. 41 C.W.N. 667=65 C.L.J. 206. Rule 22 (6) of the Rules framed under S. 43 of the Co-operative Societies Act is not *ultra vires* of the Local Government. But if the award is without jurisdiction, the Civil Court can certainly declare it a nullity. Even if the arbitrator is validly appointed, the award can still be a nullity if there is violation of the rules regulating the arbitration in matters of substance. Not only a proper appointment of the arbitrator in accordance with the rules is essential for creating jurisdiction in the arbitrator but the fundamen-

tal rules attaching restraint to the exercise of authority by the arbitrator are equally mandatory and a violation of them would nullify the award. But the fact that the arbitrator has ignored the law of limitation is not a ground which would entitle the Civil Court to interfere. I.L.R. (1940) 1 Cal. 82=188 I.C. 213=1940 Cal. 198. But see 1940 Rang. 157; 1937 Rang. 363.

C. P. RULES.—The Co-operative Societies Act nowhere gives any power to the Commissioner or any other Revenue Officer to examine or revise the proceedings of the Registrar or other officer of the department. A Revenue Court has no jurisdiction to question and disregard an award given by the Registrar of Co-operative Societies and the certificate issued to the Revenue Courts for recovery of the amount under the award, in pursuance of R. 33 of the rules framed under S. 43 of the Act. 1939 N.L.J. 405. Where an award under the rules framed under S. 43 (1) was in these terms: 'I therefore in this my award order that the J. Co-operative Society consisting of the following members or past members all of whom are jointly and severally liable for the debts of the Society, pay at once' and proceeded to give a list of members, the decree on the face of it is only an award against the J. Society alone and not against its members. Moreover it is not legally possible for a Registrar to make an award against the members personally for a debt of the Society. I.L.R. (1938) Nag. 604=1938 Nag. 434.

PUNJAB RULES.—Civil Court has no jurisdiction to entertain a suit between a Society and its members, etc., by virtue of R. 18 framed by the Punjab Government under S. 43 (1). 1937 Lah. 268.

U. P. RULES.—Jurisdiction has been specially given to the Registrar of Co-operative Societies to decide certain matters under R. 115 of the rules framed by the U. P. Government under S. 43 (2) (1) or to refer those matters for decision by an arbitrator. As this jurisdiction is contrary to the ordinary jurisdiction of Civil Courts, it must be construed strictly. The passing of a personal decree against an alleged representative of a past deceased member (who denies that he is such a representative) is clearly outside the sub-section or the rule. Both the rule and sub-section give jurisdiction to the Registrar or the arbitrator merely to decide matters concerning the estate of a deceased member. The passing of a personal decree cannot come under this jurisdiction. As such a Civil Court can set aside such a decree. 1940 A.L.J. 588=1940 All. 482. All that R. 137 (1) lays down is that the Collector can adopt the same methods for the realisation of the money as he can adopt for the recovery of an arrear of revenue. It does not invest a debt due to a Co-operative Society with the character of land revenue due to the Crown. It merely provides a summary procedure for the realisation of

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) subject to the provisions of section 5, prescribe the maximum number of shares or portion of the capital of a society which may be held by a member;

(b) prescribe the forms to be used and the conditions to be complied with in the making of applications for the registration of a society and the procedure in the matter of such applications;

(c) prescribe the matters in respect of which a society may or shall make by-laws and for the procedure to be followed in making, altering and abrogating by-laws, and the conditions to be satisfied prior to such making, alteration or abrogation;

(d) prescribe the conditions to be complied with by persons applying for admission or admitted as members, and provide for the election and admission of members, and the payment to be made and the interest to be acquired before the exercise of the right of membership;

(e) regulate the manner in which funds may be raised by means of shares or debentures or otherwise;

(f) provide for general meetings of the members and for the procedure at such meetings and the powers to be exercised by such meetings;

(g) provide for the appointment, suspension and removal of the members of the committee and other officers, and for the procedure at meetings of the committee, and for the powers to be exercised and the duties to be performed by the committee and other officers;

(h) prescribe the accounts and books to be kept by a society and provide for the audit of such accounts and the charges, if any, to be made for such audit, and for the periodical publication of a balance-sheet showing the assets and liabilities of a society;

(i) prescribe the returns to be submitted by a society to the Registrar and provide for the persons by whom and the form in which such returns shall be submitted;

(j) provide for the persons by whom and the form in which copies of entries in books of societies may be certified;

(k) provide for the formation and maintenance of a Register of members and, where the liability of the members is limited by shares, of a register of shares;

(l) provide that any dispute touching the business of a society between members or past members of the society or persons claiming through a member

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the money and does not confer a substantive right of priority over other debts. I. L.R. (1940) All. 181=1940 A.L.J. 45=1940 All. 188.

Sec. 43 (2) (l).—The words "touching the business of a society" in S. 43 (2) (l) are not confined to disputes in connection with the internal management of the affairs of society or dispute in regard to principles which would regulate the conduct of the business thereof. 28 C.W.N. 131=1924 C. 467. See also 47 A. 374=23 A.L.J. 129=1925 A. 356; 14 P. 292 (Dispute between member and society in respect of loan by society). The words "concerning the business of a Society" occurring in S. 43 (2), Cl. (l) and in R. 22 (1) framed by the Local Government, cannot be limited to disputes concerning the internal manage-

ment of the Society. The principal business of a Society being to finance its members, a dispute concerning the financial obligations of its members to the Society would be a dispute concerning the business of the Society. The use of the word "committee" in S. 43 (2), Cl. (l) and R. 22 (1) is sufficient to indicate a dispute with the Society itself and enable proceedings to be initiated and carried on before the authority referred to therein in the name of the Society. I.L.R. (1938) 2 Cal. 103=42 C.W.N. 391=1938 Cal. 327. There would be a dispute so long as a claim is asserted by one party and denied by the other, be the claim a false or a true one, or whether it ultimately turns out to be false or true. I.L.R. (1938) 2 Cal. 103=42 C.W.N. 391=1938 Cal. 327. A claim by one co-operative society against another for a sum of money as being due

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is enough to constitute a dispute within the meaning of R. 14. 1932 M.W.N. 18. R. 14 (4) only requires that the parties should be heard only when they are present, and it is impossible for the Registrar to hear a party who is absent. (*Ibid.*) A dispute between a member who happens to be an officer of a co-operative society and the society in regard to sums of money entrusted to the former for purchase of certain articles is within S. 43 (2) (1) of the Act. 44 M.L.J. 382=72 I.C. 838=1923 M. 481. Where a Co-operative Society has considered its treasurer to be responsible for embezzlement of money deposited with it by a person and the treasurer has throughout contended that he was not concerned with the alleged embezzlement there is clearly a dispute between the treasurer and the society regarding question of embezzlement of money and hence the dispute can be referred to arbitration. 42 P.L.R. 273=1939 Lah. 301. It is only members and persons claiming through members against whom the Registrar can pronounce a decision which can be executed as a Civil Court decree. The society must enforce in the regular course any claim which it may have against outsiders. The decision of the registrar, so far as it affects a stranger is a nullity as being made without jurisdiction. 148 I.C. 730=15 P.L.T. 111=1934 P. 145. Sub-r. (1) of R. 22 does not confine the dispute to such as may be referable to membership only. A dispute between the society and the members in their capacity as brokers can be the subject of reference. 36 C.W.N. 121=55 C.L.J. 89. R. 22 (b) is not meant to take away the jurisdiction of an executing Court to enquire into the competency of the award on the ground of jurisdiction. 36 C.W.N. 121. A dispute between a member who happens to be an officer of a co-operative society on the one hand and the committee or an officer thereof on the other falls within the words of the section. 36 C.W.N. 121. An award given by the Inspector of Co-operative Societies appointed as arbitrator by the Registrar of Co-operative Societies under R. 22 of the Bengal Government Rules is not an award of an arbitrator in the ordinary sense and it need not be filed in Court before it can be enforced. 60 C. 906=37 C.W.N. 649=1933 C. 695. See also 60 C.L.J. 572; 36 C.W.N. 121; I.L.R. (1941) 2 Cal. 551. In order that an award based on an arbitration under the Co-operative Societies Act may be valid and binding on a person, it is incumbent on the Society to prove that he was a member of the Society at the time when the reference to arbitration was made. Although ordinarily a Co-operative Society lends money only to its members, a Court will not be justified in holding merely on the basis of an alleged loan taken by a person that he must have been a member on the date on which he took the loan, when the

affairs of the Society do not appear to have been carried on in regular manner and it is found by the Court that the register produced by the Society is a fabricated one. 42 P.L.R. 112=1940 Lah. 193. Where a dispute between the committee and a member is referred to arbitration under R. 22, sub-R. (1) of the Rules framed by the Government of Bengal under S. 43 of the Act, the proceedings before the arbitrator are not *ab initio* void for want of jurisdiction merely because a non-member is also a party to the dispute. If the non-member submits to the jurisdiction of the arbitrator, he brings himself within the scope of R. 22, and under sub-r. (6) of that rule the award is not liable to be called into question by him in any Civil or Revenue Court and would be in all respects, final and conclusive. 41 C.W.N. 667=65 C.L.J. 206. See also 39 C.W.N. 1301. An award under the Act which is not appealed against within one month, becomes final, and cannot either be upset or interfered with by the Civil Court to which it is sent for execution. Even though the award may be anomalous and erroneous, the Civil Court cannot go behind it, and utilise its powers under S. 151, C. P. Code, to send the award back to the arbitrator for correction of mistakes in order to obtain some sort of alteration which in its opinion would be in the ends of justice. 164 I.C. 802=40 C.W.N. 89. See also 1935 C. 418. When an Inspector was appointed arbitrator to decide a dispute between two societies and after he gave his award one of the societies sued to declare the reference and award invalid. *Held*, that the suit was maintainable in the Civil Court. *Quære*, whether R. 22 (6) framed by the Bengal Government under S. 43 was *ultra vires*. 60 C. 1207=37 C.W.N. 843. Where it is sought to entertain or continue proceedings against the legal representatives of a deceased debtor, the arbitrators are competent to decide who are the legal representatives. If a wrong conclusion is arrived at with regard to a particular person that person has got a remedy under the Act of filing an appeal to the registrar. The Civil Court has no jurisdiction to interfere. 28 Bom.L.R. 598=1926 B. 352. The execution of an award settling the dispute between the Society and its member was held by the executing Court as time barred and the Society again referred the same dispute to arbitration and obtained an award. *Held*, that the dispute between the Society and its member was determined by the first award and the subsequent dispute referred by the Society to arbitration was one which under the rules made under S. 43 could only be decided by the executing Court for it related wholly to the discharge of the award. The proceedings of the executing Court were subject to the ordinary laws and if the society neglected to execute the award within time, its right to have the award enforced was lost, and that was an end of the

or past member or between a member or past member or persons so claiming and the committee or any officer shall be referred to the Registrar for decision or, if he so directs, to arbitration, and prescribe the mode of appointing an arbitrator or arbitrators and the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators, and the enforcement of the decisions of the Registrar or the awards of arbitrators;

(m) provide for the withdrawal and expulsion of members and for the payments, in any, to be made to members who withdraw or are expelled and for the liabilities of past members;

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dispute which left nothing to be referred to arbitration. Hence the second award was one which could not be passed within the scope of the Act and the rules made under it and a suit could lie to have it declared void. 38 P.L.R. 1113=1936 L. 901. A dispute between A, B and C who were all members of Society related to a transaction which took place between A and the Society. The books of the Society showed that certain money had been borrowed by A from the Society, but in reality it had been misappropriated by B and C, the Secretary. *Held*, that the dispute was concerning the business of the Society between three of its members and revision could lie from an order of the executing Court refusing to execute an award on the dispute as it failed to exercise jurisdiction vested in it by law. 165 I.C. 511=1936 L. 786. *See also* 1935 L. 947; 1935 L. 631. Civil Court has no jurisdiction to entertain a suit between a Society and its members, etc., by virtue of R. 18 framed by the Punjab Government under S. 43 (1). 1937 L. 268. After the death of a Secretary of a Co-operative Society the Union accepted liability for the members' deposits which had been embezzled by the late Secretary. The dispute between the Union and the heirs of the deceased was referred to arbitration but the heirs refused to join in the reference. *Held*, that the submission and the award were not within the scope of the rules under the Act and the award could not be enforced against the heirs of the deceased. 133 I.C. 883=32 P.L.R. 780. Rr. 31 and 34 framed under S. 43, provide that awards shall be enforceable as decree of a Court having local jurisdiction if application is made to it to enforce it. 47 B. 92=65 I.C. 212; 97 I.C. 288 (2)=1926 L. 547. Where the rules provide for reference of disputes to Registrar, Civil Courts have no jurisdiction. 23 A. L. J. 129=47 A. 374=1925 A. 356; 71 I.C. 722=1924 L. 418. But *see also* 6 P.L.T. 452=88 I.C. 671=1925 P. 575; 59 C. 1165=36 C.W.N. 414=1932 C. 317; 60 C.L.J. 572; 42 C.W.N. 391=1938 Cal. 857. The ground that a minor was not properly represented before the arbitrator, is not sufficient to give jurisdiction to the Civil Court to entertain the suit for a declaration that the award was not binding on the minor. 146 I.C. 565=1933 L. 376. The question whether certain persons are the legal representatives of a deceased member entitled to

have shares in the bank and to be registered as shareholders in the bank in the place of the deceased is a question which does not relate to the "business" or the management of the society and the decision of the Registrar on such a question being referred to him is not final but is subject to a right of suit in the Civil Court. (36 C.W.N. 414, Foll.) 151 I.C. 165=38 C.W.N. 459=1934 C. 537. A Court having power to execute an award can transfer it for execution. 24 Bom.L.R. 909=47 B. 92. An award was made at Poona under rules framed under S. 43 and then the Judge of the Small Cause Court, Poona, was requested to transfer the decree under S. 39, C. P. Code, but he refused. *Held*, that he was empowered to transfer the decree and he could refuse to retransfer it. 46 B. 128=23 Bom. L. R. 909. An *ex parte* decree was passed, in a suit in a Civil Court instituted by a Co-operative Society for money lent on a bond executed by a member of the society. Subsequently there was an agreement, which was recorded in Court, under which the member agreed to pay the decretal amount in instalments of Rs. 10 per month. Default having been committed, execution proceedings were started, and the objection was raised that the decree was void and without jurisdiction, regard being had to S. 43 of the Act and R. 22 framed thereunder by the Bengal Government. *Held*, that the agreement was a valid and binding agreement and could be enforced in execution and that it was not open to the defendant to go back on the same or to contend that the decree was void and unenforceable. 61 C.L. J. 24=39 C.W.N. 363.

Sec. 43 (2) (1) and (s).—Where an award is made by a person appointed as arbitrator who could not be appointed such an arbitrator under the law, the award is null and void and the Civil Court has jurisdiction to declare it void. But where the award is made by a person validly appointed as arbitrator, the award is not a nullity although the procedure adopted by the arbitrator is materially irregular and he is guilty of misconduct. Such an award has to be set aside only by taking such proceedings as are provided for for the purpose by the rules framed by the Local Government under S. 43 and the jurisdiction of the Civil Court is barred. (37 C.W.N. 843, Expl.) I.L. R. (1938) 2 Cal. 103=42 C.W.N. 391=1938 Cal. 857.

(*n*) provide for the mode in which the value of a deceased member's interest shall be ascertained, and for the nomination of a person to whom such interest may be paid or transferred;

(*o*) prescribe the payments to be made and the conditions to be complied with by members applying for loans, the period for which loans may be made, and the amount which may be lent, to an individual member;

(*p*) provide for the formation and maintenance of reserve funds, and the objects to which such funds may be applied, and for the investment of any funds under the control of the society;

(*q*) prescribe the extent to which a society may limit the number of its members;

(*r*) prescribe the conditions under which profits may be distributed to the members of a society with unlimited liability and the maximum rate of dividend which may be paid by societies;

(*s*) subject to the provisions of section 39, determine in what cases an appeal shall lie from the orders of the Registrar, and prescribe the procedure to be followed in presenting and disposing of such appeals; and

(*t*) prescribe the procedure to be followed by a liquidator appointed under section 42, and the cases in which an appeal shall lie from the order of such liquidator.

(3) The Provincial Government may delegate, subject to such conditions, if any, as it thinks fit, all or any of its powers to make rules under this section to any authority specified in the order of delegation.

(4) The power to make rules conferred by this section is subject to the condition of the rules being made after previous publication.

(5) All rules made under this section shall be published in the Official Gazette, and on such publication shall have effect as if enacted in this Act.

Miscellaneous.

44. (1) All sums due from a registered society or from an officer or member or past member of a registered society as such to the Government, including any costs awarded to the Government under section 37, may be recovered in the same manner as arrears of land-revenue.

(2) Sums due from a registered society to Government and recoverable under sub-section (1) may be recovered, firstly, from the property of the society; secondly, in the case of a society of which the liability of the members is limited,

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Sec. 43 (5).—Bye-law framed by a Society under S. 8 (3), a rule enacted by the Local Government under S. 43 (5)—Conflict between the two as to the persons to whom the Registrar should make a reference—Proper procedure—Registrar following the rule is legal procedure. 171 I.C. 395, cited under S. 8, *supra*.

Sec. 44.—Where a decree is passed against a co-operative society as a corporate body the decree-holder cannot pursue his remedy in execution against the shareholders or members of the society in their individual capacity. 39 L.W. 143=1934 M. 181 (2)=66 M.L.J. 475. Reading S. 44 of the Act with S. 128 of the C.P. Land Revenue Act it could not be said that an agriculturist's house as such should be exempt from attach-

ment. In such a case the provisions of S. 60, C.P. Code, could not be invoked. 23 N.L.R. 66=103 I.C. 131=1927 N. 217. As to the extent of the availability of the provisions of the Land Revenue Act for recovery of sum due by a member of Co-operative Society, see 1940 Rang.L.R. 230. Attachment and sale of movable property by Collector—Objection to claimant—Dismissal of objection—Remedy is by way of appeal to the Commissioner and not by way of suit in Civil Court. 49 A. 701=25 A.L.J. 521=1927 A. 532. Sale proceeds of execution in the hands of the Collector are not liable to attachment at the instance of other creditors; nor can they claim rateable distribution of such assets. I.L.R. (1939) Kar. 104=1938 Sind 157. See also 1940 All. 188.

from the members subject to the limit of their liability; and, thirdly, in the case of other societies, from the members.

45. Notwithstanding anything contained in this Act, the Provincial Government may, by special order in each case and subject to such conditions, if any, as it may impose, exempt any society from any of the requirements of this Act as to registration.

Power to exempt societies from conditions as to registration.

46. The Provincial Government may, by general or special order, exempt any registered society from any of the provisions of this Act or may direct that such provisions shall apply to such society with such modifications as may be specified in the order.

Power to exempt registered societies from provisions of the Act

47. (1) No person other than a registered society shall trade or carry on business under any name or title of which the word "co-operative" is part without the sanction of the Provincial Government:

Prohibition of the use of the word "co-operative."

Provided that nothing in this section shall apply to the use by any person or his successor in interest of any name or title under which he traded or carried on business at the date on which this Act comes into operation.

(2) Whoever contravenes the provisions of this section shall be punishable with fine which may extend to fifty rupees, and in the case of a continuing offence with further fine of five rupees for each day on which the offence is continued after conviction therefor.

Indian Companies Act, 1882, not to apply.

48. The provisions of the Indian Companies Act, 1882,¹ shall not apply to registered societies.

49. Every society now existing which has been registered under the Co-operative Credit Societies Act, 1904, shall be deemed to be registered under this Act, and its by-laws shall, so far as the same are not inconsistent with the express provisions of this Act, continue in force until altered or rescinded.

Saving of existing societies.

50. [Repeal.] *Rep. by the Second Repealing and Amending Act, 1914 (XVII of 1914), S. 3 and Sch. II.*

THE INDIAN COPYRIGHT ACT (III OF 1914).

Ye r.	No.	Short title.	Amendments.
1914	III	The Indian Copyright Act, 1914	Amended, IV of 1924. Repealed in part XII of 1927.

PREFATORY NOTE: NATURE OF COPYRIGHT AND LAW REGULATING COPYRIGHT.—Copyright is the exclusive right of multiplying for sale copies of works of literature or art allowed to the author thereof or his assignees. As a recognised form of property it is compared with others of very recent origin, being in fact the result of the facility for multiplying copies created by the discovery of printing and kindred arts. Whether it was recognised at all by the common law of England was long a legal question of the first magnitude, and the reasons for recognising it, and the extent of the right itself are not quite clear from controversy even now. The short paragraph in Blackstone may still be read with interest. He thinks that "this species of property, being grounded on labour and invention, is more properly reducible to the head of occupancy than any other, since

LEG. REF.

¹ See now Act VII of 1913.

NOTES.

Sec. 49.—By-laws—Liability of son for

debts due by father to Bank of which he was a member—Construction of by-law. 31 I.C. 724=18 O.C. 157.

the right of occupancy itself is supposed, by Mr. Locke and many others to be founded on the personal labour of the occupant." But he speaks doubtfully on its existence,—merely mentioning the opposing views, "that on the one hand it hath been thought no other man can have a right to exhibit the author's work without his consent, and that it is urged on the other hand that the right is of too subtle and unsubstantial a nature to become the subject of property in common law, and only capable of being guarded by positive statutes and special provisions of the Magistrate." He notices that the Roman Law adjudged, that, if one man wrote anything on the paper or parchment of another the writing should belong to the owner of the blank materials, but as to any other property in the works, the law is silent, and he adds that, "neither with us in England hath there been (till very lately) any final determination upon the rights of authors at common law."

The nature of the right itself, and the reasons why it should be recognised in law, have from the beginning been the subject of bitter dispute. By some it has been described as a monopoly, by others as a kind of property. Each of these words covers certain assumptions from which the most opposite conclusions have been drawn. As a monopoly it is urged that the copyright should be looked upon as a doubtful exception to the general regulating trade, and should at all events be strictly limited in point of duration. As property, on the other hand, it is claimed that it should be perpetual. There would appear to be no harm in describing copyright either as a property or monopoly, if care be taken that the words are not used to cover suppressed arguments as to its proper extent and duration. Historically, and in legal definition, there would appear to be no doubt that copyright, as regulated by statute, is a monopoly.

EARLY LAW OF COPYRIGHT IN ENGLAND.—The first Copyright Act in England is 8 Anne, c. 19. The preamble states that "Printers, booksellers, and other persons were frequently in the habit of printing, reprinting, and publishing book and other writings without the consent of the authors or proprietors of such books and writings to their very great detriment, and too often to the ruin of them and their families." "For preventing, therefore, such practices for the future, and for the encouragement of learned men to compose and write useful books it is enacted that the author of any book or books already printed who hath not transferred to any other the copy or copies of such book or books in order to print or assignees, shall have the sole liberty of printing or reprinting such book or books for the term of one and twenty years, and that the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assignees, shall have the sole liberty of printing or reprinting such book or books for the term of fourteen years, to commence from the day of first publishing the same, and no longer." The penalty for offences against the Act was declared to be the forfeiture of the illicit copies to the true proprietor and the fine of one penny per sheet, half to the Crown and half to any person suing for the same. "After the expiration of the said term of fourteen years the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, or their representatives, for another term of fourteen years." To secure the benefit of the Act registration at Stationers' Hall was necessary. In section 4 is contained the provision that if any person thought the price of a book too high and unreasonable he might complain to Archbishop of Canterbury, the Lord Chancellor, the Bishop of London, the Chiefs of the three Courts at Westminster, and the Vice-Chancellors of the two Universities in England, and to the Lord President, Lord Justice General, Lord Chief Baron of the Exchequer, and the Rector of the College of Edinburgh in Scotland, who may fix a reasonable price. Nine copies of each book was to be provided to the royal library, the libraries of the Universities of Oxford and Cambridge, the four Scotch Universities, Sion College and the Faculty of Advocates at Edinburgh. The Copyright of the Universities was not to be prejudiced by the Act. (Ency. Brit., 9th Ed., Vol. VI, pp. 356-357.)

The following Statement of Objects and Reasons is appended to the Copyright Bill:

STATEMENT OF OBJECTS AND REASONS TO THIS ACT.—The question of the amendment of the Indian Copyright Act (XX of 1847) has been considered on several occasions since 1864 on the ground that the Act was incomplete and did not provide, among other matters for the protection of copyright in photographs, translations, newspapers, telegrams, etc. Legislation, however, has been postponed in view of possibility of an amendment of the English Acts on the subject of copyright.

In 1908, a conference and convention, to which Great Britain was a party, was held in Berlin with the object of bringing the domestic laws of all countries concerned into harmony with one another so as to obtain international uniformity of treatment and the ratification of that Convention involved certain changes in the English law. Its provisions were examined by a strong departmental committee appointed by the Board of Trade which came to the unanimous conclusion that the Berlin Convention should be accepted by Great Britain with as few reservations as possible.

An Imperial Copyright Conference was subsequently convened in 1910 containing representations of the self-governing dominions and of the Indian Office, Colonial Office,

etc. It endorsed the recommendation of the Board of Trade Committee and recommended that an Act dealing with the essentials of Imperial Copyright law should be passed by the Imperial Parliament and that this Act should be expressed to extend to all British possessions subject to the rights of self-governing dominions and possessions to modify or add to its provisions by legislation in certain cases affecting only procedure and remedies.

A Draft Bill was approved by the Conference and eventually passed into law as the Copyright Act, 1911 (1 and 2 Geo. V, c. 46), which came into operation in the United Kingdom on 1st July, 1912.

The important changes in the Act are—

- (i) The abolition of the formality of the registration of copyright.
- (ii) The extension of the term of copyright from 42 years to one of life and 50 years subject to certain conditions.
- (iii) The extension of the scope of copyright.
- (iv) The substitution of one Act for several on the subject of copyright.

The Government of India considered that the early introduction of the Act into India was desirable both for Imperial and International as well as domestic reasons and consulted Local Governments in regard to the modifications and additions referred to in section 27 of the Act, that might be necessary to suit the special conditions. On account of non-proclamation in India of the Act of 1911, and having regard to the serious hardship and loss which might thereby be inflicted on the English authors, the Act was brought into force in India by proclamation in the *Gazette of India* on 31st October, 1912, under section 37 (2) (d) of the Act, the question of modification or additions being postponed for subsequent consideration on receipt of the views of Local Governments. These are in substantial agreement with those of the Government of India who propose by virtue of the powers conferred by section 27 of the Act of 1911 to pass the Draft Bill which embodies the modifications in and the addition to the Act which are considered desirable, together with certain formal and necessary alterations due to difference between English and Indian administration and procedure.

It will be observed that the changes proposed are as few as possible in view of the desirability of securing that uniformity throughout the Empire which was advocated by the Imperial Copyright Conference of 1910.

Clause 3.—This contains purely formal modifications necessary for the application of the Act of 1911 to British India.

Clause 4.—Under sections 1-3 of the Act of 1911 the term for which copyright subsists in translations is the life of the author and a period of fifty years after his death.

The special linguistic conditions of India render desirable a substantial relaxation of the above provision. The languages spoken in India are so numerous and differ so widely that the conditions which prevail cannot be compared with those in most European countries and vernacular translations from English and from one vernacular to another are not only common but serve the useful purpose for disseminating knowledge. It is proposed, therefore, that translations of works first published in British India should be permitted after the expiry of five years from the date of first publication, provided that two years' notice of the intention to publish a translation has been given to the author.

This proposal is considered to be a sufficient safeguard of and a reasonable compromise between rights of the author and those of the public.

Clause 5.—The provisions of section 19 of the Act of 1911 are new, and in view of the peculiar conditions of Indian music, objections have been urged against the application of this section *in toto* to Indian works. It is pointed out that it is impossible in most cases to identify the original composer or author and that the majority of the Indian melodies have not been written in staff notation except through the medium of the phonograph and are subject to infinite variety of notation and tune. If, under these circumstances, section 19 is adopted with its retro-active principle there may be fictitious claims of ownership in musical works and much confusion and undesirable litigation. To make it clear that in order to fall within the definition of "musical work" music must have been graphically represented it is proposed to adopt *mutatis mutandis* the definition of the term "musical work" contained in the English Musical Copyright Act, 1902, *viz.*, "musical work" means any combination of melody and harmony or either of them printed, or reduced to writing.

Clause 6.—Section 18 (a) of the Sea Customs Act, 1878, prohibits importation in the case of books alone, the copyright whereof subsists in India. In view of the extension of the Act of 1911 to works other than books and the difference in procedure it is proposed to repeal this section and enact the appropriate provisions as the necessary modifications referred to in section 14 (7) of the Act of 1911.

Clauses 7-12.—The provisions of section 11 of the Act of 1911 have been in the main adopted. Imprisonment, however, will in all cases be simple, and offences will be triable by

a Magistrate of the first class only. It is proposed to convert the amount of English fines on the basis of £1=Rs. 10 in accordance with the usual practice and to insert a clause exempting the case of infringement by the construction of a building from the operation of summary remedies, thus giving effect to the similar exemption provided by section 9 of the English Act.

Clause 13.—On account of the technicalities of the subject of copyright, and of the greater finality that such a tribunal will afford, it has been considered advisable to give jurisdiction to High Courts only in all suits or civil proceedings regarding infringement of copyright.

Clause 14.—This clause which is self-explanatory has been added in view of a recent decision in *Evans v. Morris* reported in the Law Journal of 29th March, 1913.

The following is the Select Committee's Report.—We have amended clause 3 of the Bill in two respects. In the first place, we have deleted sub-clause (2) which provided that the reference to the Judicial Committee in section 4 of the Copyright Act should be read in relation to works first published in British India as reference to the Governor-General in Council, as we consider that it is desirable that the power under this section should be exercised by one authority throughout the Empire. Secondly, we have amplified sub-clause (4) so as to provide that all references to arbitration in sub-section (1) of section 24 of the Act shall be read as references to arbitration in accordance with the law in force in British India.

We have modified clause 4 of the Bill in various particulars. We think that the period of copyright as regards translations, which is prescribed by the Bill for works first published in British India, is too short and we have therefore altered it from five to ten years and have deleted the provisions which required the issue of notice upon an author before the production of a translation by any other person. We have, however, provided that, if within this period of ten years the author himself publishes a translation of the work in any particular language, the limitation upon copyright prescribed by this clause shall not apply to translation into that particular language. This amendment is in accordance with the provisions of the Berlin Convention. We have added a sub-clause to secure the rights of legal representatives of deceased authors.

We have substituted the word "penalties" for the words "summary remedies" in the title of Chapter III in view of the fact that the expression "summary trial" is used in the Code of Criminal Procedure, 1898, to denote a particular procedure in the trial of cases, which might not be applicable to cases under this chapter.

We have provided for an appeal against orders of a Magistrate regarding the disposal of copies and plates which infringe copyright and have authorised the appellate Court to stay execution of such orders pending consideration of the appeal.

In view of the fact that suits relating to infringement of copyright are sometimes of a petty nature, we have given the High Court and the District Judge concurrent jurisdiction in civil suits and proceedings under the Act. It has been pointed out to us that the provisions of clause 13 of the Bill as introduced might cause unnecessary inconvenience and expenses in many cases.

THE INDIAN COPYRIGHT ACT (III OF 1914).

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THE INDIAN COPYRIGHT ACT (III OF 1914).¹

[24th February, 1914.]

An Act to modify and add to the provisions of the Copyright Act, 1911.

WHEREAS it is expedient to modify and add to the provisions of the Copyright Act, 1911, in its application to British India; it is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title and extent.

1. (1) This Act may be called THE INDIAN COPYRIGHT ACT, 1914.

(2) It extends to the whole of British India including British Baluchistan, the District of Angul² and the Sonthal Parganas.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "the Copyright Act" means the Act of Parliament entitled the Copyright Act, 1911; and

(2) words and expressions defined in the Copyright Act have the same meanings as in that Act.

CHAPTER II.

CONSTRUCTION AND MODIFICATION OF THE COPYRIGHT ACT.

3. In the application to British India of the Copyright Act (a copy of which Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, is set out in the First Schedule), the following modifications shall be made, namely:—

(1) the powers of the Board of Trade under section 3 shall, in the case of works first published in British India, be exercised by the Central Government;

LEG. REF.

¹ For Statement of Objects and Reasons, See Gazette of India, 1913, Pt. V, p. 163; for Report of Select Committee, see *ibid.*, 1914, Pt. V, p. 23; and for Proceedings in Council, see *ibid.*, 1913, Pt. VI, p. 515, *ibid.*, 1914, Pt. VI, Pp. 12 and 369.

² Now two districts, *viz.*, the Khondmals District and the Angul District. This Act has been declared to be in force in these two districts by the Khondmals Laws Regulation, 1936 (IV of 1936), S. 3 and Sch., and the Angul Laws Regulation, 1936 (V of 1936), S. 3 and Sch., respectively.

NOTES.

Sec. 1.—Distinction between 'copyright' and 'patent'. 1938 A.L.J. 390. In a case relating to infringement of copyright, it is not only proper but essential that the case should be tried with the help of experts who might be appointed commissioners to investigate and report similarities. (*Ibid.*) The compiler of a work in which absolute originality is by the very nature of the work excluded is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction as to produce an original result. But no one is entitled to convey the same information, merely with some additions. (*Ibid.*)

ASSIGNMENT OF COPYRIGHT—DIRECT WORDS

NOT USED—EVIDENCE OF PARTIES—IF A GUIDE. —Where direct words are not used to convey a right and the matter is one of inference by implication from the phrases used, then the evidence of the parties, if they are not interested one way or the other in the matter, is the surest of all guides as to the meaning of the phrases used. 1939 Lah. 433.

ASSIGNMENT—FUTURE WORK.—There cannot possibly be a transfer of copyright or assignment of copyright in a non-existing work. Where there is no proof that the work was substantially completed at the time when document transferring copyright was drawn up and on the face of it the document refers to a future work copyright cannot be transferred by it. 41 P.L.R. 879 = 1939 Lah. 433. Assignment of—Registration not necessary. I.L.R. (1939) A. 275 = 1939 All. 305 = 1939 A.L.J. 71.

INFRINGEMENT—BURDEN OF PROOF.—In an action for infringement of a copyright, it is not for the defendant to prove that there has been no infringement. It is for the plaintiff, on whom the onus lies, to prove that in fact there has been an infringement. I.L.R. (1939) Bom. 295 = 41 Bom.L.R. 530 = 1939 Bom. 347. Author agreeing to grant to publishers sole and exclusive licence to print, publish and sell his work—Agreement is merely a publishing arrangement and does not amount to an assignment of copyright. See I.L.R. (1938) Lah. 84 = 40 P.L.R. 622 = 1938 Lah. 173.

(2) the powers of the Board of Trade under section 19 shall, as regards records, perforated rolls and other contrivances, the original plate of which was made in British India, be exercised by the Central Government; and the confirmation of Parliament shall not be necessary to the exercise of any of these powers;

(3) the references in section 19, sub-section (4), and in section 24, sub-section (1), to arbitration shall be read as references to arbitration in accordance with the law for the time being in force in that part of British India in which the dispute occurs;

(4) as regards works the authors whereof were at the time of the making of the works resident in British India, and as regards works first published in British India, the reference in section 22 to the Patents and Designs Act, 1907, shall be construed as a reference to the Indian Patents and Designs Act, 1911, and the reference in the said section to section 86 of the Patents and Designs Act, 1907, shall be construed as a reference to section 77 of the Indian Patents and Designs Act, 1911;

(5) as regards works first published in British India, the reference in section 24, sub-section (1), proviso (a), to the London Gazette and two London newspapers shall be construed as a reference to the Gazette of India and two newspapers published in British India; and the reference in proviso (b) of the same sub-section of the same section to the 26th day of July, 1910, shall, as regards works the authors whereof were at the time of the making of the works resident in British India, and as regards works first published in British India, be construed as a reference to the 30th day of October, 1912.

4. (1) In the case of works first published in British India, copyright shall be subject to this limitation that the sole right to produce, reproduce, perform or publish a translation of the work shall subsist only for a period of ten years from the date of the first publication of the work:

Modification of copyright as regards translation of works first published in British India. Provided that if within the said period the author, or any person to whom he has granted permission so to do, publishes a translation of any such work in any language, copyright in such work as regards the sole right to produce, reproduce, perform or publish a translation in that language shall not be subject to the limitation prescribed in this sub-section.

(2) For the purposes of sub-section (1) the expression "author" includes the legal representative of a deceased author.

5. In the application of the Copyright Act to musical works the authors whereof were at the time of the making of the works resident in British India, or to musical works first published in British India, the term "musical work" shall, save as otherwise expressly provided by the Copyright Act, mean "any combination of melody and harmony, or either of them, which has been reduced to writing."

6. (1) Copies made out of British India of any work in which copyright subsists which if made in British India would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or his agent to the Chief Customs officer, as defined in the Sea Customs Act, 1878, that he is desirous that such copies should not be imported into British India, shall not be so imported, and

NOTES.

Sec. 5.—There cannot be an infringement of performing right in a musical composition (assuming it to exist) unless there has been a public performance of the musical composition by the defendant. A musical composition is performed by audible reproduction, by the voice or by musical instru-

ments or by mechanical methods of reproduction. Where not a word of a song is repeated in any form in a talkie film except that the title of the song is thrown on the film at the outset this does not constitute infringement of performing right in musical composition. 187 I.C. 449=21 P.L.T. 355 =1940 P.C. 55=52 L.W. 10 (P.C.).

shall, subject to the provisions of this section, be deemed to be prohibited imports within the meaning of section 18 of the Sea Customs Act, 1878.

(2) Before detaining any such copies, or taking any further proceedings with a view to the confiscation thereof, such Chief Customs officer, or any other officer appointed by ¹[the Chief Customs authority] in this behalf, may require the regulations under this section, whether as to information, security, conditions or other matters, to be complied with, and may satisfy himself, in accordance with these regulations, that the copies are such as are prohibited by this section to be imported.

(3) The Central Government may, by notification in the Official Gazette make regulations, either general or special, respecting the detention and confiscation of copies the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and confiscation; and may, by such regulations, determine the information, notices and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) Such regulations may apply to copies of all works the importation of copies of which is prohibited by this section, or different regulations may be made respecting different classes of such works.

(5) The regulations may provide for the informant reimbursing the ²[Central Government] all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention, and may provide that notices given under the Copyright Act to the Commissioners of Customs and Excise of the United Kingdom, and communicated by that authority to any authority in British India, shall be deemed to have been given by the owner to the said Chief Customs officer.

(6) This section shall have effect as the necessary modification of section 14 of the Copyright Act.

CHAPTER III.

PENALTIES.

Offences in respect of infringing copies.

7. If any person knowingly—

LEG. REF.

¹ Substituted for the words "the Local Government" by Act IV of 1924, Sch.

² Substituted for 'Secretary of State for India in Council' by A.O.

NOTES.

Sec. 7.—The mere failure of an author to make the payment prescribed by S. 5 of Act XX of 1847 does not deprive him of his copyright in his book. On the other hand, the proviso to S. 14 of the Act definitely states the contrary. It is only the right to sue under that Act that is prohibited if the registration fee has not been paid. 53 M. L.J. 529=105 I.C. 669=1927 M. 981. The procedure about payment of fees prescribed by Act XX of 1847 has no place in the present Act III of 1914, and therefore a complaint under S. 7 of the new Act cannot be thrown out on the ground of non-payment of fees. (*Ibid.*) An acquittal will be set aside in revision in a case where the Court below has proceeded on a wrong view of the law, and where the matter is of great importance to the complainant in his posi-

tion as author of a book, which, if the acquittal stands, will be pirated by the accused who will secure for himself the gains that ought legitimately to go to the complainant. (*Ibid.*) Under the old Act "copyright" did not include the exclusive right of translation but the author of a book who made a translation of it was entitled to a copyright in it as if it were an original work. 13 A. L.J. 636=16 Cr.L.J. 656=30 I.C. 480; offence when complete. 28 P.R. 1916 (Cr.). On this section, *see also* 51 M. 180.

COLOURABLE IMITATION—QUESTION OF FACT. The question whether there has been an infringement of copyright depends on whether a colourable imitation has been made. Whether a work is a colourable imitation of another is a question of fact. Similarity is a great point to be considered but mere similarity is not enough. A conglomeration of similarities which cannot be mere coincidence is evidence of infringement. 126 I.C. 197=51 C.L.J. 243=34 C.W.N. 540. But *see also* 142 I.C. 815=1933 P.C. 26=64 M.L.J. 193 (P.C.). *Infringement of copyright of pictures*—Offending pictures

(a) makes for sale or hire any infringing copy of a work in which copyright subsists; or

(b) sells or lets for hire, or by way of trade exposes or offers for sale or hire, any infringing copy of any such work; or

(c) distributes infringing copies of any such work, either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or

(d) by way of trade exhibits in public any infringing copy of any such work; or

(e) imports for sale or hire into British India any infringing copy of any such work;

he shall be punishable with fine which may extend to twenty rupees for every copy dealt with in contravention of this section, but not exceeding five hundred rupees in respect of the same transaction.

8. If any person knowingly makes, or has in his possession, any plate for the purpose of making infringing copies of any work in which copyright subsists, or knowingly and for his private profit causes any such work to be performed in public without the consent of the owner of the copyright, he shall be punishable with fine which may extend to five hundred rupees.

9. If any person, after having been previously convicted of an offence punishable under section 7 or section 8, is subsequently convicted of an offence punishable under either of these sections, he shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

10. (1) The Court before which any offence under this Chapter is tried may, whether the alleged offender is convicted or not, order that all copies of the work or all plates in the possession of the alleged offender, which appear to it to be infringing copies, or plates for the purpose of making infringing copies, be destroyed or delivered up to the owner of the copyright, or otherwise dealt with as the Court may think fit.

(2) Any person affected by an order under sub-section (1) may, within thirty days of the date of such order, appeal to the Court to which appeals from the Court making the order ordinarily lie; and such appellate Court may direct that execution of the order be stayed pending consideration of the appeal.

11. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence against this Act.

12. The provisions of this Chapter shall not apply to any case to which section 9 of the Copyright Act, regarding the restrictions on remedies in the case of a work of architecture, applies.

NOTES.

must be copies of substantial portion of copyright pictures. 112 I.C. 784=30 Cr. L.J. 16=33 C.W.N. 172. As to *infringement* of right in a musical composition, see 52 L.W. 10=1940 P.C. 55 (P.C.). In a criminal proceeding started for infringement of copyright of books the order was

"summon the accused under S. 7, Act III of 1914." From the order it did not appear under which clause of S. 7 the accused was being summoned nor was it clear from the order sheet that the accused knew under what clause of S. 7 he was going to be tried. *Held*, that the accused had not had a fair trial. 152 I.C. 248=1934 P. 522.

CHAPTER IV.

MISCELLANEOUS.

Courts having civil jurisdiction regarding infringement of copyright.

13. Every suit or other civil proceeding regarding infringement of copyright shall be instituted and tried in the High Court or the Court of the District Judge.

14. No suit or other civil proceeding instituted after the 30th of October, 1912, regarding infringement of copyright in any book the author whereof was at the time of making the book resident in British India, or of any book first published in British India, shall be dismissed by reason only that the registration of such book had not been effected in accordance with the provisions of the Indian Copyright Act, 1847.

Effect of non-registration under Act XX of 1847.

15. The enactments mentioned in the Second Schedule are hereby repealed to the extent specified in the fourth column thereof.
[Repealed by Act XII of 1927.]

Repeals.

THE FIRST SCHEDULE.

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(See section 3.)

COPYRIGHT ACT, 1911.

[1 & 2 GEO. V, CH. 46.]

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[16th December, 1911.]

CHAPTER XLVI.

An Act to amend and consolidate the law relating to copyright.

Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:—

PART I.

IMPERIAL COPYRIGHT.

Rights.

1. (1) Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary, dramatic, musical and artistic work, if—

(a) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid; and

NOTES.

Secs. 1 and 2, Geo. V, c. 46: LAW BEFORE—EXTENT OF COPYRIGHT.—Even under the Copyright Act, XX of 1847, copyright is infringed not merely by printing and publication but also by performance of the works. 38 C.W.N. 611=1934 C. 671.

CONSTRUCTION OF ACT.—All laws which put a restraint upon human activity and enterprise, must be construed in a reasonable and generous spirit. Under the guise of a copyright a plaintiff cannot ask the Court to close all the avenues of research and scholarship and all frontiers of human knowledge. 1934 L. 777.

Sec. 1 (1).—"Original" does not relate to ideas. 46 M.L.J. 637=51 I.A. 109=48 B. 308=28 C.W.N. 613 (P.C.); 1938 A.L.J. 390. The laws of copyright do not protect ideas. Its protection falls within the patent laws. While a patentee has the sole right to use his invention within certain limits and if any body uses the patent, though on independent investigations, there is infringement of the patent. In the case of an infringement of copyright, it must be shown that the defendant has derived his work from the plaintiffs. I.L.R. (1938) All. 370=1938 A. L.J. 390=1938 All. 266. The compiler of a work in which absolute originality is by the very nature of the work excluded is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction as to produce an original result. But

no one is entitled to convey the same information, merely with some additions. I.L.R. 1938 All. 370=1938 A.L.J. 390=1938 All. 266.

ORIGINAL WORKS, include photographs taken from paintings, drawings or other photographs, or from engravings from pictures. (1868) L.R. 3 Q.B. 387; 37 L.J.Q.B. 161; (1869) L.R. 4 Q.B. 715; 39 L.J.Q.B. 31. If current traditional poems embodying the main incidents of legend are given a literary form demanding considerable powers of adaptation and polishing, the result is an original literary work within the meaning of S. 1. 42 C. W.N. 541=1938 Cal. 594. A man who gets another to sing or recite traditional poems for the express purpose of recording the words and then publishes the record, is entitled to a copyright. 178 I.C. 106=42 C.W.N. 541=1938 Cal. 594.

"ARTISTIC WORK".—Means not merely the suggestion of the subject of a painting as executed by another. (1890) 25 Q.B.D. 99; or the employer of a photographer, (1883) 11 Q.B.D. 627; 52 L.J.Q.B. 767; distinguished in (1895) 2 Ch. 531; 65 L.J. Ch. 41. In *Kenrick v. Lawrence*, (1890) 25 Q.B.D. 99, cards with a hand holding a pencil in the act of completing a cross in a ballot paper were held unprotected. It would appear that the work must be something—apart from work specifically included in the definitions in S. 35—that is capable of being printed and published. See (1908) 1 K.B. 821; 77 L.J.K.B. 577; (1921) 1 Ch. 503; 90 L.J.Ch. 318.

(b) in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid;

but in no other works, except so far as the protection conferred by this Act is extended by Orders in Council thereunder relating to self-governing dominions to which this Act does not extend and to foreign countries.

(2) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right—

(a) to produce, reproduce, perform, or publish any translation of the work;

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work;

NOTES.

Sec. 1 (1) (b).—The Act does not define "*the date of the making*." It is submitted that such date does not mean the completion of the work, but it must be in so advanced a state that some more or less permanent record of it exists. Thus a mere idea or artistic conception cannot claim copyright. See (1887) 19 Q.B.D. 629, 636; 56 L.J. Q.B. 553; and as to proving the commencement of writing a play, see (1893) 2 Q.B. 308.

TITLE OF A WORK.—In general a title is not by itself a proper subject-matter of copyright. As a rule a title does not involve literary composition and is not sufficiently substantial to justify a claim to protection. That statement does not mean that in particular cases a title may not be on so extensive a scale and of so important a character as to be a proper subject of protection against being copied. Where theme of a film is different from that of a song the use for the film of a title of a song is too unsubstantial to constitute infringement of literary copyright. 187 I.C. 449=21 P.L.T. 355=52 L.W. 10=1940 P.C. 55 (P.C.). *Musical composition*, see 52 L.W. 10=1940 P.C. 55 (P.C.).

BROADCAST OF PERFORMANCE OF MUSICAL WORK—INFRINGEMENT OF COPYRIGHT—LIABILITY OF BROADCASTERS.—The acoustic representation of a musical work by means of wireless so that the musical work is heard many miles away from the transmitting studio or place of actual performance, is a performance (public or private) of the work within the meaning of S. 19 of the Copyright Act. Here it is necessary to remember that the sole right of the owner of the musical work is to perform it *in public*, and that any one may perform the work in private. The original performance in the studio may be, and generally will be, a performance in private. In such a case the broadcasted performance at the receiving end, if in public and unlicensed, will be an infringement of copyright at that place. If there is merely a broadcast from the studio where the piece is performed in studio, there

is obviously no performance in public at all. A broadcast *per se* is not an *acoustic* representation of the work. If the broadcast is picked up only by listeners in private it might be difficult to establish that there is a public performance; for each performance would be separate and each would be private. But a broadcast to all and sundry listeners will include hotels and other places of entertainment or refreshment who, if not forbidden, will perform the piece to a number of members of the public, and such a performance will be a public performance within the meaning of the Act by the owners or occupiers of those places; for their actions in connection with the receivers which have been installed there and which they control have caused the public performances to take place. Whether the studio performance is public or private, if the persons who are responsible for that performance are also responsible for the broadcasting of the piece, there is no doubt that they have facilitated the performance of the work in public by any listener who is in a position to use a loud-speaker and thus to perform the piece in public. The question as to the position of the broadcasters in such a case, so far as regards infringement, is answered by the language of S. 1 (2) of the Act. It is sufficient to show that they have "authorised" the performance in public of the works; and this will generally be established by proving that listeners with a licence were entitled to tune in their receivers and thus to perform the musical works in question in public as well as in private. 188 I.C. 237=1940 P.C. 111 (P.C.).

Sec. 1 (2): "SOME SUBSTANTIAL PART".—Means some material and substantial part. (1878) 3 A.C. 483; 47 L.J.C.P. 545.

LECTURE.—A reporter of a speech may have copyright in the report. (1900) A.C. 539; 69 L.J.Ch. 699.

Sec. 1 (2) (a): "REPRODUCE".—These words do not include the representation of a picture by a *tableau vivant*, formed by grouping in the same way as the figures in the picture living persons dressed in the same way and placed in the same attitudes

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise;

(d) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered; and to authorise any such acts as aforesaid.

(3) For the purposes of this Act, publication, in relation to any work, means the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art, but for the purposes of this provision, the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works.

2. (1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright:

Infringement of copyright.

NOTES.

as the figures in the picture. (1894) 2 Ch. 1; 63 L.J. Ch. 417.

Sec. 1 (2) (c).—A person who employs another to adapt a foreign play is not the "author" of the adaptation. (1856) 25 L.J. C.P. 127.

Sec. 1 (2) (d).—The term "*musical work*" is not defined in the Act; but see the partially repealed definition of S. 3 of the (English) Musical Copyright Act, 1906. An arrangement for the pianoforte of the score of an opera by a person other than the composer of the opera is an independent musical composition, of which the person who arranges the score for the pianoforte, and not the composer of the original opera, is the "author or composer". (1867) L.R. 3 Q.B. 223; 37 L.J.Q.B. 84. See also 52 L.W. 10=1940 P.C. 55 (P.C.).

"AND, TO AUTHORIZE ANY SUCH ACTS AFORESAID."—In the absence of any stipulation to the contrary, the vendor of a copyright may after the sale of the copyright sell any copies which were printed before such sale. (1869) L.R. 7 Eq. 418. The word "authorise" in S. 1 (2) of the Act covers anything done with the knowledge and connivance of a person. 1939 Rang.L.R. 121=1939 Rang. 266.

Sec. 1 (3): "COPIES".—No definition is given in the Act as to what will constitute a "copy", but see (1905) 1 Ch. 519; 74 L.J. Ch. 304; (1898) 14 T.L.R. 550; 55 Sol.J. 272.

"ISSUE OF COPIES OF THE WORK TO THE PUBLIC".—Under the Copyright Act, 1842, the legislature only contemplated publication within the country. (1868) L.R. 3 H.L. 100; 37 L.J. Ch. 454; but this was altered by the International Copyright Act, 1886, and the Orders in Council thereunder. Even gratuitous circulation would seem to amount to a publication. See (1852) 12 C.B. 177; 2 V. & B. 23.

Sec. 2: COPYRIGHT IN COMPILATION.—Though a book is a compilation from other works and is not original, the fact that its contents have been arranged on a new plan will give the compiler a copyright in the book. 43 A. 412=61 I.C. 394=19 A.L.J. 180. Where in an action for breach of copyright of a book much stress was laid by the plaintiff upon similarities with regard to the plan of the book, the scheme, upon phraseal identities and certain mistakes. *Held*, that the evidence was fantastic, and such actual coincidences as do exist were quite explicable, and should be explained that both the authors had to rely upon the accumulation of information which had been made by many authors before them and to which they have had to have recourse in writing their books. 1933 A.L.J. 393=1933 P.C. 26=64 M.L.J. 193 (P.C.); 39 C.W.N. 945=61 C.L.J. 573. See also 1938 A.L.J. 390; 126 I.C. 197=34 C.W.N. 540.

WHAT AMOUNTS TO WAIVER OF COPYRIGHT.—34 I.C. 357=14 A.L.J. 724=38 A. 484.

FINE ARTS—COPYRIGHT IN—ENGLISH AND INDIAN LAW.—The Fine Arts Copyright Act (25 and 26 Vic., c. 68) does not extend to any part of the British Dominions outside the United Kingdom. [(1903) A.C. 496, F.] In England before the Statute of Anne (8 Anne, c. 19) there was no copyright at common law for an author or a publisher in his productions. 22 Bom.L.R. 808=57 I.C. 592=44 B. 720 (4 H.L.C. 815; 19 B. 557, Foll.).

TEST OF INFRINGEMENT OF COPYRIGHT—DAMAGES DIRECTORY.—67 I.C. 983. Innocence is no defence to a charge of infringement of copyright. The offence is complete even if the offender authorises the performance of a musical piece without any knowledge of infringing the rights of any other person. 32 P.L.R. 20=124 I.C. 894=1930 P.C. 314 (P.C.). The question, what is an infringement of an author's copyright is frequently

Provided that the following acts shall not constitute an infringement of copyright:—

(i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary:

NOTES.

one of great difficulty, and is one which must depend upon the circumstances of each particular case, having regard to the nature of the work into which the pirated parts are imported, and the value and extent of the infringement. See 1878 A.C. 483; 47 L.J.C. P. 545 and (1873) L.R. 8 Exch. 1; 45 L.J. Ex. 28, where the defendant was held to have been guilty of an infringement of copyright in publishing copies of all the cartoons which had appeared in *Punch* relating to the Emperor Napoleon III. Although there are some subjects which must lead to the same result if accurately performed, the compiler has a right to restrain others from using the result of his labours, or to sue him for doing so, as in the case of translations. (1814) 3 V. & B. 77; roadbooks, (1807) 1 East 358; directories, (1806) 12 Ves. 270; (1809) 16 Ves. 269; (1866) L.R. 1 Eq. 697; 35 L.J. Ch. 423; (1870) L.R. 5 Ch. 279; the heading of trades directories though the letterpress consists only of advertisements. (1893) 1 Ch. 218; 62 L.J. Ch. 404; statistical tables, (1867) L.R. 3 Eq. 718; 3 L.J. Ch. 629; diaries, (1872) L.R. 14 Eq. 431; 41 L.J. Ch. 781; a telegraph code, (1884) 26 Ch.D. 637; 53 L.J.Ch. 589; or law reports, (1823) cited in 5 Ves. 709; (1838) 3 Myl. & Cr. 711; (1840) 11 Sim. 51; 9 L.J. Ch. 323. In such cases the question is whether the alleged infringement is a legitimate use of the author's publication, in the fair exercise of a mental operation deserving the character of an original work. (1810) 17 Ves. 422; 11 R.R. 118. As to trade catalogues, see (1875) L.R. 19 Eq. 623 and (1882) 21 Ch.D. 369; 52 L.J. Ch. 67. As to dramatisation of novel, see (1890) 63 L.T. 762. To obtain protection, a work must have literary value. Protection has been in the case of a photograph album. (1886) 33 Ch.D. 546; 55 L.J. Ch. 892 and a perforated card, (1882) 47 L.T. 539; 52 L.J. Ch. 107. It has been held that a *fair abridgment* is no infringement of a copyright. (1740) 2 Atk. 141; 3 *ib.* 269; 5 Ves. 709; (1785) 1 Bro. C.C. 451, cited in 3 Swanst. 679; (1761) Ambl. 402; (1801) 5 Ves. 709; and see 93 L.J.P.C. 113; but there appears to be reason for doubting the soundness of those decisions: See Scrutton on Copyright, 2nd Edn. at page 125, Every Day St. Vol. I, pp. 516-517. An *abridgment* of a book after the coming into force of Act III of 1914 may under certain circumstances amount to a reproduction of a substantial part of a book and therefore come within the rule of prohibition. 154 I.C. 207=1934 A. 922. See also 48 Bom. 308=51 I.A. 109=46 M.L.J. 637 (P.C.). With respect to *encyclopaedias* and compilations of that kind, a certain licence is allowed

in extracting passages from other works. (1807) 1 Camp. 94; (1817) 2 Swans. 428; (1839) 8 L.J. Ch. 141. *Quotations are necessary for the purpose of reviewing*, and quotations for such a purpose are not to have the appellation of piracy affixed to them; but quotations may be carried to the extent of manifesting piratical intention. (1826) 2 Russ. 393; (1846) 10 Jur. 420. As to music, see (1835) 1 Y. & C. 288; 4 L.J. Ex. Eq. 21. *Similarities due to mere coincidence* are not an infringement. (1911) 28 T.L.R. 69. The registered owner of a copyright in a work is entitled to have all the unsold copies of a piratical edition delivered up to him for his own use, without making any compensation for the cost of production or publication. (1857) 3 K. & J. 581. In (1887) 12 A.C. 326; 57 L.J.P.C. 2 in which a professor of the University of Glasgow was held by the House of Lords in 1887 to be entitled to restrain other persons from publishing his *lectures*—delivered orally to students on payment of fees—was decided independently of the Lectures Copyright Act of 1835, which though it preserved the law, was silent as to what the law was. *A reporter has copyright in his own report.* (1900) A.C. 539; 69 L.J. Ch. 699.

UNPUBLISHED WORK—COPYRIGHT IN.—Where P purchased the right to publish and sell 90 songs composed by D and shortly afterwards D sold 40 of these to M, who published the same and sold them, *held*, that P was entitled to sue M for an injunction restraining him from publishing and selling the 40 songs in violation of the right exclusively acquired by him. 12 L.W. 151=39 M.L.J. 341=9 I.C. 229.

BOOK PRODUCED BY AUTHOR AFTER FURTHER STUDIES AND RESEARCH.—Every man can take what is useful from the original work, improve, add and give to the public the whole, compromising the original work, the additions and improvements; and in such a case there is no invasion of any right. But a copy, much less a servile copy of a work cannot be allowed. Where in a case of infringement of copyright, the new book is a work which the author has produced after further studies, and represents the result of ten years of research work, and represents a mature art and a greater wealth of details in depicting the various incidents, and the imagery is of a superior type and there are fresh incidents and details, which are the result of researches made by the author into works which had existed before as well as those which came into existence after the first work had been written and published; the two works are substantially different and there is no infringement of copyright. 1934 L. 777.

(ii) Where the author of an artistic work is not the owner of the copyright therein, the use by the author of any mould, cast, sketch, plan, model, or study made by him for the purpose of the work, provided that he does not thereby repeat or imitate the main design of that work;

(iii) The making or publishing of paintings, drawings, engravings, or photographs, of a work of sculpture or artistic craftsmanship, if permanently situate in a public place or building, or the making or publishing of paintings,

NOTES.

LAW REPORTS—EXTRACTS BY REPORTER.—A plaintiff's copyright is infringed when the defendant reproduced not only the judgments but also part of the plaintiff's reports not forming parts of judgments and facts collected by the plaintiff from the records of cases. The reporter has no copyright in the reports of judgment, but he has protection of the law in selecting and reporting cases which he obtains by expenditure of time, labour and money. 26 I.C. 30=18 C. W.N. 1078.

INJUNCTION.—In a suit for a perpetual injunction against the defendants who, it was alleged, had infringed the plaintiff's copyright by copying a large number of judgments from the plaintiff's journal "Lahore Law Times" and compiling and publishing a book called "Consolidated Revenue Rulings," it appeared that the allegation referred to the rulings portion only of the "Law Times" and that of past years; secondly, the defendants publication consisted not merely of Lahore rulings, but those of other places as well; thirdly, the plaintiffs had, by bringing out a similar book at a cheaper price, substantially reduced the chance of a loss to themselves; lastly, the trial Court had, by directing the defendant to keep a separate account of their sales, amply safeguarded their interests. *Held*, in the circumstances, a temporary injunction was not necessary. 1933 L. 448=34 P.L.R. 249. But *see also* 1931 L. 624. The power of the Court to grant a temporary injunction is not limited by the absence of any finding on the question of jurisdiction which has been raised in the case. *Prima facie* until such a question is decided in the negative, a Court has jurisdiction to do all acts and take any action that may be sanctioned by law in connection with the case. 132 I.C. 586=1931 L. 624.

ABRIDGMENT—MERELY SELECTING PASSAGES AND KNITTING THEM TOGETHER NO INFRINGEMENT—RAW MATERIAL OR THE ORIGINAL WORKS ARE OPEN FOR CONSULTATION FOR ALL—USE OF ANOTHER'S LABOUR AND SKILL ONLY IS PROHIBITED.—48 B. 308=51 I.A. 109=1924 P.C. 75=46 M.L.J. 637 (P.C.). On appeal from 23 Bom.L.R. 1299 the word "original" does not mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the origin of ideas, but with the expression of thought; and in the case of "literary work with the expression of thought in print or writing". (*Ibid.*) The originality which is required relates to the expression, which

must be in an original or novel form, but the work must not be copied from another work, that is, it should not originate from another. (*Ibid.*) *See also* 1934 All. 922.

EVIDENCE.—In an action for breach of copyright the plaintiff relied upon the intrinsic evidence to be derived from a comparison of the two works; and urged that on comparison between the two works it would be found that there was such an accumulation of similarities, of like omissions, of plan, of phrases, of mistakes, that the inference was irresistible that defendant did in fact have her work before him before he composed his work. *Held*, that the Board were not prepared to say that in the case of two literary works intrinsic evidence of that kind might not be sufficient to establish a case of copying even if the direct evidence was all the other way and appeared to be evidence that could be accepted; but such evidence must be of the most cogent force before it could be accepted as against the oath of respectable and responsible people whose evidence otherwise would be believed by the Court. 1933 A.L.J. 393=1933 P.C. 26=64 M.L.J. 193 (P.C.). *See also* 126 I.C. 197=34 C. W.N. 540.

PRESUMPTION—BURDEN OF PROOF.—Where the defendants in an action for damages for infringement of copyright in respect of a work do not put into issue the existence of the copyright in the work, there is an irrebuttable presumption that the alleged work was a work in which copyright existed and that the plaintiff was the owner of the copyright. In this class of cases, the Court should be reluctant to sit as experts and to decide the question of infringement of copyright without the aid of expert evidence. The proper course, in such cases, is to get the opinion of experts who might be appointed Commissioners to investigate and report on the matters in issue. The opinion and findings of experts are not conclusive on the Court, but may be reviewed on exceptions. 39 C.L.J. 134=81 I.C. 754=1924 C. 595. The defence of having had no reasonable ground for suspecting that the performances of a musical piece would be infringement of copyright should be proved by the defendants affirmatively. 1930 A.C. 377=124 I.C. 894=1930 P.C. 314 (P.C.). Where a person complaining of infringement of his copyright produces the book and the certificate of registration of the copyright, the burden of proving that the portion of the book which had been copied by the accused was also contained in a previous

drawings, engravings or photographs (which are not in the nature of architectural drawings or plans) of any architectural work of art:

(iv) The publication in a collection, mainly composed of non-copyright matter, *bona fide* intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools in which copyright subsists: provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged:

(v) The publication in a newspaper of a report of a lecture delivered in public, unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except whilst the building is being used for public worship, in a position near the lecturer; but nothing in this paragraph shall affect the provisions in paragraph (i) as to newspaper summaries:

(vi) The reading or recitation in public by one person of any reasonable extract from any published work.

(2) Copyright in a work shall also be deemed to be infringed by any person who—

(a) sells or lets for hire, or by way of trade exposes or offers for sale or hire; or

(b) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or

(c) by way of trade exhibits in public; or

(d) imports for sale or hire into any part of His Majesty's dominions to which this Act extends,

any work which to his knowledge infringes copyright or would infringe copyright if it had been made within the part of His Majesty's dominions in or into which the sale or hiring, exposure, offering for sale or hire, distribution, exhibition, or importation took place.

(3) Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

NOTES.

book published by the accused's father and that the complainant had, therefore, no subsisting copyright at the time of the infringement, is on the defence. 131 I.C. 865=1931 A.L.J. 304=1931 A. 353.

Sec. 2 (1) Proviso: CONSTRUCTION.—The proviso does not say that not more than two passages from each work of the same author are published, but says "not more than two passages from work by the same author". Obviously, the proviso is not intended to protect a man who brings out an unauthorized edition of a poet's poems by taking out two poems out of each of many works published by him separately. *Quære*.—Whether when a number of poems are brought out in one volume the whole volume is to be considered a literary work of the author or whether each separate poem in that volume is to be considered as separate literary work. 55 All. 564=1933 A.L.J. 791=1933 All. 474.

C.C.M.—255

COPYRIGHT—ASSIGNMENT—WHAT AMOUNTS TO—SALE OF FIRST EDITION OF CERTAIN NUMBER OF COPIES, EFFECT OF.—A sale of a first edition of 1,100 copies of a certain book, to be published in a particular form, amounts to an assignment of an interest in the copyright until the last copy is sold. Until then the purchaser has the right exclusively to the copyright, at any rate as far as the right to publish the book in any form is concerned. It is not merely a sale of a right to print and sell 1,100 copies in the particular form. 62 Cal. 57=39 C.W.N. 224.

Sec. 2 (3): "FOR THE PERFORMANCE IN PUBLIC".—The performance in public, though not necessarily for profit will be infringement. (1884) 13 Q.B.D. 843; 53 L.J.Q.B. 338. See (1911) 27 T.L.R. 554. To constitute infringement, it is not necessary to show that the defendant knowingly invaded the right. See (1859) 29 L.J.C.P. 20.

"CONSENT OF THE OWNER OF THE COPY-

3. The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author and a period of fifty years after his death:

Term of copyright.

Provided that at any time after the expiration of twenty-five years, or in the case of a work in which copyright subsists at the passing of this Act, thirty years, from the death of the author of a published work, copyright in the work shall not be deemed to be infringed by the reproduction of the work for sale if the person reproducing the work proves that he has given the prescribed notice in writing of his intention to reproduce the work and that he has paid in the prescribed manner to, or for the benefit of, the owner of the copyright royalties in respect of all copies of the work sold by him calculated at the rate of ten per cent. on the price at which he publishes the work; and, for the purposes of this proviso, the Board of Trade may make regulations prescribing the mode in which notices are to be given, and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, including (if they think fit) regulations requiring payment in advance or otherwise securing the payment of royalties.

4. If, at any time after the death of the author of a literary, dramatic, or musical work which has been published or performed in public, a complaint is made to the Judicial Committee of the Privy Council that the owner of the copyright in the work has refused to republish or to allow the republication of the work or has refused to allow the performance in public of the work, and that by reason of such refusal the work is withheld from the public, the owner of the copyright may be ordered to grant a licence to reproduce the work or perform the work in public, as the case may be, on such terms and subject to such conditions as the Judicial Committee may think fit.

Ownership of copyright, etc.

5. (1) Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein:

Provided that—

(a) where, in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some other person and was made for valuable consideration in pursuance of that order, then, in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copyright;

(b) where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the

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RIGHT".—It need not be in the handwriting of the author, and may be given by any agent having due authority. (1855) 16 C.B. 517; 24 L.J.C.P. 169; *see further*, (1856) 25 L.J.C.P. 127; 17 C.B. 427; (1888) 20 Q.B.D. 378; 57 L.J.Q.B. 227. Under the English Dramatic Copyright Act, 1833, such person only was liable who, by himself or his agent, actually took part in the representation which was a violation of the copyright, and therefore the landlord of the rooms in which the performance took place was not, as such, liable. (1849) 8 C.B. 836; 19 L.J.C.P. 33; and *see further* as to this point. 5 B. & S. 751; (1864) 17 C.B. (N.S.) 418; 33 L.J.C.P. 319. As to *infringement by a co-owner*, *see* (1916) 2 K.B. 325; 85 L.J.K.B. 1504. As to *proof of infringement by interrogatories*, *see* (1887) 18 Q.B.D. 625.

Sec. 3.—If a copyright is shown to have subsisted when Act III of 1914 came into force, the period of copyright substituted by that Act would be 50 years from the death of the author. Where the complaint for infringement is made after the new Act the question to be considered is whether the copyright was subsisting under the new Act and not whether it was subsisting under the old Act XX of 1847. 131 I.C. 865=1931 A.L.J. 304=1931 All. 353.

Sec. 5.—*See* 1930 A.C. 377=124 I.C. 894=1930 P.C. 314.

Sec. 5 (1) (a).—A husband can prohibit the exhibition of a photograph of his wife and children, the inference being that the wife who ordered the photograph acted as the husband's agent. (1901) 18 T.L.R. 126.

Sec. 5 (1) (b).—In order to give the proprietor of a periodical a copyright in articles

course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine, or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical.

(2) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations, to the United Kingdom or any self-governing dominion or other part of His Majesty's dominions to which this Act extends, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorized agent:

Provided that, where the author of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him (otherwise than by will) after the passing of this Act, shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of

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composed for him by others, it is not necessary that there should be an express contract that he should have the property in the copyright. Where the defendants published a monthly periodical, professing to be a digest of the cases decided in the Courts during the previous month, and inserted among others, head-notes or marginal notes copied verbatim from the plaintiff's publication, it was held that the defendants were guilty of piracy. (1855) 24 L.J.C.P. 175. See (1893) 1 Ch. 218; 62 L.J. Ch. 404; approved in (1904) A.C. 17; 7 L.J. Ch. 85, and see (1859) 29 L.J.C.P. 20. The proprietor of an encyclopædia, who employs a person to write an article for publication in that work, cannot, without the writer's consent, publish the article in a separate form, or otherwise than in the encyclopædia, unless the article was written on the terms that the copyright therein should belong to the proprietor of the encyclopædia for all purposes. (1848) 16 Sim. 190; 17 L.J. Ch. 210. Where the publishers of a magazine employ and pay an editor, and the editor employs and pays persons for writing articles in the magazine, the copyright in such articles is not vested in the publishers under this section. (1846) 16 L.J. Ch. 140. As to a map, see (1871) L.R. 6 Ch. 346; 40 L.J.Ch. 489. The re-publication of the Christmas number of a periodical under a different title, form and price is a "separate publication" of an article contained in such number, which the author is entitled to restrain. (1860) 1 J. and H. 312.

TRANSLATION.—The copyright of an Eng-

lish work translated by a foreigner is infringed by a re-translation of it by an Englishman into English. (1853) 1 Drew. 353; 22 L.J. Ch. 457.

Sec. 5 (2).—See 1939 Lah. 433; 1939 A. L.J. 71; 1938 Lah. 173, cited under S. 1, *supra*. A sale, valid by the law of the country where made, has been held to pass the interest of the assignor. (1848) 5 C.B. 860 (Eng.). Since the assignment or grant must be in writing. (1876) 4 Ch.D. 419; 46 L.J. Ch. 103; evidence that the plaintiff in an action for printing a musical work acquiesced in the defendant's publication of it six years ago does not raise a presumption that the plaintiff has transferred his interest in the copyright; nor does a receipt given by the plaintiff for money received by him as the price of the copyright. (1818) 2 Stark. 382; or on admission of an assignment, *ibid.*; (1814) 4 Camp. 9 n.; (1723) Vin. Abr. "Books", etc., 3. A receipt in writing for the price of the copyright operates as an effectual assignment. 3 Macq. H.L. 611. It would seem that a copyright of a book not in existence can be assigned at law. (1906) 2 Ch. 550; 75 L.J. Ch. 732, and the assignment may take the form of an agreement to assign (*ibid.*); but see (1839) 8 L.J. Ch. 216; (1838) 9 Sim. 151. On bankruptcy, the copyright would pass to the trustee without any writing. (1826) 2 Russ. 392. Actual payment is a condition precedent to the vesting of the copyright of the article in the proprietor of the work; a contract for payment is not sufficient. (1851) 1 Sim. 336; 20 L.J. Ch. 553.

such reversionary interest shall be null and void, but nothing in this proviso shall be construed as applying to the assignment of the copyright in a collective work or a licence to publish a work or part of a work as part of a collective work.

(3) Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee, as respects the rights so assigned, and the assignor, as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and the provisions of this Act shall have effect accordingly.

Civil Remedies.

6. (1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right.

(2) The Costs of all parties in any proceedings in respect of the infringement of copyright shall be in the absolute discretion of the Court.

(3) In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff, and where any such question is in issue, then—

(a) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work;

(b) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly

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Sec. 6.—A book containing selections from the works of different authors can be the subject-matter of copyright. The principle applicable to such cases is that one person is not at liberty to use or avail himself of the labour which another has been at for the purpose of producing his work, and so take away the result of that other's labour, *i.e.*, his property. 156 I.C. 841=1935 Lah. 282. Where the legal right of the plaintiff, namely, his copyright in a particular book, was admitted and only its violation by the threatened publication of an alleged similar book, was not denied and it further appeared that if the injunction was not issued irreparable injury or inconvenience might result to the plaintiff. *Held*, that it was a proper case in which a temporary injunction should be issued. Principles applicable to grant of interlocutory injunctions considered. 132 I.C. 586=1931 L. 624. *See also* 34 P.L.R. 249. In a case of infringement of copyright the application for temporary injunction is governed by S. 6 of the Copyright Act and not by S. 56 (f) of the Specific Relief Act. 132 I.C. 586=1931 Lah. 624. As to measure of damages, *see* (1898) 1 Ch. 58; 67 L.J. Ch. 6; and as to when damages are recoverable, *see* (1899) 1 Ir. R. 386. The owner of a copyright in any book has no right in

a Court of equity to more than the usual account of the net profits of all copies of the book. He has no right to an account of the gross proceeds. (1857) 3 K. & J. 581.

Secs. 6 and 7.—Where in a case of infringement of copyright the plaintiff asked for damages under S. 6 on the footing of the loss sustained and in the alternative under S. 7 for the delivery of the unsold infringing copies and damages on the footing of conversion in respect of the infringing copies sold, and the Court awarded damages under S. 6 and also decreed delivery of the unsold copies, *held*, that the plaintiff could not claim damages under S. 7 also. *Quære*, whether the Court was justified in awarding damages under S. 6 and also ordering delivery of the unsold copies when the prayers had been cast in the alternative. 126 I.C. 197=51 C.L.J. 243=34 C.W.N. 540. Though the remedies given by S. 6 are not alternative to those given by S. 7, yet when an owner of a copyright obtains damages under S. 6, it often happens that he can recover nothing further in respect of damages under S. 7. Where the amount of damages awarded under S. 6 covers the price of permission to publish the work in question, the author is not entitled to damages also under S. 7. 1938 Lah. 173=40 P.L.R. 622.

known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein.

7. All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

8. Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware, and had not reasonable ground for suspecting, that copyright subsisted in the work.

9. (1) Where the construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work has been commenced, the owner of the copyright shall not be entitled to obtain an injunction or interdict to restrain the construction of such building or structure or to order its demolition.

(2) Such of the other provisions of this Act as provide that an infringing copy of a work shall be deemed to be the property of the owner of the copyright, or as impose summary penalties, shall not apply in any case to which this section applies.

10. An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement.

11.	*	*	*	*
12.	*	*	*	*
13.	*	*	*	*

Importation of Copies.

14. (1) Copies made out of the United Kingdom of any work in which copyright subsists which if made in the United Kingdom would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or his agent to the

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Sec. 7.—The offence is complete as soon as the book infringing the copyright is printed and consequence contemplated in S. 179, Cr.P. Code, are not necessary for the completion of the offence. 28 P.R. 1916 (Cr.) = 38 I.C. 737 = 18 Cr.L.J. 353. Under S. 7, all infringing copies of any work in which copyright subsists, become the property of the owner of the copyright. He has, therefore, a right to recover the possession of the infringing copies unsold and the price of the copies sold. 1938 A.L.J. 390

= 1938 All. 266.

Sec. 8.—Where in an action for infringement of a copyright, the defendant alleges that he was not aware of the existence of the alleged copyright, in order to come within the provisions of S. 8 of the English Copyright Act which has been incorporated in the Indian Act (III of 1914), it is for the defendant to allege and prove that the infringement was innocent. I.L.R. (1939) Bom. 295 = 41 Bom.L.R. 530 = 1939 Bom. 347.

Commissioners of Customs and Excise, that he is desirous that such copies should not be imported into the United Kingdom shall not be so imported, and shall, subject to the provisions of this section, be deemed to be included in the table of prohibitions and restrictions contained in section forty-two of the Customs Consolidation Act, 1876, and that section shall apply accordingly.

(2) Before detaining any such copies or taking any further proceedings with a view to the forfeiture thereof under the law relating to the Customs, the Commissioners of Customs and Excise may require the regulations under this section, whether as to information, conditions, or other matters, to be complied with, and may satisfy themselves in accordance with those regulations that the copies are such as are prohibited by this section to be imported.

(3) The Commissioners of Customs and Excise may make regulations, either general or special, respecting the detention and forfeiture of copies, the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may, by such regulations, determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) The regulations may apply to copies of all works, the importation of copies of which is prohibited by this section, or different regulations may be made respecting different classes of such works.

(5) The regulations may provide for the informant reimbursing the Commissioners of Customs and Excise all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention; and may provide for notices under any enactment repealed by this Act being treated as notices given under this section.

(6) The foregoing provisions of this section shall have effect as if they were part of the Customs Consolidation Act, 1876: Provided that, notwithstanding anything in that Act, the Isle of Man shall not be treated as part of the United Kingdom for the purposes of this section.

(7) This section shall, with necessary modifications, apply to the importation into a British possession to which this Act extends of copies of works made out of that possession.

Delivery of Books to libraries.

15. (1) The publisher of every book published in the United Kingdom shall, within one month after the publication, deliver, at his own expense, a copy of the book to the trustees of the British Museum, who shall give a written receipt for it.

(2) He shall also, if written demand is made before the expiration of twelve months after publication, deliver within one month after receipt of that written demand or, if the demand was made before publication, within one month after publication, to some depot in London named in the demand a copy of the book for, or in accordance with the directions of, the authority having the control of each of the following libraries, namely, the Bodleian Library, Oxford; the University Library, Cambridge, the Library of the Faculty of Advocates at Edinburgh, and the Library of Trinity College, Dublin; and, subject to the provisions of this section, the National Library of Wales. In the case of an encyclopædia, newspaper, review, magazine, or work published in a series of numbers or parts, the written demand may include all numbers or parts of the work which may be subsequently published.

(3) The copy delivered to the trustees of the British Museum shall be a copy of the whole book with all maps and illustrations belonging thereto finished

and coloured in the same manner as the best copies of the book are published, and shall be bound, sewed, or stitched together, and on the best paper on which the book is printed.

(4) The copy delivered for the other authorities mentioned in this section shall be on the paper on which the largest number of copies of the book is printed for sale, and shall be in the like condition as the books prepared for sale.

(5) The books of which copies are to be delivered to the National Library of Wales shall not include books of such classes as may be specified in regulations to be made by the Board of Trade.

(6) If a publisher fails to comply with this section, he shall be liable on summary conviction to a fine not exceeding five pounds and the value of the book, and the fine shall be paid to the trustees or authority to whom the book ought to have been delivered.

(7) For the purposes of this section, the expression "book" includes every part or division of a book, pamphlet, sheet of letter-press, sheet of music, map, plan, chart or table separately published, but shall not include any second or subsequent edition of a book unless such edition contains additions or alterations either in the letter-press or in the maps, prints, or other engravings belonging thereto.

Special Provisions as to certain Works.

16. (1) In the case of a work of joint authorship, copyright shall subsist during the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer, and references in this Act to the period after the expiration of any specified number of years from the death of the author shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first or after the death of the author who dies last, whichever period may be the shorter, and in the provisions of this Act with respect to the grant of compulsory licences a reference to the date of the death of the author who dies last shall be substituted for the reference to the date of the death of the author.

(2) Where, in the case of a work of joint authorship, some one or more of the joint authors do not satisfy the conditions conferring copyright laid down by this Act, the work shall be treated for the purposes of this Act as if the other author or authors had been the sole author or authors thereof:

Provided that the term of the copyright shall be the same as it would have been if all the authors had satisfied such conditions as aforesaid.

(3) For the purposes of this Act, "a work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.

(4) Where a married woman and her husband are joint authors of a work the interest of such married woman therein shall be her separate property.

17. (1) In the case of a literary, dramatic or musical work, or an engraving, in which copyright subsists at the date of the death of the author or, in the case of a work of joint authorship at or immediately before the date of the death of the author who dies last, but which has not been published, nor, in the case of a dramatic or musical work, been performed in public nor, in the case of a lecture, been delivered in public, before that date, copyright shall subsist till publication, or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter and the proviso to section 3 of this Act, shall, in the case

of such a work, apply as if the author had died at the date of such publication or performance or delivery in public as aforesaid.

(2) The ownership of an author's manuscript after his death, where such ownership has been acquired under a testamentary disposition made by the author and the manuscript is of a work which has not been published nor performed in public nor delivered in public, shall be *prima facie* proof of the copyright being with the owner of the manuscript.

18. Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.

19. (1) Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works, but the term of copyright shall be fifty years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts.

(2) It shall not be deemed to be an infringement of copyright in any musical work for any person to make, within the parts of His Majesty's dominions to which this Act extends, records, perforated rolls or other contrivances by means of which the work may be mechanically performed, if such person proves—

(a) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and

(b) that he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him, calculated at the rate hereinafter mentioned:

Provided that—

(i) nothing in this provision shall authorise any alterations in, or omissions from, the work reproduced, unless contrivances reproducing the work sub-

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Sec. 19 does not in terms provide that the making of the record must be a lawful act or with the consent of the owner of the copyright in the original work, if such a person exists. But the section must be limited to a lawful making of the record. The copyright conferred by the section on the owner of the plate from which the record is made presupposes, therefore, that that plate came into existence lawfully. *I. L.R.* (1937) Bom. 724=39 Bom.L.R. 654=1937 Bom. 472. Where the original work is the subject-matter of the copyright, it necessarily follows that the consent of the owner of that copyright must be obtained to

the making of the plate. Obviously it would be lawful for the owner to refuse his consent. It would also be legitimate for him to give his consent subject to certain conditions and those conditions may involve restricting the copyright which the owner of the plate would otherwise acquire under S. 19. Such copyright might be restricted in various ways, amongst others, by restricting the public performance of records made from the plate. (*Ibid.*) *Quære*.—Whether the rights which accrue to the maker of a record or plate under S. 19, are subject or subsidiary to the rights of the owner of copyright in the original work? (*Ibid.*)

ject to similar alterations and omissions have been previously made by, or with the consent or acquiescence of, the owner of the copyright, or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question; and

(ii) for the purposes of this provision, a musical work shall be deemed to include any words so closely associated therewith as to form part of the same work, but shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced.

(3) The rate at which such royalties as aforesaid are to be calculated shall—

(a) in the case of contrivances sold within two years after the commencement of this Act by the person making the same, be two and one-half per cent.; and

(b) in the case of contrivances sold as aforesaid after the expiration of that period, be five per cent.;

on the ordinary retail selling price of the contrivance calculated in the prescribed manner, so however that the royalty payable in respect of a contrivance shall, in no case, be less than a half-penny for each separate musical work in which copyright subsists reproduced thereon, and, where the royalty calculated as aforesaid includes a fraction of a farthing, such fraction shall be reckoned as a farthing:

Provided that, if, at any time after the expiration of seven years from the commencement of this Act, it appears to the Board of Trade that such rate as aforesaid is no longer equitable, the Board of Trade may, after holding a public inquiry, make an order either decreasing or increasing that rate to such extent as under the circumstances may seem just, but any order so made shall be provisional only and shall not have any effect unless and until confirmed by parliament; but where an order revising the rate has been so made and confirmed, no further revision shall be made before the expiration of fourteen years from the date of the last revision.

(4) If any such contrivance is made reproducing two or more different works in which copyright subsists and the owners of the copyright therein are different persons, the sums payable by way of royalties under this section shall be apportioned amongst the several owners of the copyright in such proportions as, failing agreement, may be determined by arbitration.

(5) When any such contrivances by means of which a musical work may be mechanically performed have been made, then, for the purposes of this section, the owner of the copyright in the work shall, in relation to any person who makes the prescribed inquiries, be deemed to have given his consent to the making of such contrivances if he fails to reply to such inquiries within the prescribed time.

(6) For the purposes of this section, the Board of Trade may make regulations prescribing anything which under this section is to be prescribed, and prescribing the mode in which notices are to be given and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, and any such regulations may, if the Board think fit, include regulations requiring payment in advance or otherwise securing the payment of royalties.

(7) In the case of musical works published before the commencement of this Act, the foregoing provisions shall have effect, subject to the following modifications and additions:—

(a) The conditions as to the previous making by, or with the consent or acquiescence of, the owner of the copyright in the work, and the restrictions as to alterations in or omissions from the work shall not apply;

(b) The rate of two and one-half per cent. shall be substituted for the rate of five per cent. as the rate at which royalties are to be calculated, but no royalties shall be payable in respect of contrivances sold before the first day of July, nineteen hundred and thirteen, if contrivances reproducing the same work had been lawfully made, or placed on sale, within the parts of His Majesty's dominions to which this Act extends before the first day of July, nineteen hundred and ten;

(c) Notwithstanding any assignment made before the passing of this Act of the copyright in a musical work, any rights conferred by this Act in respect of the making, or authorising the making, of contrivances by means of which the work may be mechanically performed shall belong to the author or his legal personal representatives and not to the assignees, and the royalties aforesaid shall be payable to, and for the benefit of, the author of the work or his legal personal representatives;

(d) The saving contained in this Act of the rights and interests arising from, or in connexion with, action taken before the commencement of this Act shall not be construed as authorising any person who has made contrivances by means of which the work may be mechanically performed to sell any such contrivances, whether made before or after the passing of this Act, except on the terms and subject to the conditions laid down in this section;

(e) Where the work is a work on which copyright is conferred by an Order in Council relating to a foreign country, the copyright so conferred shall not, except to such extent as may be provided by the Order, include any rights with respect to the making of records, perforated rolls, or other contrivances by means of which the work may be mechanically performed.

(8) Notwithstanding anything in this Act where a record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced has been made before the commencement of this Act, copyright shall, as from the commencement of this Act, subsist therein in like manner and for the like term as if this Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived:

Provided that—

(i) the person who, at the commencement of this Act, is the owner of such original plate shall be the first owner of such copyright; and

(ii) nothing in this provision shall be construed as conferring copyright in any such contrivance if the making thereof would have infringed copyright in some other such contrivance, if this provision had been in force at the time of the making of the first-mentioned contrivance.

20. Notwithstanding anything in this Act, it shall not be an infringement

of copyright in an address of a political nature delivered at a public meeting to publish a report thereof in a newspaper.

21. The term for which copyright shall subsist in photographs shall be

fifty years from the making of the original negative from which the photograph was directly or indirectly derived, and the person who was owner of such negative at the time when such negative was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts.

NOTES.

Sec. 20.—“Public meeting” is not defined in this Act, but *see* S. 4 of the English Law

of Libel Amendment Act, 1888 (51 and 52 Vic., c. 64).

22. (1) This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.

Provisions as to designs registrable under 7 Edw. VII, c. 29.

(2) General rules under section 86 of the Patents and Designs Act, 1907, may be made for determining the conditions under which a design shall be deemed to be used for such purposes as aforesaid.

23. If it appears to His Majesty that a foreign country does not give, or has not undertaken to give, adequate protection to the works of British authors, it shall be lawful for His Majesty by Order in Council to direct that such of the provisions of this Act as confer copyright on works first published within the parts of His Majesty's dominions to which this Act extends, shall not apply to works published after the date specified in the Order, the authors whereof are subjects or citizens of such foreign country, and are not resident in His Majesty's dominions, and thereupon those provisions shall not apply to such works.

Works of foreign authors first published in parts of His Majesty's dominions to which Act extends.

24. (1) Where any person is immediately before the commencement of this Act entitled to any such right in any work as is specified in the first column of the First Schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted right set forth in the second column of that schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder:

Existing works.

Provided that—

(a) if the author of any work in which any such right as is specified in the first column of the First Schedule to this Act subsists at the commencement of this Act has, before that date, assigned the right or granted any interest therein for the whole term of the right, then at the date when, but for the passing of this Act, the right would have expired the substituted right conferred by this section shall, in the absence of express agreement, pass to the author of the work, and any interest therein created before the commencement of this Act and then subsisting shall determine; but the person who immediately before the date at which the right would have so expired was the owner of the right or interest shall be entitled at his option either—

(i) on giving such notice as hereinafter mentioned, to an assignment of the right or the grant of a similar interest therein for the remainder of the term

NOTES.

Sec. 24.—Under S. 24 no new right was conferred on an author in respect of an existing book. Whatever copyright he had at the commencement of the Act was continued in his favour. 154 I.C. 207=1934 All. 922. An entry in the Copyright Register Book under S. 3 of the previous Copyright Act is *prima facie* evidence of the proprietorship of the person mentioned therein, but the absence of that provision from the new Copyright Act does not make it any the less evidence when the new Act grants to the owners of existing copyrights, rights at least as valuable as the rights given under the repealed Act. S. 14 of the Indian

Evidence Act can, therefore, be invoked to make such evidence admissible. A High Court can in such cases interfere under S. 15 of the Charter Act. 30 I.C. 721=16 Cr.L.J. 673. If a copyright is shown to have subsisted when Act III of 1914 came into force the period of copyright substituted by that Act would be 50 years from the death of the author. Where the complaint for infringement is made after the new Act the question to be considered is whether the copyright was subsisting under the new Act and not whether it was subsisting under the old Act XX. 131 I.C. 865=1931 A.L.J. 304=1931 All. 353.

of the right for such consideration as, failing agreement, may be determined by arbitration; or

(ii) without any such assignment or grant, to continue to reproduce or perform the work in like manner as theretofore subject to the payment, if demanded by the author within three years after the date at which the right would have so expired, of such royalties to the author as, failing agreement, may be determined by arbitration, or where the work is incorporated in a collective work and the owner of the right or interest is the proprietor of that collective work, without any such payment;

The notice above referred to must be given not more than one year nor less than six months before the date at which the right would have so expired, and must be sent by registered post to the author, or, if he cannot with reasonable diligence be found advertised in the London Gazette and in two London newspapers;

(b) where any person has, before the twenty-sixth day of July, nineteen hundred and ten, taken any action whereby he has incurred any expenditure or liability in connexion with the reproduction or performance of any work in a manner which at the time was lawful, or for the purpose of or with a view to the reproduction or performance of a work at a time when such reproduction or performance would, but for the passing of this Act, have been lawful, nothing in this section shall diminish or prejudice any rights or interests arising from or in connexion with such action which are subsisting and valuable at the said date unless the person who by virtue of this section becomes entitled to restrain such reproduction or performance agrees to pay such compensation as, failing agreement, may be determined by arbitration.

(2) For the purposes of this section, the expression "author" includes the legal personal representatives of a deceased author.

(3) Subject to the provisions of section 19, sub-sections (7) and (8) and of section 33 of this Act, copyright shall not subsist in any work made before the commencement of this Act, otherwise than under, and in accordance with the provisions of this section.

Application to British Possessions.

25. (1) This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, shall extend throughout His Majesty's dominions: Provided that it shall not extend to a self-governing dominion, unless declared by the Legislature of that dominion to be in force therein either without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature.

(2) If the Secretary of State certifies by notice published in the London Gazette that any self-governing dominion has passed legislation under which

NOTES.

Sec. 25.—The certificate by the Secretary of State, under S. 25 (2), (English) Copyright Act, has merely the effect of bringing into operation the provision that the Dominion in respect of which the certificate is issued should, for the purposes of the rights conferred by the (English) Act (but for those purposes only), be treated as if it were a Dominion to which the Act extended. Thus although under S. 1, (English) Act, an author writing in a Dominion would not, when the (English) Act was

passed, have any copyright under the (English) Act, the effect of the certificate would be that such an author would become a person entitled to "the rights conferred" by the (English) Act. Hence the authors in that Dominion will have the same rights under the (English) Act, within the area to which that Act extends as they would have if the Act extended to the Dominion. But the certificate does not and cannot extend the (English) Act to the Dominion, if it is not in force there. 171 I.C. 406=1937 P.C. 326 (P.C.).

works, the authors whereof were at the date of the making of the works British subjects resident elsewhere than in the dominion or (not being British subjects) were resident in the parts of His Majesty's dominions to which this Act extends, enjoy within the dominion rights substantially identical with those conferred by this Act, then, whilst such legislation continues in force, the dominion shall, for the purposes of the rights conferred by this Act, be treated as if it were a dominion to which this Act extends; and it shall be lawful for the Secretary of State to give such a certificate as aforesaid, notwithstanding that the remedies for enforcing the rights, or the restrictions on the importation of copies of works, manufactured in a foreign country, under the law of the dominion, differ from those under this Act.

26. (1) The legislature of any self-governing dominion may, at any time, repeal all or any of the enactments relating to copy-right passed by Parliament (including this Act) so far as they are operative within that dominion: Provided that no such repeal shall prejudicially affect any legal rights existing at the time of the repeal, and that, on this Act or any part thereof being so repealed by the Legislature of a self-governing dominion, that dominion shall cease to be a dominion to which this Act extends.

(2) In any self-governing dominion to which this Act does not extend the enactments repealed by this Act shall, so far as they are operative in that dominion, continue in force until repealed by the Legislature of that dominion.

(3) Where His Majesty in Council is satisfied that the law of a self-governing dominion to which this Act does not extend provides adequate protection within the dominion for the works (whether published or unpublished) of authors who at the time of the making of the work were British subjects resident elsewhere than in that dominion, His Majesty in Council may, for the purpose of giving reciprocal protection, direct that this Act, except such parts (if any) thereof as may be specified in the Order, and subject to any conditions contained therein shall, within the parts of His Majesty's dominions to which this Act extends, apply to works the authors whereof were, at the time of the making of the work, resident within the first-mentioned dominion, and to works first published in that dominion; but, save as provided by such an Order, works the authors whereof were resident in a dominion to which this Act does not extend shall not, whether they are British subjects or not, be entitled to any protection under this Act except such protection as is by this Act conferred on works first published within the parts of His Majesty's dominions to which this Act extends:

Provided that no such Order shall confer any rights within a self-governing dominion, but the Governor in Council of any self-governing dominion to which this Act extends may, by Order, confer within that dominion the like rights as His Majesty in Council is, under the foregoing provisions of this subsection, authorized to confer within other parts of His Majesty's dominions.

For the purposes of this sub-section, the expression "a dominion to which this Act extends" includes a dominion which is for the purposes of this Act to be treated as if it were a dominion to which this Act extends.

27. The Legislature of any British possession to which this Act extends may modify or add to any of the provisions of this Act in its application to the possession, but except so far as such modifications and additions relate to procedure and remedies, they shall apply only to works the authors whereof were, at the time of the making of the work, resident in the possession, and to works first published in the possession.

28. His Majesty may, by Order in Council, extend this Act to any territories under his protection and to Cyprus, and on the making of any such Order, this Act shall, subject to the provisions of the Order, have effect as if the territories to which it applies or Cyprus were part of His Majesty's dominions to which this Act extends.

PART II.

INTERNATIONAL COPYRIGHT.

Powers to extend Act to foreign works.

29. (1) His Majesty may, by Order in Council, direct that this Act (except such parts, if any, thereof as may be specified in the Order) shall apply—

(a) to works first published in a foreign country to which the Order relates, in like manner as if they were first published within the parts of His Majesty's dominions to which this Act extends;

(b) to literary, dramatic, musical, and artistic works, or any class thereof, the authors whereof were, at the time of the making of the works, subjects or citizens of a foreign country to which the Order relates, in like manner as if the authors were British subjects;

(c) in respect of residence in a foreign country to which the Order relates, in like manner as if such residence were residence in the parts of His Majesty's dominions to which the Act extends;

and thereupon, subject to the provisions of this Part of this Act and of the Order, this Act shall apply accordingly:

Provided that—

(i) before making an Order in Council under this section in respect of any foreign country (other than a country with which His Majesty has entered into a convention relating to copyright), His Majesty shall be satisfied that that foreign country has made, or has undertaken to make, such provisions, if any, as it appears to His Majesty expedient to require for the protection of works entitled to copyright under the provisions of Part I of this Act;

(ii) the Order in Council may provide that the terms of copyright within such parts of His Majesty's dominions as aforesaid shall not exceed that conferred by the law of the country to which the Order relates;

(iii) the provisions of this Act as to the delivery of copies of books shall not apply to works first published in such country, except so far as is provided by the Order;

(iv) the Order in Council may provide that the enjoyment of the rights conferred by this Act shall be subject to the accomplishment of such conditions and formalities (if any) as may be prescribed by the Order;

(v) in applying the provisions of this Act as to ownership of copyright, the Order in Council may make such modifications as appear necessary having regard to the law of the foreign country;

(vi) in applying the provisions of this Act as to existing works, the Order in Council may make such modifications as appear necessary, and may provide that nothing in those provisions as so applied shall be construed as reviving any right of preventing the production or importation of any translation in any case where the right has ceased by virtue of section five of the International Copyright Act, 1886.

(2) An Order in Council under this section may extend to all the several countries named or described therein.

30. (1) An Order in Council under this Part of this Act shall apply to all His Majesty's dominions to which this Act extends except self-governing dominions and any other possessions specified in the Order with respect to which it appears to His Majesty expedient that the Order should not apply.

Application of Part II to British possessions.

(2) The Governor in Council of any self-governing dominion to which this Act extends may, as respects that dominion, make the like Orders as under this Part of this Act His Majesty in Council is authorized to make with respect to His Majesty's dominions other than self-governing dominions, and the provisions of this Part of this Act shall, with the necessary modifications, apply accordingly.

(3) Where it appears to His Majesty expedient to except from the provisions of any Order any part of his dominions, not being a self-governing dominion, it shall be lawful for His Majesty by the same or any other Order in Council to declare that such Order and this Part of this Act shall not, and the same shall not, apply to such part, except so far as is necessary for preventing any prejudice to any rights acquired previously to the date of such Order.

PART III.

SUPPLEMENTAL PROVISIONS.

31. No person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.

32. (1) His Majesty in Council may make Orders for altering, revoking or varying any Order in Council made under this Act, or under any enactments repealed by this Act, but any Order made under this section shall not affect prejudicially any rights or interests acquired or accrued at the date when the Order comes into operation, and shall provide for the protection of such rights and interests.

(2) Every Order in Council made under this Act shall be published in the *London Gazette* and shall be laid before both Houses of Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act.

33. Nothing in this Act shall deprive any of the universities and colleges mentioned in the Copyright Act, 1775, of any copyright they already possess under that Act, but the remedies and penalties for infringement of any such copyright shall be under this Act and not under that Act.

34. There shall continue to be charged on, and paid out of, the Consolidated Fund of the United Kingdom such annual compensation as was immediately before the commencement of this Act payable in pursuance of any Act as compensation to a library for the loss of the right to receive gratuitous copies of books:

Provided that this compensation shall not be paid to a library in any year unless the Treasury are satisfied that the compensation for the previous year has been applied in the purchase of books for the use of and to be preserved in the library.

Interpretation.

35. (1) In this Act, unless the context otherwise requires,—

"Literary work" includes maps, charts, plans, tables, and compilations;

NOTES.

Sec. 30 (3).—This provision will not revive a right of preventing unauthorised translations of a foreign work in England

which under the previously existing law had expired before the passing of the Act. See (1892) 3 Ch. 402; 61 L.J. Ch. 580.

Sec. 35: "LITERARY WORK".—It is to be

"Dramatic work" includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character;

"Artistic work" includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs;

"Work of sculpture" includes casts and models;

"Architectural work of art" means any building or structure having an artistic character or design, in respect of such character or design, or any model for such building or structure, provided that the protection afforded by this Act shall be confined to the artistic character and design, and shall not extend to processes or methods of construction;

"Engravings," include etchings, lithographs, wood-cuts, prints, and other similar works, not being photographs;

"Photograph" includes photo-lithograph and any work produced by any process analogous to photography;

"Cinematograph" includes any work produced by any process analogous to cinematography;

"Collective work" means—

- (a) an encyclopædia, dictionary, year book, or similar work;
- (b) a newspaper, review, magazine, or similar periodical; and
- (c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated;

"Infringing" when applied to a copy of a work in which copyright subsists means any copy, including any colourable imitation, made or imported in contravention of the provisions of this Act;

"Performance" means any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument;

"Delivery", in relation to a lecture, includes delivery by means of any mechanical instrument;

"Plate" includes any stereotype or other plate, stone, block, mould, matrix, transfer, or negative used or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which records, perfo-

NOTES.

noted that this definition as well as ones which follow it do not purport to be exclusive and that the ordinary and popular meaning must be given to the words interpreted as well as making them inclusive of those things specifically mentioned. The word "book" does not appear in this section, but the definition of "book" given in the Copyright Act (1842), 5 & 6 Vic., c. 45, was held to include wood engravings. (1852) 5 De G. & Sm. 267; 21 L.J. Ch. 470; maps, (1871) L.R. 6 Ch. 346; 40 L.J. Ch. 489; and newspapers, (1881) 17 Ch. D. 708; 50 L.J. Ch. 621; (1899) 40 Ch. D. 425; 58 L.J. Ch. 293 (C.A.), overruling (1869) L.R. 9 Eq. 324; 39 L.J. Ch. 52; which have no right to copy from each other,

(1892) 2 Ch. 489; 61 L.J. Ch. 521; but not the title of a book in the ordinary sense. (1881) 18 Ch. D. 76; 50 L.J. Ch. 809.

"ENGRAVINGS".—Copyright was extended to lithographs by S. 14 of the International Copyright Act, 1852 (15 & 16 Vic., c. 12).

"PHOTOGRAPHY".—This will include, it is submitted, copying by a process discovered after the passing of the Act. (1863) 14 C. B. (N.S.) 306; 32 L. J. C. P. 166; (1867) L.R. 2 C.P. 410; 36 L.J.C.P. 139.

"ENCYCLOPEDIA"—"COLLECTIVE WORK".—The infringement of articles composed at the joint expense of proprietors of several newspapers may be restrained at the joint suit of all the proprietors. (1889) 40 Ch. D. 425; 58 L.J. Ch. 293. See (1907) 23 T.L.R. 370.

rated rolls or other contrivances for the acoustic representation of the work are or are intended to be made;

"Lecture" includes address, speech, and sermon;

"Self-governing dominion" means the dominion of Canada, the Commonwealth of Australia, the dominion of New Zealand, the Union of South Africa, and Newfoundland.

(2) For the purposes of this Act (other than those relating to infringements of copyright), a work shall not be deemed to be published or performed in public, and a lecture shall not be deemed to be delivered in public, if published, performed in public, or delivered in public, without the consent or acquiescence of the author, his executors, administrators or assigns.

(3) For the purposes of this Act, a work shall be deemed to be first published within the parts of His Majesty's dominions to which this Act extends, notwithstanding that it has been published simultaneously in some other place, unless the publication in such parts of His Majesty's dominions as aforesaid is colourable only and is not intended to satisfy the reasonable requirements of the public, and a work shall be deemed to be published simultaneously in two places if the time between the publication in one such place and the publication in the other place does not exceed fourteen days, or such longer period as may, for the time being, be fixed by Order in Council.

(4) Where, in the case of an unpublished work, the making of a work has extended over a considerable period, the conditions of this Act conferring copyright shall be deemed to have been complied with, if the author was, during any substantial part of that period, a British subject or a resident within the parts of His Majesty's dominions to which this Act extends.

(5) For the purposes of the provisions of this Act as to residence, an author of a work shall be deemed to be a resident in the parts of His Majesty's dominions to which this Act extends if he is domiciled within any such part.

36. Subject to the provisions of this Act, the enactments mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule:

Provided that this repeal shall not take effect in any part of His Majesty's dominions until this Act comes into operation in that part.

Short title and commencement.

37. (1) This Act may be cited as THE COPYRIGHT ACT, 1911.

(2) This Act shall come into operation—

(a) in the United Kingdom, on the first day of July, nineteen hundred and twelve or such earlier date as may be fixed by Order in Council;

(b) in a self-governing dominion to which this Act extends, at such date as may be fixed by the Legislature of that dominion;

(c) in the Channel Islands, at such date as may be fixed by the States of those islands respectively;

(d) in any other British possession to which this Act extends on the proclamation thereof within the possession by the Governor.

FIRST SCHEDULE.

Section 24.

EXISTING RIGHTS.

Existing Right.	Substituted Right.
(a) <i>In the case of Works other than Dramatic and Musical Works.</i>	
Copyright	Copyright as defined by this Act. ¹

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¹ In the case of an essay, article, or portion forming part of and first published in a review, magazine or other periodical or work

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of a like nature, the right shall be subject to any right of publishing the essay, article or portion in a separate form to which the author is entitled at the commencement of

Existing Right.	Substituted Right.
<i>(b) In the case of Musical and Dramatic Works.</i>	
Both copyright and performing right.	Copyright as defined by this Act. ¹
Copyright, but not performing right.	Copyright as defined by this Act, except the sole right to perform the work or any substantial part thereof in public.
Performing right, but not copyright.	The sole right to perform the work in public, but none of the other rights comprised in copyright, as defined by this Act.

For the purposes of this schedule the following expressions, where used in the first column thereof, have the following meanings:—

"Copyright", in the case of a work which according to the law in force immediately before the commencement of this Act has not been published before that date and statutory copyright wherein depends on publication, includes the right at common law (if any) to restrain publication or other dealing with the work;

"Performing right," in the case of a work which has not been performed in public before the commencement of this Act, includes the right at common law (if any) to restrain the performance thereof in public.

SECOND SCHEDULE. ENACTMENTS REPEALED.

Session and Chapter.	Short title.	Extent of Repeal.
8 Geo. 2, c. 13 ..	The Engraving Copyright Act, 1734 ..	The whole Act.
7 Geo. 3, c. 38 ..	The Engraving Copyright Act, 1767 ..	Do.
15 Geo. 3, c. 53 ..	The Copyright Act, 1775 ..	Do.
17 Geo. 3, c. 57 ..	The Prints Copyright Act, 1777 ..	Do.
54 Geo. 3, c. 56 ..	The Sculpture Copyright Act, 1814 ..	Do.
3 & 4 Will. 4, c. 15 ..	The Dramatic Copyright Act, 1833 ..	Do.
5 & 6 Will. 4, c. 65 ..	The Lectures Copyright Act, 1835 ..	Do.
6 & 7 Will. 4, c. 59 ..	The Prints and Engraving Copyright (Ireland) Act, 1836 ..	Do.
6 & 7 Will. 4, c. 110 ..	The Copyright Act, 1836 ..	Do.
5 & 6 Vict., c. 45 ..	The Copyright Act, 1842 ..	Do.
7 & 8 Vict., c. 12 ..	The International Copyright Act, 1844 ..	Do.
10 & 11 Vict., c. 95 ..	The Colonial Copyright Act, 1847 ..	Do.
15 & 16 Vict., c. 12 ..	The International Copyright Act, 1852 ..	Do.
25 & 26 Vict., c. 68 ..	The Fine Arts Copyright Act, 1862 ..	Sections one to six. In section eight the words "and pursuant to any Act for the protection of copyright engravings," and "and in any such Act as aforesaid." Sections nine to twelve.
38 & 39 Vict., c. 12 ..	The International Copyright Act, 1875 ..	The whole Act.
39 & 40 Vict., c. 36 ..	The Customs Consolidation Act, 1876 ..	Section forty-two from "Bookswherein" to "such copyright will expire". Sections forty-four, forty-five and one hundred and fifty-two.
45 & 46 Vict., c. 40 ..	The Copyright (Musical Compositions) Act, 1882 ..	The whole Act.
49 & 50 Vict., c. 33 ..	The International Copyright Act, 1886 ..	Do.
51 & 52 Vict., c. 17 ..	The Copyright (Musical Compositions) Act, 1888 ..	Do.
52 & 53 Vict., c. 42 ..	The Revenue Act, 1889 ..	Section one, from "Books first published" to "as provided in that section."

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this Act, or would, if this Act had not been passed, have become entitled under section

eighteen of the Copyright Act, 1842.
¹ Vide footnote (1), p. 2049.

Session and Chapter.	Short title.	Extent of Repeal.
6 Edw. 7, c. 36	The Musical Copyright Act, 1906	In section three the words "and which has been registered in accordance with the provisions of the Copyright Act, 1842, or of the International Copyright Act, 1844, which registration may be effected notwithstanding anything in the International Copyright Act, 1886."

THE SECOND SCHEDULE.¹
REPEAL OF ENACTMENTS.
 (See section 15.)

Year.	No.	Short title.	Extent of repeal.
1847	XX	The Indian Copyright Act, 1847.	So much as has not already been repealed.
1867	XXV	The Press and Registration of Books Act, 1867.	In section 18 the following words, namely:—"Every registration under this section shall, upon the payment of the sum of two rupees to the office keeping the said Catalogue, be deemed to be an entry in the Book of Registry kept under Act No. XX of 1847 (for the encouragement of learning in the territories subject to the Government of the East India Company, by the defining and providing for the enforcement of the right called copyright therein); and the provisions contained in that Act as to the said book of Registry shall apply <i>mutatis mutandis</i> to the said catalogue."
1878	VIII	The Sea Customs Act, 1878.	Clause (a) of section 18.

THE COURT-FEES ACT (VII OF 1870.)

No.	Year.	Short title.	Repealed or otherwise how affected by legislation.
1870	VII	The Court-Fees Act, 1870	Repealed in part, XIV of 1870; VIII of 1871; XIII of 1889; VIII of 1890; V of 1908; XVIII of 1923. Repealed in part and amended, XX of 1870; VI of 1889, s. 18; XII of 1891; XI of 1923. Amended, XV of 1872, s. 2; XIII of 1875, s. 6; V of 1881, s. 153; VII of 1889, s. 13; XI of 1899, ss. 2 and 3; VI of 1900, s. 47; IX of 1900; X of 1901; VI of 1905; VII of 1910; XIV of 1911; XVII of 1914, s. 2; XXIV of 1917, s. 2; XVIII of 1919; XXXVIII of 1920; Reg. V of 1933; Government of India (Adaptation of Indian Laws) Order, 1937.

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¹ Repealed by Act XII of 1927.

No.	Year.	Short title.	Repealed or otherwise how affected by legislation.
			<i>N.B.</i> —As to Provincial amendments of the Court-Fees Act, Assam, III of 1932, <i>see</i> Bengal Acts, IV of 1922 ; VI of 1922 ; XI of 1835 ; VII of 1935 ; III of 1938 ; Bom. Act III of 1926 ; Burma Acts XI of 1922 and III of 1926 ; II of 1932 ; Bombay Finance Acts, 1935-1940 ; Bom. Act IV of 1939 and Act I of 1940 ; Mad. Acts V of 1922 and XIX of 1922 ; Punjab Acts XVII of 1887 ; VII of 1922 and IV of 1939 ; U. P. Acts III of 1923 ; III of 1932 ; VII of 1933 ; II of 1936 ; XIX of 1938 ; Orissa Act V of 1939 ; Bihar and Orissa Act II of 1922 ; Bihar Act XVII of 1939 ; C. P. Acts I of 1923 and XVI of 1935.

PREFATORY NOTE.—The practice in our country, in respect of the levy of fees, is similar to the practice prevailing in England and other European countries.

The origin of court-fees in British India may be described in the following words of the first report of the Commissioners appointed to consider the reform of the judicial establishment, etc., of India, 1856. The report says :

“ No institution fee has ever been paid in the Supreme Court ; nor under the original system of Lord Cornwallis was there any such fee in the Courts of the Company. The State defrayed the expense of all the judicial establishments. An institution fee, in the case of civil suits, was first established by Bengal Regulation XXXVIII of 1795, not as a source of revenue, but as appears from the preamble to the Regulation, for the purpose of preventing vexatious litigation. By Bengal Regulation VI of 1797 the institution fees were converted into stamp duties ; the preamble there assigns the same object, but adds also that of increasing the public revenue. The last purpose is the only one mentioned in Bengal Regulation I of 1814 which further regulates these payments.

The old Regulations and Acts as to Court-fees in the three Presidencies are no longer of any practical application. The Madras and Bombay Regulations proceeded to a great extent on the lines of the Bengal Regulations.

With regard to criminal cases it was found that there were no means of checking litigious complaints, in trifling matters before the magistrate, and therefore a fee of eight annas was first directed to be paid on all complaints of a petty nature before the magistrate by Bengal Regulation X of 1797. Subsequently a duty of one rupee was levied on complaints as to offences of a heinous nature. This continued to be the state of the law till 1829, when it was amended by the imposing of a fee of eight annas on complaints of offences of bailable nature. When this provision was sought to be introduced in Bombay and Madras by the Bill of 1860 there was opposition and consequently fees on complaints were altogether abolished, but were introduced again by the Act of 1867.

The Stamp Act (XXXVI of 1860) was the first general Act of the Governor-General in Council relating to judicial and non-judicial stamps in British India and repeated the previous Regulations in force in the three Presidencies. This Act was in turn repealed by Act X of 1862. It was represented to the Government of India that the scale of 1862 was too low and capriciously arranged. Mr. Roberts was proposing from time to time that a scheme should be introduced, the objects of which were that there should be a uniform rate of duty of 12 per cent. and that duty shall be charged up to certain sum and beyond that sum a small duty should be levied and that the money so obtained should be employed in the improvement of the Courts. The last of these recommendations reached the Government of India in 1866. Lord Lawrence had formed the opinion that the greatest evils in the administration of justice arose from the under-payments of the lower moffusil judges and the officers of their courts. The plans which he had been considering for remedying the evils came to maturity in 1866. The first reason which led to the Stamp Bill of 1867 was a proposition on the part of Mr. Strachey that a certain sum of money should be expended in enhancing the salaries of ministerial officers and of the judicial officers of certain courts. That proposition involved an extra-expenditure of several lakhs of rupees, and the finances of the country then were ill-able to bear the additional burden. To meet that expenditure and generally that incurred on account of the Courts, a Commission was appointed for considering the stamp laws, and before them was laid the proposals of Mr. Roberts in respect of the amendment of the scale of fees leviable under Schedule B to Act X of 1862. The Commission was appointed with the object, namely, if possible, to derive out of the stamp duties levied in judicial proceedings sufficient revenue not only to meet the increased expenditure to be incurred for the Courts, but also to make the Courts, to a more considerable extent than they did, pay for themselves.

The scheme which the Stamp Commission submitted was accepted in its entirety by the Executive Council and the scale of 1867 was the result of this Commission.

Act XXVI of 1867 proved repressive of litigation, but a considerable increase of revenue was obtained through its operation. Moreover, the Act of 1867 was intended only to be a tentative measure. To give some measure of relief, Act VII of 1870 was passed. The provisions relating to Court-fees were scattered over a number of enactments and the present Act consolidated these provisions relating to Court-fees.

The law relating to Court-fees and that relating to Stamps proper were contained in one and the same regulation or Act till Act XXVI of 1867 was passed when they were dealt with each separately. In order that for the future there might be no confusion between stamp revenue proper (non-judicial) and the revenue derived "from judicial stamp" the proceeds of Act VII of 1870 were designated the Court-fees and the Act is entitled accordingly.

As regards the general policy of levying a tax on the administration of justice, it may be noted Mr. Bentham was of opinion that justice ought not to be taxed. Mr. Hobhouse, when he asked for leave to introduce the Bill of 1867 remarked, that he was aware that there was an opinion among certain writers in England that justice should not be taxed, but as far as he knew that theory did not meet with entire approbation in England."

Mr. Maine observed thus on the objection to judicial taxation—

"This astounding fact (i.e., 75 per cent. of demonstrable false accusations which was the practical result of the relaxation of the stamp law) might well make them cautious as to minor and therefore less hazardous generalities on the subject of judicial taxes in India. But it still remained to refute the more sweeping generalisation that judicial taxes in all countries were mischievous and improper. It may be observed that the opinion against judicial taxation was extremely modern. For centuries and centuries there had seemed to be nothing more simple or natural than that the parties to a dispute should remunerate the authority by whom their differences were arranged. No doubt in modern Europe the mistake had been made of allowing judicial fees to go into the pocket of the Judge himself and not into the exchequer of the State that paid him. This had led in France before the Revolution by a perfectly logical association to the sale of judicial offices, and in England though it had always been illegal to traffic in such offices, the same result had practically been obtained by the creation of sinecures which were conferred on the relations of the Judge. Against such scandals and abuses Jeremy Bentham, now not far short of a hundred years ago, protested with all the vehemence of which he was capable, and it may be stated that the opinion against the judicial taxation was entirely produced by Jeremy Bentham and was not older. It was true that Jeremy Bentham's opinions, in this respect, had not been practically carried out even in England, and that still large amounts were levied in the forms of judicial taxes in aid of the payments which the State made to its judicial officers. But the truth was that Bentham's name was so great in England that even those views of his which had never been acted upon obtained currency and importance in the shape of commonplaces. If it should be enquired into as to what were the reasons of Bentham for denouncing judicial taxation as mischievous, the following points may be noticed: Bentham's idea was that all litigation or all but very little, was entirely the fault of Government and therefore he naturally objected that the Government which caused litigation should profit by it. Bentham believed that litigation was owing to the complexity of the law, and this litigation might be almost entirely removed by legislation adapted to true principles. He thought that litigation and therefore the expense of litigation might be reduced to a minimum, if it were not for the blindness, the stupidity or the cupidity of legislatures in not simplifying the laws. Mr. Maine would quote the panacea expressly prescribed by Bentham for all but complete suppression of fees and costs, and an all-comprehensive code of substantive law having for its end in view the greatest happiness of the greatest number. Each part of it presented to the minds of all persons on whom conformity to its enactments, and the attainment of its end depends, an all-comprehensive code of adjective law, otherwise called a code of procedure, having for its end the giving, to the utmost possible amount, execution and effect to the enactments of the substantive Code. This passage was quoted from the principles of judicial procedure as a statement of Bentham's expedient for preventing judicial taxation and accordingly he argued with perfect logic that it is the State and not the litigant that ought to pay them.

Now without entering into the question of the truth of these views, had they any application whatever to India? The simple fact was that the people of India objected to having their laws and institutions simplified, and resented such interference as a breach of the conditions on which the country was governed. The truth appeared to be that the people of the country were not only wedded by custom and religious feeling to a complex system of law, but prided themselves on their usages in proportion to the complexity of those usages. If this were so, the foundation of Bentham's doctrine collapsed and the doctrine itself had no application to India. The legislature was estopped by the conditions of our tenure of the country from so simplifying the law as to render judicial taxation mischievous. He (Mr. Maine) did not mean to imply that indefinite judicial taxation was legitimate to this country. All they argued was that it was governed by the same principles as the levying of any other tax, and not by any special consideration of the mischievousness of judicial taxation.

Mr. Maine again remarked in the Council that the question whether justice might be taxed for the general purposes of the State did not arise in India, and that the last thing which could be attributed to the Commission or to the Government was policy of taxing litigants as a separate class for the benefit of the general finance.

The above observations of Mr. Maine were made in vindication of the policy of the Government in levying taxes for the administration of justice. The Court-Fees Act (VII of 1870) was passed into law; and it prescribes certain fees to be paid by suitors before the Court can take action

in their suit or on their application.”—*Abstract of Proceedings in the Indian Legislative Council, Vol. VI, pp. 70, 123, 125, 290, 291.* It is now well settled that the Court-Fees Act is essentially a fiscal enactment; and all the provincial legislatures have passed Special Local Acts enhancing the scale of fees laid down by Act VII of 1870. See Court-Fees (Amendment) Act (II of 1912); Bengal Court-Fees (Amendment) Act (IV of 1922); Bihar and Orissa Court-Fees (Amendment) Act (II of 1922); Bombay Court-Fees (Amendment) Act (III of 1926); The Central Provinces Court-Fees Act (I of 1923); Madras Court-Fees (Amendment) Act (V of 1922); Punjab Court-Fees (Amendment) Act (VII of 1912); United Provinces Court-Fees (Amendment) Act (III of 1923).

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THE COURT-FEES ACT (VII OF 1870).¹

[11th March, 1870.]

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called THE COURT-FEES ACT, 1870.

LEG. REF.

¹ For the Statement of Objects and Reasons, see *Gazette of India*, 1869, Pt. V, p. 57; for proceedings in Council, see *ibid.*, 1869, Supplement, pp. 1179 and 1462; *ibid.*, 1870, Supplement, pp. 52, 378, 421, 427 and 434.

For rules under the Act by the High Court, Madras, Appellate Side, see *Fort St. George Gazette*, Supplement, dated 20th December, 1904, p. 1, and for Civil Rules of Practice by the same Court, under this Act, the Civil Procedure Code and certain other Acts; for observance of the Subordinate Civil Courts in that province, except the Small Cause Court at Madras, see *ibid.*, 1905, Supplement, p. 1.

Act VII of 1870 has been declared in force—in Upper Burma generally (except the Shan States) by the Burma Laws Act (XIII of 1898), S. 4 (1), Sch. I, Bur. Code; in British Baluchistan, by the British Baluchistan Laws Regulation (I of 1890), S. 3, Bal. Code; in the Sonthal Parganas, by the Sonthal Parganas Settlement Regulation (III of 1872), as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), Ben. Code; in the sub-division of Angul, by the Angul District Regulation (I of 1894), S. 3, Ben. Code.

It has further been declared, by notification under S. 3 (a) of the Scheduled Districts Act (XVI of 1874), to be in force in the following Scheduled Districts, namely:—the District of Hazaribagh, *Gazette of India*, 1881, Pt. I, p. 507; the District of Lohardaga (now called the Ranchi District, see *Calcutta Gazette*, 1899, Pt. I, p. 44; the District of Lohardaga then included the present District of Palamau, separated in 1894), see *Gazette of India*, 1881, Pt. I, p. 508; the District of Manbhum, *Gazette of India*, 1881, Pt. I, p. 509; the Pargana Dhalbhum in the District of Singhbhum, *Gazette of India*, 1881, Pt. I, p. 510; the Scheduled Districts in Ganjam and Vizagapatam, see *Gazette of India*, 1898, Pt. I, p. 869; the Tarai of the Province of Agra, see *Gazette of India*, 1876, Pt. I, p. 505.

It has been extended by notification under S. 5 of the same Act to the Kolhan in the District of Singhbhum, see *Gazette of India*, 1907, Pt. I, p. 655 and under Ss. 5 and 5-A of that Act to the following Scheduled Districts,

namely:—the Garo Hills District, the Khasi and Jaintia Hills District, the Naga Hills District, the North Cachar Sub-Division of the Cachar District, the Mikir Hill Tract in the Nowgong District and the Dibrugar Frontier Tract in the Lakhimpur District, provided that the Act does not apply to natives of these districts and tracts who are assessed to house-tax except in such places and cases as the Deputy Commissioner may withdraw from the operation of the exemption, see *Assam Gazette*, 1881, Pt. I, p. 861; *Gazette of India*, 1884, Pt. I, p. 164; the Lushai Hills, with the same proviso, see *Gazette of India*, 1904, Pt. I, p. 913, and *Assam Gazette*, 1904, Pt. II, p. 787.

The Act came into permanent operation in Aden on 1st April, 1876, see *Bombay Government Gazette*, 1876, Pt. I, p. 956.

It has been declared inapplicable to proceedings before officers making a settlement, and in certain other cases under the Sonthal Parganas Settlement Regulation (III of 1872), S. 8, as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), Ben. Code.

The Act has been amended in Upper Burma by the Upper Burma Civil Courts Regulation (I of 1896), S. 36, Bur. Code; in the Punjab, by the Punjab Courts Act (XVIII of 1884), S. 71, P. and N. W. Code; and in Lower Burma by the Lower Burma Courts Act (VI of 1900), S. 47.

NOTES.

Sec. 1 : OBJECTS AND SCOPE OF THE ACT.—The object of the Act is not to arm a litigant with a weapon of technicality but to secure revenue to the State and its provisions are to be so construed. 43 B. 507=46 I.A. 24=36 M.L.J. 437 (P.C.). See also 22 L.W. 42; 34 C.W.N. 1129. As to the imperative necessity to faithfully follow the provisions of the Act, see 1940 A.L.J. 891=1940 All. 55. The Act not only prescribes the fees, but provides how these are to be ascertained, how questions as to sufficiency of fees are to be determined, etc. 12 A. 129=(1890) 10 A.W.N. 39. See also 32 M. 305 (310)=19 M.L.J. 340 (F.B.).

CONSTRUCTION OF THE ACT.—The Act is a fiscal enactment, and must, in cases of doubt, be interpreted strictly in favour of the subject.

Extent of Act.

It extends to the whole of British India ;
And it shall come into force on the first day of

Commencement of Act.

April, 1870.

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39 C.L.J. 209 ; 8 A. 438 ; 9 M. 148 (F.B.) ; 23 Cr.L.J. 121 ; 115 P.R. 1918=44 I.C. 261 (F.B.). See also 54 M.L.J. 67 ; 43 C.W.N. 52=1938 Cal. 785 ; 1933 A.L.J. 673=1933 A. 488 (F.B.) ; 152 I.C. 244=15 P.L.T. 548=1934 P. 571 (S.B.) ; 15 A.L.J. 163=38 I.C. 993 ; 14 A.L.J. 850=36 I.C. 877 ; 37 A. 159=27 I.C. 731 ; 34 B. 239=5 I.C. 610 ; 34 C.W.N. 1129 ; 1930 N. 73 ; 1928 L. 113. See also the observations of Justice Mahmood and Chief Justice Edge on the point in 12 A. 129=(1890) 10 A.W.N. 39 (F.B.). The drafting of the Act is imperfect and unscientific and its interpretation gives rise to much difficulty. 4 P. 336=6 P.L.T. 262=1925 P. 392. The Act must be taken as a whole and individual sections should not be considered by themselves in order to give effect to the legislative intent upon a particular matter. 21 I.C. 502=18 C.W.N. 121. Though the Court-Fees Act is a fiscal enactment and its provisions have therefore to be strictly construed, yet they should not be so construed as to furnish a chance of escape and means of evasion. 13 Luck. 628=1937 O.W.N. 1186=1938 O. 1. See also 18 P.L.T. 438=1937 Pat. 514. Practice of Court though long established cannot override the express provisions of the Act. See 12 A. 129=(1890) 10 A.W.N. 39 (F.B.). See also 41 I.C. 446 (Cal.) ; 43 B. 507 (P.C.) ; 27 C. 508 ; 13 C.W.N. 815 at 821. Provisions of other statutes which are in *pari materia* may be referred to, but when the Acts are different in their scope and character, they cannot be read together. 22 M. 494=9 M.L.J. 37 ; 4 B. 515. Thus Limitation Act cannot be consulted. 29 A. 749 ; 22 M. 494 ; 9 M. 134. The special provisions of the Land Acquisition Act should not be extended by analogy to vary the provisions of the Court-Fees Act. 152 I.C. 244=15 P.L.T. 548=1934 P. 571. In such an Act as the Court-Fees Act if there is a special provision which applies to a particular case then that special provision must be applied by the Court rather than some general classification in which the suit may also be included which may be more favourable to the plaintiff. 36 L.W. 225=1932 M. 605=63 M.L.J. 764. The Act ought to be liberally construed. 1927 M. 1002=105 I.C. 881=54 M.L.J. 67. See also 152 I.C. 244=1934 P. 571 (S.B.).

OPERATION OF THE ACT.—Court-fee on an application (for review) should be calculated according to the law in force when the application was filed. 1932 A.L.J. 908=1933 A. 20. See also 1940 A.L.J. 904=1941 All. 134. Notification increasing Court-fees issued and published on a certain date in the official Gazette even if it was received at 5 P.M. after office hours, would apply to plaints filed on the same date earlier in the day. 45 M.L.J. 557=46 M. 685 (F.B.). Plaint returned for presentation to proper Court—Court-Fees Act coming into force before actual presentation—Court-fee is payable under the new Act. 30 C.W.N. 90=91 I.C. 862=1926 C. 355. An amending Act passed subsequent to the filing of the docu-

ment need not be taken into account. 1932 A.L.J. 908=1933 A. 20. See also 51 C. 216 (Plaint originally filed with insufficient stamp). Though the operation of its provisions may result at some extraordinary situation, the Act must be construed as it stands. See 1941 A.L.J. 409=1941 All. 357.

APPLICATION OF ACT—APPEALS.—*Horwill, J.*—The various section of the Court-Fees Act apply not only to suits but to appeals also. All the High Courts have always taken it for granted that appeals are valued in the same way as suits. 165 I.C. 972=44 L.W. 763=71 M.L.J. 677. Act does not apply to cases coming before the ordinary original jurisdiction of High Court. 13 R. 156=1935 R. 460.

DETERMINATION OF COURT-FEES UNDER THE ACT.—In order to determine the amount of Court-fee payable in a suit, the Court has to look at and see in each particular case what the nature of the relief claimed is, and for that purpose it must look at the allegations contained in the plaint. 21 C.W.N. 375=35 I.C. 797. See also 15 L. 531=150 I.C. 994=1934 L. 563 (F.B.) ; 40 C.L.J. 150=79 I.C. 982. In other words, the cause of action as stated in the plaint must be seen. 20 C. 762=1928 B. 476 ; 15 P. 386=161 I.C. 706=1936 P. 171. For purposes of calculation of Court-fee, the Court must take the allegations in the plaint to be *prima facie* correct ; and a plaintiff is entitled to insist that the Court-fee should be assessed on the basis on which he has framed his plaint although there might be room for suspicion that the plaint has been so drafted as to avoid inconvenient facts and the payment of a higher Court-fee. (1937) 1 M.L.J. 572=45 L.W. 720=1937 Mad. 402. The Court-fee has to be determined on the nature of the allegations in the plaint and not on what is set up or pleaded in the defence. 138 I.C. 88=1932 M. 409 ; 16 I.C. 773 (Sind) ; 35 C.W.N. 942 ; 5 P. 631 ; 6 P. 506=1927 P. 145. The Court should not ask itself whether the allegations made in the plaint are true or probable. 64 M.L.J. 24=141 I.C. 80=1933 M. 430. See also 30 I.C. 73 (Oudh) ; 16 I.C. 773 (Sind). The substance and not the mere language of the plaint must be looked to. 28 I.C. 79=38 M. 922, following 30 Mad. 18 and 40 C. 59=21 I.C. 404. See also 1932 M. 605=63 M.L.J. 764=36 L.W. 225 ; 1939 M. 435=(1939) 1 M.L.J. 425 ; 46 L.W. 484=1937 M. 876=(1937) 2 M.L.J. 616 ; I.L.R. (1938) All. 470=1938 A.L.J. 578 ; 1938 All. 481 ; 1938 Oudh 1 ; 139 I.C. 317=1932 M. 605=63 M.L.J. 764 ; 1930 N. 73 ; 50 M.L.J. 406=91 I.C. 709=1925 M. 248. But see 1928 M. 929=110 I.C. 752 (Parties can avail themselves of any camouflage that the law allows or does not forbid). But see 1935 A.M.L.J. 4. (Though Court-Fees Act is a fiscal enactment, Courts must see that it is not evaded). It has not been the practice of the Patna High Court from the time of its foundation, to depend exclusively on the averments of the plaintiff for the ascertainment of what should be the proper Court-fee payable,

¹[1-A. In this Act 'the Appropriate Government' means, in relation to fees or stamps relating to documents presented or to be presented before any officer serving under the Central Government, that Government, and in relation to any other fees or stamps, the Provincial Government.]

LEG. REF.

¹Inserted by A.O., 1937.

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or to permit a plaintiff to escape liability by a vague and indefinite statement of facts in the plaint, or to penalize him because he may possibly ask for a declaration which may be unnecessary. 18 P.L.T. 438=1937 Pat. 514. Merely asserting that a suit is a suit for administration does not make it one, and if a party sues to recover an estate, the valuation of the suit must be the value of the estate he seeks to recover. 1937 Rang.L.R. 426=1937 Rang. 455. The question of the proper court-fee payable in a suit is to be determined on the substance of the claim to be gathered from the whole of the plaint and not merely on the language of the relief claimed in the plaint. A Court ought not to allow itself to be deceived by the language used for evading the payment of proper court-fee by concealing the real purposes of the suit. 13 Luck. 628=1937 O.W.N. 1186=1938 O. 1 (F.B.). See also 63 M.L.J. 764. The substance of the plaint and not merely the exact relief asked for, has to be looked into in order to determine the Court-fee payable on the plaint. 10 P. 432=130 I.C. 46=1931 P. 78. It is the duty of Court to see that proper value is put on the relief claimed. Where it is too small on the face of the plaint, the Court can question the same. 21 I.C. 404=40 C. 615. The question whether Court-fee should be paid or not is a matter that is important from the point of view of Government alone. 133 I.C. 465=1931 A.L.J. 727=1931 A. 659. The plaintiff's estimate of the value of land, if contrary to the section of the Court-Fees Act cannot be allowed to operate to the prejudice of the defendant at any stage of the suit. The defendant can object to the valuation whenever it is in his interest to do so. 49 A. 398=25 A.L.J. 258=1927 A. 308. The Court-fee payable on a plaint in a suit and the forum of trial depend on the allegations made in the plaint and not on the defence set up by the defendant. If the plaintiff can prove his allegations he would be entitled to the relief on the lines that he has claimed, and the forum of trial is the Court in which he has brought the suit. The fact that the defendant sets up a different title cannot alter the nature of the plaintiff's claim. If the facts are found to be as pleaded by the defendant, the proper course is to dismiss the suit and not to convert the suit into another of a different character. 182 I.C. 178. Court-fee is paid on the relief available at the time of the institution of the suit, but if after its institution circumstances change and it becomes necessary for the plaintiff to ask for any further relief, it is always open to him to apply to the Court for amendment of the plaint by adding new relief and to offer to pay Court-fee thereon. 20 P.L.T. 818

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=1939 P.W.N. 61=1939 P. 219. Method provided in the Act for valuing property in suits should be followed. 1927 M. 825=105 I.C. 171. Appeal liable to *ad valorem* Court-fee but not valued as such—*Ad valorem* fee should be levied before admission of appeal. See 1937 Pat. 514=18 P.L.T. 438. As to refund of Court-fees, see under S. 13.

DETERMINATION OF—COMPROMISE BETWEEN PARTIES AND COURT.—The question of Court-fee cannot be settled by any compromise between the parties and the Court, in the absence of any one representing the fiscal authorities. 14 L. 558=144 I.C. 636=1933 L. 905. See also 1939 A. 659.

COURT-FEES AND LIMITATION.—Where no Court-fee stamp was affixed to the copy of the order appealed against filed along with the memorandum of appeal and in spite of the objection raised by the office the stamp was not affixed till long after the expiry of the period of limitation. *Held*, that the appeal was not properly presented within time. 147 I.C. 343=35 P.L.R. 142=1934 L. 272. A memorandum of appeal presented to the Court of the District Judge under the law applicable to appeals, which has been transferred to the High Court on an application by the appellant, should bear court-fee stamp as prescribed for a memorandum of appeal presented to the High Court. 41 C.W.N. 1083=65 C.L.J. 499=1937 C. 514.

JURISDICTION.—The Suits Valuation Act and the Court-Fees Act are purely fiscal enactments and they have no bearing on the question as to which is the proper Court for the institution of the suit having regard to the value of the property. 1932 A.L.J. 416=1932 A. 413. When a Court has finished with and disposed of a suit, it has no jurisdiction to take up the question of valuation of the suit for purposes of Court-fee or to direct the payment of additional Court-fee. There is no provision of law authorizing such a procedure. An order for additional Court-fee made under such circumstances is *ultra vires*. 1936 R.D. 390. If the deficiency in the Court-fee in the lower Court is not made up, the appellate Court may refuse to prepare or sign its decree until the deficiency is made up. 41 P.L.R. 491. See also 1939 Sind 279. There is no provision in the Court-Fees Act which justifies a process of attachment for recovery of court-fees after the Court finally parts with seisin of a case. 140 I.C. 191=1932 A.L.J. 165=1932 A. 316. See also 1933 M.W.N. 330=1934 A.L.J. 820. The only Court which can rectify an improper order as to Court-fee is the appellate Court and in cases where no appeal lies, the revisional Court. 81 I.C. 56=1923 All. 86.

COURT-FEE AND VALUATION CHARTS.—Charts showing the minimum values of lands of different classes in different parts of the district may be used for the purpose of S. 9 of the Court-

"Chief Controlling Revenue authority" defined.

¹2. In this Act, unless there is anything repugnant in the subject or context, "Chief Controlling Revenue authority" means—

(a) in the Presidency of Fort St. George ²[The Presidency of Fort William in Bengal] and the territories respectively under the administration of the Provincial Governments of ³[Bihar and Orissa] and the North-Western Provinces⁴ and the Chief Commissioner of Oudh—the Board of Revenue ;

(b) in the Presidency of Bombay outside Sindh and the limits of the town of Bombay—a Revenue Commissioner ;

(c) in Sind—the Commissioner ;

(d) in the Punjab⁵ and Burma, including Upper Burma—the Financial Commissioner ; and

(e) elsewhere—the Provincial Government or such officer as the ⁶[Provincial Government may, by notification in the ⁷[Official Gazette,] appoint in this behalf.] [*Repealed by A.O.*]

LEG. REF.

¹ S. 2 has been omitted as in force elsewhere than in Bengal by A.O., 1937.

² The words "The Presidency of Fort William in Bengal" were inserted by Act XXIV of 1917.

³ The words "Bihar and Orissa" were substituted for the word "Bengal" by Act XXIV of 1917.

⁴ These Provinces are now known as the United Provinces of Agra and Oudh and the Lieutenant-Governor and Chief Commissioner as the Lieutenant-Governor of those Provinces, see Proclamation No. 9196, P., dated the 22nd March, 1902 ; *Gazette of India*, 1902, Pt. I, p. 228 and the United Provinces Designation Act (VII of 1902).

⁵ As to the N.-W.F. Province, see the N.-W.F. Province Law and Justice Regulation

⁶ Substituted by A.O., 1937. (VII of 1901), S. 6 (1) (d), P. and N.-W. Code.

⁷ For officer appointed for (1) the Island of Bombay, see *Bombay Government Gazette*, 1902, Pt. I, p. 35 ; (2) Baluchistan, see *Gazette of India*, 1908, Pt. I, p. 389 and (3) The Assam Valley Districts and certain parts of the district of Cachar, see *E. B. & A. Gazette*, 1905, Pt. I, p. 5.

NOTES.

Fees Act. But such charts cannot and must not be put upon the parties as though they are evidence in themselves and any judicial officer acting in a judicial matter upon such charts is acting without evidence before him. 33 C.W.N. 952=50 C.L.J. 164. The Court-Fees Act provides that the Court may issue a commission for local investigation but there is no provision for a chart issued by the District Court to the subordinate Court in which the valuation is set out of the various classes of lands in the District. 33 C.W.N. 845=49 C.L.J. 562=1929 Cal. 717.

REFUND OF COURT-FEE.—The Court can order a refund of Court-fees (1) where the Court-fees Act applies, (2) where there is an excess payment by a mistake, and (3) where on account of a mistake of a Court a party has been compelled to pay the Court-fees either

wholly or in part. Outside these cases the Court has no authority to direct a refund. Thus where an appeal is withdrawn and consequently dismissed, the appellant is not entitled to apply for a refund of the Court-fees paid on the memorandum of appeal. 57 M. 1028=1934 M. 566=67 M.L.J. 321. See also 159 I.C. 443=1935 C. 707 ; 1935 Pesh. 8 ; 46 L.W. 757=(1937) 2 M.L.J. 788. Where on a memorandum of appeal filed out of time a conditional order was made by the Court for its admission and the condition was not complied with by the appellant, he is not entitled to get a refund of Court-fees paid on the memorandum of appeal. 41 G. W. N. 1184. The Court has inherent jurisdiction to order a refund of court-fee even in cases which do not fall within Ss. 13, 14 and 15, Court-Fees Act. Where there has been no real trial of the main issues involved in the case in both the Courts below, the appellant is entitled to a refund of Court-fee paid by him in the lower appellate Court on the memorandum of appeal. 41 P.L.R. 796=1939 L. 257. See also (1939) 2 M.L.J. 867. Where a suit is properly filed in a Civil Court, the plaintiff being at the time entitled in law to institute such suit, but in the meantime the legislature takes by an amendment of the law, away the right to the relief claimed in the suit, the proper course for the Civil Court to adopt is to dismiss the suit. In such circumstances the Court cannot invoke its inherent powers to order the refund of the court-fee or grant a certificate under the Court-Fees Act. 51 L.W. 105=1940 M.W.N. 68=1940 Mad. 451. The District Court, as a Court of appeal, is not entitled to issue an order of refund of excess of Court-fees paid on the memorandum of appeal. Recovery of excess amount paid is a matter between the party concerned and the Revenue Authorities. All that the District Court can do is to certify that in its opinion the amount paid by the appellant is in excess of the amount required by law. Armed with the certificate the party may go to the Revenue authorities and claim a refund from them. The certificate is however merely the expression of the opinion of the Court which the executive orders of the Government require to be obtained

CHAPTER II.

FEES IN THE HIGH COURTS AND IN THE COURTS OF SMALL CAUSES AT THE PRESIDENCY-TOWNS.

3. The fees payable for the time being to the clerks and officers (other than the sheriffs and attorneys) of the High Courts established by Letters Patent, by virtue of the power conferred by ¹[section 15 of the Indian High Courts Act, 1861, or section 107 of the Government of India Act, 1915] ²[or section 229 of the Government of India Act, 1935.]

LEG. REF.

¹ The words "Section 15 of the Indian High Courts Act.....1915" were substituted for the words "St. 24 and 25 Vic., Ch. 104, S. 15" by Act XXIV of 1917

² Inserted by A.O., 1937.

NOTES.

where any person desires to make an application to the Revenue authorities for the refund of the fees paid in excess. 164 I.C. 639=1936 R. 352. The plaintiff who was called upon to make good a deficiency in Court-fee, without having done so, made an application to the Court to permit her to withdraw the suit and for liberty to sue again. Her application was granted but subsequently an attachment of her property was ordered to enforce the payment of the deficiency in Court-fee whereupon she paid. In revision, *held*, that it was not open to a Court to issue an order of attachment for realisation of deficiency in Court-fee stamp. *Held*, further that as no order permitting the plaintiff to withdraw the suit and to bring a fresh suit could have been made on the basis of an insufficiently stamped plaint, which was liable to be rejected, the plaintiff had paid what was due from her and was, therefore, not entitled to get back the money. 152 I.C. 816=1934 A.L.J. 820=1934 A. 989. A plaintiff whose plaint is rejected for non-payment of deficit Court-fee within the time fixed by the Court is not entitled to an order of refund of the Court-fee paid by him originally on his plaint. There is no specific provision for refund in such a case, and the Court has no inherent jurisdiction to refund the Court-fee in such a case. 1937 A.L.J. 481=1937 All. 505.

COURT-FEE—PROCEDURE OVER OTHER DEBTS.—Court-fees form crown debts and is entitled to precedence over the debts of other creditors. 80 I.C. 935=1925 Mad. 433.

CHARGE FOR COURT-FEES IN PAUPER SUIT—LIABILITY OF PURCHASER FROM PAUPER.—The charge under O. 33, r. 10, C. P. Code, is created by law and a purchaser of a decree obtained by a pauper takes it subject to the charge. The charge however is only for the Court-fee and not for the fees of the Government Pleader also. 147 I.C. 751=1934 A. 438. Suit or appeal *in forma pauperis*—Review of judgment in—Application for—Court-fee—If payable. See 40 C. W.N. 1407.

"BRITISH INDIA."—See General Clauses Act, S. 3 (7). See also 9 B. 244 and notes under S. 3, C. P. Code.

SECS. 3 AND 4: SCOPE OF THE SECTIONS.—S. 4, Court-Fees Act, is imperative and enacts that no document of any kind shall be received

unless it bears Court-Fees of the requisite value. Though S. 149, C. P. Code, which was subsequently introduced in the Code of Civil Procedure, vests in the Courts a discretion as to whether appeals with insufficient Court-fee should be allowed to be received when proper Court-fees are paid within the time allowed by the Court, the discretion should be exercised on correct judicial principles, and not in a way so as to nullify the express provisions of S. 4 of the Court-Fees Act. 61 C. 663=38 C.W.N. 650=1934 C. 659. S. 4 has no application to the ordinary original civil and criminal jurisdiction, or admiralty and matrimonial jurisdictions, etc., of the High Court. But S. 3 enacts that the procedure laid down in Chapter V, Ss. 25 to 28 for collections and the mode of levying the fees shall apply to the original jurisdiction as well as the appellate jurisdiction from the High Court and no Court-fee is leviable not applicable to Letters Patent appeal from the judgment of a single Judge of the High Court and no Court-fee is leviable thereon except Rs. 2 prescribed for an application to the High Court. 44 A. 13=19 A.L.J. 677. See also 13 R. 156; 1933 S. 148 (Income-tax Reference); 45 M. 849=1922 M. 421; 65 I.C. 675; 3 L. 420=1923 L. 275; 1 P. 384=3 P.L.T. 194; nor to appeals under Agency Rules referred by Government to High Court for disposal. 22 M. 162. A reasonably wide construction must be given to S. 3 and if a particular fee could have been imposed under the High Courts Act or the Government of India Act, it is payable in virtue of the power conferred by that Act within the meaning of the section, even although the High Court purported to impose the fee under a power derived from some other source. R. 204 of the Insolvency Rules (Calcutta) made under S. 112 of the Presidency Towns Insolvency Act could have been made by the High Court under the powers conferred on it by S. 15 of the Indian High Courts Act and the fees prescribed thereby are accordingly covered by S. 3 of the Court-Fees Act. 42 C.W.N. 1146=1938 Cal. 755. Suit transferred to High Court under Cl. 13 of the Letters Patent (Mad.) from Presidency Small Cause Court—Deficiency must be paid according to Court-Fees Act. 22 L.W. 15=91 I.C. 751=1925 M. 1216. Where a suit is transferred from the City Civil Court to the High Court under Cl. 13 of the Letters Patent and tried by the High Court as a Court of extraordinary original jurisdiction, the Court-fees payable are those in force in the High Court as a Court of Ordinary Original Jurisdiction (and not those payable under the Court-Fees Act) as the case is expressly governed by S. 14 of the Madras City Civil Courts Act

or chargeable in each of such Courts under No. 11 of the first, and Nos. 7, 12, 14, ¹[*] 20 and 21 of the second schedule to this Act annexed ;

Levy of fees in Presidency Small Cause Courts. and the fees for the time being chargeable in the Courts of Small Causes at the Presidency-towns,² and their several offices, shall be collected in manner hereinafter appearing.

4. No document of any of the kinds specified in the first or second schedule to this Act annexed, as chargeable with fees, shall be filed, exhibited or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction ;

Fees on documents filed, etc., in High Courts in their extraordinary jurisdiction. or in the exercise of its extraordinary original criminal jurisdiction ; or in the exercise of its jurisdiction as regards appeals from the ³[Judgments (other than judgments passed in the exercise of the ordinary original civil jurisdiction of the Court) of one] or more Judges of the said Court, or of a Division Court.

or in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence ;

As Courts of reference and revision. or in the exercise of its jurisdiction as a Court of reference or revision ;

unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

5. When any difference arises between the officer whose duty it is to see

LEG. REF.

¹ The number "sixteen" was repealed by the Repealing and Amending Act XII of 1891.

² See the Presidency Small Cause Courts Act (XV of 1882), Ch. X.

³ The words "judgments (other than..... Court) of one" were substituted for the words "judgment of two" by Act XIX of 1922.

NOTES.

(VII of 1892). 132 I.C. 647=1931 M. 457 =60 M.L.J. 435. O. 7, R. 11, C. P. Code, does not refer to a plaint which bears no stamp. Such a plaint must be rejected in accordance with the provisions of Ss. 4 and 6. 1930 N. 224.

Sec. 4 : MEMORANDUM OF APPEAL.—Under S. 4, "documents" includes memorandum of appeal. 12 A. 129 (F.B.). Appeal should not be entertained without payment of proper Court-fee. 30 I.C. 379 (Pat.) ; 3 P.L.J. 74 =42 I.C. 675 ; 25 M. 24 (memorandum of cross objections). See also 1929 A. 75. The appeal is liable to be rejected if the deficiency is not made up within the period of limitation. 1924 L. 401. See also 46 I.C. 509=3 P.L.J. 484 ; 119 I.C. 700 ; 1930 N. 224. See also S. 28, *infra*. High Court has full power to refuse to accept a memorandum of appeal when it has the endorsement of the Stamp Reporter that the Court-fee is deficient. 50 A. 980=118 I.C. 228=26 A.L.J. 1199=1929 A. 75. Under r. 19 of Chapter VII of the Patna High Court Rules the Stamp Reporter would be required to take action if he found that a memorandum of appeal which was insufficiently

stamped had been accepted by mistake or inadvertence as sufficiently stamped and it cannot be said that when the appeal is once admitted and registered the functions of the Stamp Reporter are necessarily at an end. Where the law was changed after the decision of the Reporter by reason of a Bench decision of the High Court and additional Court-fee was sought to be levied under the later decision. *Held*, that the action of the Stamp Reporter was valid in law. 14 P.L.T. 180. S. 4 is imperative in its terms. Filing of an appeal on insufficient Court-fee stamp, with the knowledge that it is insufficient, with a view to save limitation cannot be allowed. 119 I.C. 700=1929 N. 294. See also 1930 N. 224.

APPLICABILITY—DOCUMENTS PRODUCED IN HIGH COURT UNDER INCOME-TAX ACT (1922), S. 66.—As no mention of the Court-fee payable on a reference under S. 66, Income-tax Act, is to be found in Schs. I and II, Court-Fees Act, S. 4 of that Act does not apply to documents produced in a reference to the High Court under S. 55, Income-tax Act, and therefore no Court-fee is chargeable on such documents. 145 I.C. 254=27 S.L.R. 243=1933 S. 148.

Sec. 5 : SCOPE OF THE SECTION.—See the observations of Collins, C. J., in 21 M. 269 (270). Conditions necessary for the operation of the section. See 12 A. 129 (F.B.) ; 4 P.L.J. 700 ; 3 P.L.J. 92=43 I.C. 521. Before S. 5 can be applied, it must be shown that the subject-matter of the reference is a fee covered by S. 3 of the Act. 42 C.W.N. 1146=1938 Cal. 755. The jurisdiction of a Taxing Officer does not raise like the jurisdiction of an arbitrator

Procedure in case of difference as to necessity or amount of fee. that any fee is paid under this chapter and any suitor or attorney, as to the necessity of paying a fee or the amount thereof, the question shall, when the difference arises in any of the said High Courts, be referred to the taxing-officer, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the Chief Justice of such High Court, or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf.

When any such difference arises in any of the said Courts of Small Causes, the question shall be referred to the Clerk of the Court, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance in which case he shall refer it to the final decision of the first Judge of such Court.

The Chief Justice shall declare who shall be taxing-officer within the meaning of the first paragraph of this section.

NOTES.

upon a difference of opinion between a Court clerk and a suitor and upon formal reference to decide the dispute. The intention of S. 5 is merely to ensure that the question should be raised before the Taxing Officer, that he should bring his mind to bear on the question and decide it. 52 C. 871=29 C.W.N. 879=1925 C. 1201. See also 20 M. 398; 44 L.W. 763=71 M.L.J. 677. S. 5 of the Act contemplates a decision of the Taxing Officer on the merits of the question. Where the Taxing Officer declines to entertain the question and to decide it, his order cannot be considered to be one under S. 5, so as to operate as a bar to the question of Court-fee being considered by the Court. 1933 A.L.J. 1537. The power of the Taxing Officer under S. 5 is not confined merely to memoranda of appeal filed in the High Court, but extends to deficiencies in stamp on a plaint or memorandum of appeal in the Courts below when the fact of detriment to the revenue is brought to his notice. 22 A.L.J. 1038=84 I.C. 822=1925 A. 184. The decision of the Taxing Officer of the High Court holding that *ad valorem* fees are payable in respect of a matter is final under S. 5 of the Court-Fees Act and final for every purpose and cannot be impeached before the Court at the time of the hearing. *Venkatasubba Rao, O.C.J.*—S. 5, like several other sections, is undoubtedly defective, as it makes no provision for the Taxing Officer being compelled to refer the question to the Judge of the Court. 44 L.W. 763=71 M.L.J. 677. See also 14 P. 658=159 I.C. 4=16 P.L.T. 433=1935 P. 396. Under S. 5 it is competent to the Chief Justice to refer a dispute *re*: Court-fee between a suitor or his attorney and the Officer of the Court, to the decision of a particular Judge of the High Court. 45 M. 849=43 M.L.J. 436=1922 M. 421. See also 71 M.L.J. 677. The decision of such Judge is final. 1927 B. 643=52 B. 61=106 I.C. 66 (2). It is not proper for a Judge to whom a Court-fee matter is referred to refer the matter to a Bench. 3 P. 146=75 I.C. 871. Nor has the Division Bench jurisdiction to decide the reference. 33 A. 20=7 A.L.J. 842 (30 M. 96, Foll.) A Division Bench of the High Court has no jurisdiction to reopen the valuation of the appeal after it is admitted. 4 P.L.J. 700=52 I.C. 508. S. 5 does not give the High

Court Judge, deputed for the purpose of dealing with the questions of Court-fees under S. 5 to decide questions with regard to sufficiency of Court-fees paid in Subordinate Courts. He has jurisdiction only to deal with questions relating to Court-fees in the High Court. 12 R. 335=1934 R. 268. It is not within the province of a taxing Judge of the High Court under S. 5 to say whether the trial Court ought to have required payment of *ad valorem* Court-fee before the trial of the suit, while holding that an appeal in that suit is liable to *ad valorem* Court-fee. 18 P.L.T. 438=16 P. 491=1937 P. 514.

FINALITY OF THE DECISION OF THE TAXING OFFICER.—A decision of the Taxing Officer is final and is not open to appeal, review or revision. 4 P.L.J. 700=52 I.C. 508; 3 P.L.J. 92=43 I.C. 521; 60 C.L.J. 201=39 C.W.N. 131; 12 A. 129; 105 I.C. 119=1927 M. 940=53 M.L.J. 457; 1932 A.L.J. 244=1932 A. 319. It is final both as to the category under which the suit falls and the amount of the fee payable by the suitor. 12 A. 129; 23 A.W.N. 214; 32 A. 19=6 A.L.J. 972=4 I.C. 123; 15 A. 117. It is final though wrongly given. The Bench hearing appeal will not interfere with it. 2 P. 919=5 P.L.T. 315. See also 2 P. 198=4 P.L.T. 71; 4 P. 336=87 I.C. 137=1925 P. 392 (F.B.); 1926 P. 147; 52 C. 871=29 C.W.N. 89=1925 C. 1201. The remedy of the party aggrieved is to move the Board of Revenue to grant a refund. 1926 P. 147. See also 39 P.R. 1907. The effect of a wrong decision, however, by the Taxing Officer cannot be to prejudice the rights of the parties. 15 A. 117=13 A.W.N. (1893) 45.

OBJECTIONS AS TO INSUFFICIENCY OF COURT-FEE.—When once the Taxing Officer has decided the amount of Court-fee no objection can be taken by the respondent at the time of hearing. 20 M. 398; 20 A. 11 at 17. Where, however, no reference under S. 5 has been made at all, the Court hearing the appeal must decide such question. 47 A. 756=23 A.L.J. 725. See also 20 M. 328; 37 C. 914; 21 M. 269. In a case where there has been no decision by the Taxing Officer under S. 5, the Court is not precluded from taking notice at the hearing of the deficiency in the stamp duty. 1930 M. 597=58 M.L.J. 497. See also 12 R. 335=1934 R. 268.

CHAPTER III.

FEES IN OTHER COURTS AND IN PUBLIC OFFICES.

6. Except in the Courts hereinbefore mentioned, no document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

NOTES.

TAXING OFFICER—JURISDICTION.—The jurisdiction of the Taxing Officer is limited to cases in which it is alleged that a document filed, exhibited or received in the High Court is not sufficiently stamped. It does not extend to cases in which it is alleged that a party paid insufficient Court-fee on his plaint or memorandum of appeal in the lower appellate Court. To this class of cases, S. 12 (ii) is clearly applicable. 1934 A.L.J. 957=150 I.C. 653=1934 A. 805. The jurisdiction of the Taxing Officer of the High Court is confined to the question of Court-fee on the memorandum of appeal in the High Court only and he cannot decide the question of proper Court-fee payable in the Courts below. That has to be decided by the Court itself. 165 I.C. 213=17 P.L.T. 677. Taxing Officer of the High Court is the Registrar on the Appellate Side. 37 C. 914=8 I.C. 1145. In Madras, the Registrar was the *ex officio* Taxing Officer—*Fort St. George Gazette*, 29th September 1915, Pt. II, p. 1769. But under a recent Notification the Master has been appointed as the Taxing Officer. The Deputy Registrar is not the Taxing Officer and his order is not final under the section. The question decided by him can be raised at the hearing of the appeal. 37 C. 914=8 I.C. 1145. But see also 12 R. 335=1934 R. 268.

POWERS OF THE TAXING OFFICER.—To determine the amount of Court-fee payable, the Taxing Officer has power to investigate for himself the proper valuation of the appeal. He can take evidence for that purpose and should not exercise his powers in a summary manner. 4 P. 336=6 P.L.T. 262. A taxing Judge is bound to follow the law as laid down by a Division Bench of the High Court, whether he is acting administratively or judicially. 42 P.L.R. 101.

COLLECTION OF FEE ON APPEAL BY STAMP REPORTER—SUBSEQUENT DECISION BY HIGH COURT—Under R. 19 of Chapter VII of the Patna High Court Rules the Stamp Reporter would be required to take action if he found that a memorandum of appeal which was insufficiently stamped had been accepted by mistake or inadvertence as sufficiently stamped and it cannot be said that when the appeal is once admitted and registered the functions of the Stamp Reporter are necessarily at an end. Where the law was changed after the decision of the Reporter by reason of a Bench Decision of the High Court and additional Court-fee was sought to be levied under the later decision. *Held*, that the action of the Stamp Reporter was valid in law. 12 P. 694=14 P.L.T. 180=1933 P. 234.

REPORT OF STAMP REPORTER—NO OBJECTION IN TIME—POWER OF COURT NEVERTHELESS TO OVERRULE REPORT.—Though in view of R. 11 of Allahabad High Court Rules, Ch. III, it is not open to the advocate or the party to question the accuracy of the report of the Stamp Reporter; if it has not been made within three weeks from the date of the report, it does not and cannot prevent the Court from overruling his report or entering a question of the sufficiency of the Court-fee. 1933 A.L.J. 1537.

Sec. 6: DOCUMENTS.—A memorandum of appeal is a document within the meaning of this section, as also a plaint, and an application for review. 12 A. 57=A.W.N. (1889) 197. In a case to which S. 17 applies, S. 6 is controlled by S. 17. 141 I.C. 533 (1)=1933 M. 178. Documents not required to be stamped, see Ss. 33 and 19, *infra*. Application not required to be in writing does not fall within the section. 2 N.W.P. 418. Thus an application by an auction-purchaser for a certificate of sale need bear no stamp. 13 B. 670. So also an application for issue of succession certificate. 17 W.R. 489. As to Court-fee on application for letter of administration, see 154 I.C. 722=1935 A. 449. Also an application for refund of stamp duty. 9 W.R. 357; 1932 A.L.J. 601=1932 A. 590. No additional Court-fees are payable on a plaint returned for presentation to the proper Court. 8 B. 313. See also 1 B. 538; 7 C. 157; 2 A. 357. When a suit properly instituted before the Settlement Officer without a Court-fee under S. 8 of Reg. III of 1872 was under S. 5 of the Regulation transferred to the Civil Court, no institution Court-fee had to be paid in the Civil Court also. 12 C.W.N. 917. Under the section, a certificate under Act XL of 1858 cannot come into existence until the person, who has the permission of the Court to obtain it, deposits the requisite amount of stamp duty. 12 C. 542. A document not properly stamped is not a nullity. 1936 C. 277. It is always open to the Court to find out by looking into the allegations in the plaint in a suit whether or not the suit is really what it purports to be and whether the Court-fee paid is sufficient. In fact it is a duty cast upon the Court under S. 6 of the Court-Fees Act; and if it finds that the suit in substance is not what is ostensibly appears to be but one requiring a larger Court-fee, it can demand additional Court-fee. 1937 A.L.J. 562=1937 A. 411.

"FILED."—Meaning of. See 20 A. 11 (17).

"FURNISHED."—See 17 W.R. 489.

As to payment of stamp duty on documents insufficiently stamped, see under S. 28. The cause of action arose on 24th September, 1929,

7. The amount of fee payable under this Act in the suits ¹ next hereinafter mentioned shall be computed as follows :—

Computation of fees payable in certain suits—

LEG. REF.

¹ For the amount of fee payable in certain suits and proceedings under the Agra Tenancy Act (U. P. Act II of 1901), see S. 170 of that Act, U. P. Code.

NOTES.

and the suit was filed on 11th October, 1932, that is, on the day of the opening of the Courts after the long vacation. The plaintiff was stamped with a Court-fee stamp of Rs. 4 instead of Rs. 39, and on the office report the Court ordered that the deficiency should be made good within two days. The deficiency was made good on 13th October, 1932, and the suit was then registered. *Held*, that although the Court-fee had not been paid on 11th October, 1932, the order of the Court passed under S. 149 allowing the plaintiff two days in which to make good the deficiency undoubtedly had the effect of giving the plaintiff the same force and effect as if such fee had been paid in the first instance. 1934 A.L.J. 533=1934 A. 160. Document insufficiently stamped—Rejection of—Powers of single judge of High Court. See 157 I.C. 347=1935 A. 620=1935 A.L.J. 681 (F.B.).

Sec. 6, 13, 14 and 15.—Refund of Court-fee—Limitations on the inherent power of Court. See 157 I.C. 443=62 C.L.J. 298=1935 C. 707.

Secs. 6 and 17.—In a case to which S. 17 applies S. 6 is controlled by S. 17. 37 L.W. 74=1933 M. 173=65 M.L.J. 252.

Secs. 6 and 28.—Any conflict between S. 6 of the Court-Fees Act and Act, S. 149, C.P. Code is resolved by S. 28 of the Court-Fees Act. When an insufficiently stamped memorandum of appeal is received and comes before the Court, it falls to be dealt with under S. 149, C. P. Code, read with S. 28 of the Court-Fees Act. The Court acting under S. 149, C. P. Code, may reject the memorandum as inadmissible in cases in which it sees no good ground for extension of time to make good the deficiency or merely return it. In either case representation with proper Court-fee is not precluded. I.L.R. (1941) Nag. 467=1941 N.L.J. 258=1941 Nag. 220.

Sec. 6-A (as amended by United Provinces Act XIX of 1938).—When an appeal lies against an order directing payment of Court-fee, incidental orders which lead up to it can be set right. I.L.R. (1941) A. 558=1941 O.W.N. 704=1941 A. 298. The right of appeal given to a suitor under S. 6-A of U. P. Act XIX of 1938 is a part of procedure relating to determination of Court-fee and is purely a matter in which the Crown is interested and in which neither the plaintiff nor the defendant has such a vested right as cannot be affected by a subsequent enactment. The Act XIX of 1938, which allows an appeal against the order demanding Court-fee does not take away any right which was vested in the plaintiff on the date when he filed the plaint, it only confers upon him new right, and it does not take away any right which was vested in the defendant either. The defendant has no vested right in the procedure by which the proper Court is

determined. A change in procedure cannot be said to deprive him of any vested right. Where in respect of a suit filed before the Act XIX of 1938 came into force, an order for payment of Court-fee is passed subsequent to the Act coming into force, the right of appeal under S. 6-A is available to the aggrieved party. I.L.R. (1941) A. 558=1941 A.L.J. 376=1941 O.W.N. 704=1941 A. 298. Where on an objection as to Court-fee paid being raised the Court decides the question of Court-fee along with the merits of the case and embodies everything in a single judgment and adds a direction that the decree is to be drawn up after the deficiency is made good, the procedure adopted by the Court is in flagrant violation of the provisions of the Court-Fees Act. Where the plaintiff in such a case does not make good the deficiency and appeals the appeal is an appeal against an order in accordance with S. 6-A, Court-fees Act and not against a decree under S. 96, C. P. Code, for no decree has been drawn up in the case. 1940 O.A. 1168=1941 A. 55.

Secs. 6-B and 6-C : REFERENCE BY WHOM COMPETENT—CHIEF INSPECTOR OF STAMPS, HOW TO MOVE HIGH COURT.—Under S. 6-C, Court-Fees Act it is only the Chief Controlling Revenue Authority that is given the power to make a reference to the High Court. The Chief Inspector cannot make a reference under that section. He is only entitled under S. 6-B within the prescribed period to move the prescribed Court "by an application in writing" for revision. A letter sent by the Chief Inspector containing a statement of his opinion and not bearing a stamp cannot be considered to be an application in writing for revision under S. 6-B. I.L.R. (1941) A. 585=1941 A.L.J. 487=1941 A. 369.

Sec. 7 : SCOPE OF THE SECTION.—S. 7 states the various processes by which the values in different suits are to be ascertained and the schedule then applies the proper Court-fee to these values. 6 N.L.R. 164=8 I.C. 1125. Once the value of a relief is ascertained for purposes of a plaint, the first schedule rates the relief at the same value for purposes of appeal. The value of the same relief remains unchanged all through the succeeding stages though the appeal is made against its grant or its refusal by the lower Court. (*Ibid.*) See also 1933 N. 362; 49 I.C. 962 (P.); 30 M.L.J. 402=39 M. 725. The value of the suit thus artificially ascertained is quite distinct from valuation for jurisdiction although it may be the same in many cases. 5 C. 489=4 C.L.R. 491; 4 B. 515; 15 C. 104; 12 B.L.R. 115 (Note)=18 W.R. 109. See Suits Valuation Act. The provisions of S. 7 are applicable equally to appeals as to original suits. But the Court-fee payable in appeal need not be the same as in the suit, as the nature of the litigation may be changed in appeal. See 25 O.C. 30=1922 O. 82. In suits to obtain a declaratory decree or order where consequential relief is prayed for, and in suits to obtain an injunction, where the Court finds the relief claimed as undervalued, it is under O. VII, r. 11 (b), entitled to require

- (i) In suits for money (including suits for damages or compensation, or arrears of maintenance of annuities, or of other sums payable periodically)—according to the amount claimed:

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the plaintiff to correct the valuation stated by him in accordance with the provisions of S. 7, Court-Fees Act. But so long as there are no rules framed under S. 9, Suits Valuation Act (VII of 1887), the Court would have no standard before it on which it may regard the plaintiff's valuation as an under-valuation, and its powers of correction would have to be exercised on that footing. 61 C. 796=38 C.W.N. 589=1934 C. 448 (F.B.). See 149 I.C. 109=1934 P. 234. See also cases cited under Sch. I, Art. 1, on the point. The application of any particular clause of S. 7 must depend on the substance of the claim and not on the mere words used in the plaint. 1925 M. 248=91 I.C. 709=50 M.L.J. 406; 29 L.W. 584. Court-fee is payable on the footing of the plaint and not on what is afterwards decided by the Court. 79 I.C. 913=5 P.L.T. 655.

OPERATION OF AMENDING ACTS.—Where a suit for injunction is filed before the amendment of the Court-Fees Act, by U. P. Act XIX of 1938 and court-fee paid according to the law then in force but a second appeal is filed after the amendment, on a question as to the court-fee payable on the appeal, it was held that it was the amount mentioned in the plaint which was the basis of valuation and that one must look back to the date of the institution of the suit to ascertain it. I.L.R. (1940) A. 793=1940 A.L.J. 904=1941 A. 134. See also 1941 A.L.J. 376=1941 O.W.N. 704=1941 A. 298.

Sec. 7, Cl. (i): SCOPE AND APPLICATION.—This clause has no application to suits or appeals in which no amount is claimed. 30 M. 96=16 M.L.J. 458. Suits for recovery of money by the sale of mortgaged property fall under this clause and not under cl. (ix). 30 A. 103; 58 C. 829=1931 C. 159; 18 B. 696; 7 Bom. L.R. 194. A co-mortgagee suing to recover his individual share in the mortgage must value his suit according to the full amount due under the deed and cannot value it according to his own share. One of several co-mortgagees who are in the position of tenants-in-common can sue to recover his own share of the mortgage debt, provided he makes his co-mortgagors defendants, if they refuse to join him as plaintiffs. He must ask for a preliminary mortgage decree in respect of the entire debt; he has to ask the Court to decide what is due on the mortgage as a whole and to fix a period for redemption of the mortgaged property in its entirety, as there can be no redemption in part. The plaint must be stamped accordingly on the value of entire mortgage-debt under S. 7 (i) of the Act; which is also the valuation for purposes of jurisdiction under S. 8 of the Suits Valuation Act. This principle applies also to the case of a charge on immovable property. 54 L.W. 679=(1941) 2 M.L.J. 986 (1939 M. 986) overruled. Sub-mortgage—Suit by sub-mortgagee impleading original mortgagor also—Prayer for sale of the properties mortgaged under original mortgage—Court-fee is payable on original mortgage amount not sub-mortgage

amount. 1937 M.W.N. 1040. The stamp on a plaint on an instalment bond should be calculated not on the amount of the whole bond but on the amount claimed in the suit. 4 W.R. 12.

WHAT ARE MONEY SUITS.—A suit for the balance due on a commission agency account is a money suit under S. 7 (i). 64 I.C. 626=15 S.L.R. 82. See also 18 B. 696. Also a suit for a definite sum as commission. 1928 B. 476. So also a suit for arrears of maintenance in which no declaration as to future maintenance is asked for. 87 I.C. 911=1925 N. 435; 42 A. 356. A suit for arrears of maintenance. 1927 O. 623. See also 149 I.C. 982=1934 L. 150. A suit to obtain a declaration that the plaintiff is the sole and exclusive owner of G. P. Notes which are not mature for payment is not a suit for recovery of money. As such S. 7 (i) does not apply to such a suit. 188 I.C. 471=1940 Lah. 26. A suit for an order that the defendant should specifically perform a contract of guarantee or for compensation for breach of the contract falls under Cl. (1). Bom.P.J. (1890) p. 204. See also 2 R. 462=1925 R. 65; 47 I.C. 992. A suit for specific movable property of different kinds or their value as compensation, must be stamped under S. 7 (i) on the total value of the claim. 3 A. 131. Suit for an ascertained sum of cesses is governed by this clause (i). 11 P.L.T. 619. Also a suit for rent accrued due. 42 A. 353=55 I.C. 809; 17 I.C. 44. As to suit for enhancement of rent, see 61 C. 513=38 C.W.N. 527=1934 C. 674. A suit for taking of accounts of the assets and income of the joint family property for the purposes of partition of the share of the outstandings after taking accounts, is not a claim for money governed by S. 7 (i), so far as the assets of the family or even such funds as may be found to be in the possession of the defendants on the taking of the accounts are concerned, and the Court cannot refuse to accept the plaintiff's valuation even on the ground that it is arbitrary. 165 I.C. 412 (2)=1936 M.W.N. 401=1936 M. 562. See also 160 I.C. 935=70 M.L.J. 292. In a suit for accounts, the mere fact that the plaintiff refers in the plaint to the account set by the defendant wherein it is stated that a specific amount was remaining in the hands of the defendant, would not convert the suit into a suit for recovery of a specific sum of money stated in the letter so as to be chargeable to Court-fee on that amount. 163 I.C. 822=1936 M. 525. See also 1936 B. 166.

SUIT FOR MESNE PROFITS.—A suit for mesne profits falls under this clause and not under Cl. (6) of Art. 17, Sch. II. Court-fee should be paid on the amount claimed antecedent to the suit. 13 C.W.N. 815=1 I.C. 670. See also 1 P.L.W. 781=40 I.C. 579; 165 I.C. 972=44 L.W. 763=71 M.L.J. 677. No Court-fee need be paid on the amount claimed subsequent to the suit. 15 B. 416. See also under S. 11. In an appeal from a decree directing ejectment and awarding mesne profits, Court-fee must be calculated on the value of land

- (ii) In suits for maintenance and annuities or other sums payable periodically —according to the value of the subject-matter of the suit, and such value shall be deemed to be ten times the amount claimed to be payable for one year.
- (iii) In suits for movable property other than money, where the subject-matter has a market-value—according to such value at the date of presenting the plaint;
- (iv) In suits—

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and the mesne profits. 16 M. 310. See also 23 M. 84; 43 I.C. 962.

Sec. 7, Cl. (ii).—Suits for declaration of right to periodical payment fall under the clause. 42 A. 353=18 A.L.J. 328=55 I.C. 809. If in addition to such declaration, arrears are claimed, Court-fee must be paid also on such claim under cl. (1). *Ibid.* See also 24 B. 386=163 I.C. 471=1936 M. 388=70 M.L.J. 128. Where a suit is to secure a certain sum as arrears of annuity and also to call upon the defendant to furnish security for the payment of a certain sum per mensem the second part of the prayer is chargeable under S. 7 (ii). 1886 A.W.N. 228. A suit to obtain a reduction in the amount of maintenance decreed to a Hindu widow on a change of circumstances does not come under the clause and may be presented on a Court-fee stamp of Rs. 10. 24 B. 386=2 Bom.L.R. 191. See also 1 A. 594; 59 M. 159=69 M.L.J. 202=1935 M. 655. Suit by A against B and C for a declaration of title to certain property and injunction restraining C from paying and B from receiving an allowance of Rs. 2,400 a year out of the income thereof falls under S. 7, cl. 4 (c) and (d) and not under S. 7, cl. (2). 17 B. 56.

OTHER SUMS PAYABLE PERIODICALLY.—*Re*: Court-fee payable for suits for arrears of maintenance, see 1 Luck. 648. See also Madras Amending Act V of 1922. In construing S. 7, cl. (ii) the expression "Other sums payable periodically" must be limited by the specific words precede it. Court-fee on a suit for assessment of rent and recovery of a specific sum of money as damages for use and occupation should be computed under cl. (iv) (c) of S. 7. 51 I.C. 15=4 P.L.J. 561. But see 59 C. 997=55 C.L.J. 303=1932 C. 674. On this section, see also 40 C.W.N. 1149.

Sec. 7, Cl. (iii).—A suit for the recovery of movable property pledged falls under this clause. See D.C.R. (Central Provinces) Part V, p. 3. Bonds have a certain market-value. A suit for bonds must be valued according to the amount secured by them and not on the value of the stamp paper. 10 P.R. 1871. See also 4 C. 322=3 C.L.R. 375.

Sec. 7, Cl. (iv), Court-Fees Act, must be read with O. 7, r. 11 (b), C. P. Code, S. 7 (iv) simply means that the relief sought is to be valued in the plaint or memorandum of appeal by the plaintiff. (1933 S. 322; 1931 S. 15 and 1934 C. 448, Rel. on.) 161 I.C. 384=1936 S. 25.

BENGAL AMENDMENT ACT, SEC. 8-C.—In Bengal S. 7, cl. (iv) is subject to S. 8-C of Court-Fees Bengal Amendment Act, 1935. 68 C.L.J. 144. See also 44 C.W.N. 591=1940 Cal. 560; 44

C.W.N. 745. [For recent cases bearing on Ben. Am. Act, S. 8-C, see 41 C.W.N. 1339=1937 C. 748; 42 C.W.N. 504=1938 C. 865; 43 C.W.N. 167; I.L.R. (1939) 2 Cal. 20=1939 C. 743; 44 C.W.N. 745=1940 Cal. 451; I.L.R. (1940) 1 Cal. 409=1940 C. 482; 68 C.L.J. 144; 42 C.W.N. 315; 1941 Cal. 509; 42 C.W.N. 614=1939 Cal. 265.]

PLAINTIFF'S RIGHT TO PUT HIS OWN VALUATION IN SUITS COMING UNDER THE CLAUSE.—"The nature of the suits comprised in the six articles of the clause which in some instances renders it impossible, and in others either impossible or generally extremely difficult to lay down even approximately fair *ad valorem* scale as a means of fixing the Court-fee in such suits would appear fully to account for the legislature leaving it to the plaintiff to name the valuation." *Per Westropp, C. J.*, in 2 B. 219. There is a conflict of rulings as to whether the Court has power to question or interfere with the plaintiff's valuation or whether the Court is bound to accept the valuation of the plaintiff however arbitrary it may be. The Calcutta High Court is of the view that it was never intended that the plaintiff should assign an arbitrary value and that if he puts an arbitrarily low value, it is open to the Court to determine the true value. 40 C. 245=15 C.L.J. 194=17 C.W.N. 591; 11 C.W.N. 705=6 C.L.J. 427. See also 31 C. 301; 14 C.L.J. 47=15 C.W.N. 823; 40 C.L.J. 150=79 I.C. 982=1924 C. 969; 27 C.W.N. 627=86 I.C. 853=1925 C. 814. But see 27 C.W.N. 457=1923 C. 329; 33 C.W.N. 231 (23 C.W.N. 753, P.C. Rel. on.) The Patna High Court and the Allahabad High Court are of the same view. 2 P. 198=4 P.L.T. 71; 56 I.C. 316=4 P.L.J. 703; 41 I.C. 95=2 P.L.W. 173; 5 P.L.J. 394; 131 I.C. 808=1931 P. 195; 36 A. 500=12 A.L.J. 844=24 I.C. 679. But the Bombay and Madras High Courts hold that the plaintiff has the right to put his own valuation on the claim and that the Court cannot revise such valuation. 44 B. 331=22 Bom.L.R. 289; 33 B. 307=11 Bom.L.R. 30. See also 2 B. 219 cited *infra* and 17 B. 56; 23 M. 490=10 M.L.J. 240; 38 M. 922=28 M.L.J. 118=28 I.C. 79. See also 27 M. 480; 30 M. 18; 24 M.L.J. 233 (F.B.). The Privy Council ruling in 23 C.W.N. 753=43 B. 376 would seem to support this view. There it was held that where a plaintiff sues for a declaratory decree and asks for consequential relief, then for purposes of Court-fee and for purposes of jurisdiction, it is the value that the plaintiff puts upon the plaint that determines both. See also 33 C.W.N. 231; 68 C.L.J. 144. In Punjab also the Court does not interfere with plaintiff's valuation of the suit. 1922 L. 236; 111 P.R. 1913=22 I.C.

for movable property of no market-value ;

to enforce a right to share in joint family property ;

(a) for movable property where the subject-matter has no market-value, as, for instance, in the case of documents relating to title,

(b) to enforce the right to share in any property on the ground that it is joint family property,

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503 ; 1927 L. 890=9 L. 366. So also in Burma *See* 3 Bur.L.J. 128=1924 R. 378 (2). But *see* 1933 R. 40. For decisions of Nagpur Judicial Commissioner's Court, *see* 1924 N. 295 ; 1924 N. 316. *See also* 79 I.C. 582. [*See also* under Cl. (iv) (c).]

APPEAL.—In the light of the reference to the memorandum of appeal in the last paragraph of the clause, the appellant can set his own value where the subject-matter of the appeal is not co-extensive with the original claim. 23 M. 490. But a party cannot differently value the relief sought by him at different stages of the same litigation. 24 M. 331. *See also* 82 I.C. 614=5 L. 481=1925 L. 1.

Sec. 7 (iv) (a).—A suit to recover title-deeds, although it may involve a question of title, is not a suit to obtain possession of land. 4 C. 322=3 C.L.R. 375. *See also* 26 C. 204=2 C.W.N. 718 ; 10 P.R. 1871. As to whether suit for recovery of mortgage deed falls under this clause, *see* 39 P.R. 1875 ; 63 C. 657 ; 164 I.C. 1042=40 C.W.N. 90=62 C.L.J. 405. A suit for a declaration that the person really interested in a promissory note is the plaintiff and not the defendant, though it is in the defendant's name, and for recovery of the note but not for recovery of the money due thereunder, to which the maker of the note is also a party falls under S. 7, cl. (iv) (a) of the Court-Fees Act, and the plaintiff has got to state the value at which he values the relief. Cl. (iii) of S. 7 does not apply to the case. 58 M. 228=40 L.W. 709=1934 M. 730 (1)=67 M.L.J. 680.

CASE UNDER U. P. AMENDMENT ACT, S. 7 (iv) (a).—When along with a declaratory relief there is sought some consequential relief in respect of immovable property, but such relief is not capable of valuation in money, then court-fee should be paid as if the relief was one for possession of immovable property. 15 Luck. 415=1940 O.W.N. 223=1940 O. 249.

Sec. 7 (iv) (b) : "RIGHT TO SHARE."—The expression "right to share" has been differently interpreted by the different High Courts. The *Bombay* High Court has held that the words refer to a suit for the enforcement of what may be called an abstract claim of right to share in any joint property. In such view the clause would apply only where the right which is sought to be enforced is a right to share as a joint sharer in joint family property, where the plaintiff's status as a coparcener is in dispute. *See* 33 B. 658=11 Bom.L.R. 1074=4 I.C. 243. Ordinary suits for partition would fall either under Cl. (v) or Art. 17 (6) of Sch. II according as the plaintiff is in joint possession or not. For cases where the *Bombay* High Court has held that *ad valorem* Court-fee should be paid under Cl. (v) *see* 33 B. 658 ; 18 B. 209. In a previous case (22 B. 315), however, this Court had held that the fee payable in a suit for partition would be according to the amount at which

the relief sought is valued in the plaint. [S. 7, Cl. (iv) (b).] The *Calcutta* High Court also has held the view that the clause refers to a suit for joint possession by a coparcener who is out of possession and not to a suit for partition which is governed by Art. 17, Cl. (6). 6 C.L.J. 651=12 C.W.N. 37. Where the plaintiff is already in possession of his share and all that he wants, is to obtain a partition which is merely to change the form of enjoyment of the property, the suit is incapable of valuation. 8 C. 757=11 C.L.R. 95 ; 5 C. 188=4 C.L.R. 418 ; 13 C.L.R. 253. *See also* 20 C. 762 ; 27 I.C. 465 (C.) ; 137 I.C. 519=36 C.W.N. 291=1932 C. 353 ; 22 C.W.N. 669 ; 38 C. 681. In a recent Full Bench decision, the *Madras* High Court also has taken the view that the clause does not apply to ordinary suits for partition between coparceners of a Hindu family. *See* I.L.R. (1940) Mad. 259=(1940) 1 M.L.J. 32=51 L.W. 11=1940 Mad. 113 (F.B.) overruling 21 M.L.J. 21. The *Allahabad* High Court and *Patna* High Court are of the same view. *See* 34 A. 184=8 A.L.J. 1329=13 I.C. 185 following A.W.N. (1900) P. 90 and 28 A. 340 ; 49 I.C. 115 (Pat.) ; 58 I.C. 236=5 P.L.J. 540 ; 2 P. 432. As also the *Nagpur* Judicial Commissioner's Court. *See* 15 C.P.L.R. 120 ; 1924 N. 86=81 I.C. 766 ; 19 N.L.R. 99 ; 101 I.C. 770=1927 N. 248. Where the plaintiff is out of possession of his share in the joint property he is required to pay *ad valorem* Court-fee under S. 7, Cl. (iv) upon the valuation of his share in the property. 58 I.C. 236=5 P.L.J. 540. *See also* 63 I.C. 203 (Pat.) ; 1924 N. 86=81 I.C. 766 ; 19 N.L.R. 99 ; 101 I.C. 770=1927 N. 248. [The plaintiff cannot give this value as he likes according to the view taken by these Courts—*see* cases cited *supra* on the point.] The *Patna* High Court went to the length of holding that a party seeking partition must ask for joint possession if he is out of possession as a condition precedent to a decree for partition and that in a suit so framed he must pay fixed fee in addition to an *ad valorem* fee. 3 P. 618=1924 P. 558=81 I.C. 1052. *See also* 6 P.L.J. 662=65 I.C. 294. (declaration of title prayed for regarding one of the items to be partitioned) ; 1 P.L.T. 529=56 I.C. 570. Where the suit is for partition of properties, alleged to belong to a joint family, of which the parties are said to be members, and which are stated in the plaint to be in the joint possession of the parties, a fixed court-fee of Rs. 10 is enough and no *ad valorem* court-fee need be paid. 40 P. L.R. 2=1938 L. 321. The *Lahore* High Court also is of the same view, *viz.*, that the clause applies to a suit by a coparcener to enforce his right to share where it is disputed. Only the plaintiff is allowed by this Court to value the relief sought by him at any sum he pleases. *See* 2 L. 114=61 I.C. 628. For older decisions, *see* 104 P.R. 1895 ; 28 P.R. 1903=65 P.L.R. 1903. In all other partition suits,

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where the plaintiff is in joint possession a fixed fee is payable according to this Court. See 123 I.C. 525=1930 L. 839; 131 I.C. 283=1931 L. 170; 141 I.C. 175=1933 L. 208=34 P.L.R. 84. Where there is a jointness of title, each coparcener is in possession of every portion of the joint property while his share is not defined and in such cases the change in the mode of enjoyment is not capable of assessment in terms of money and therefore the residuary Art. 17 becomes applicable. Such jointness of title can ordinarily exist in the case of a coparcenary property only, but where the shares of co-owners are known and ascertained, a suit for partition is virtually a suit to enforce a right to a share in joint family property. Under the Mahomedan Law the share of each member of the family in the family property is specific and is known and the title of one member of such a family is not joint with that of any other member. Hence a suit by a Mahomedan co-owner in joint possession against the co-owners for possession by partition and separation of his share is a suit for the enforcement of that share which he claims in the family property under the Mahomedan Law. The suit therefore falls under S. 7 (iv) (b) and not under Art. 17 (vi) of Sch. II. 1939 L. 568. In a suit to enforce the right to share in joint family property, i.e., a suit to be restored to joint possession or enjoyment of joint family property, Court-fee would be payable under S. 7 (iv) (b), *ad valorem* on the value of the relief as fixed by the plaintiff; and in a suit for partition of joint property, whether owned by a joint family or otherwise, where the plaintiff alleges that he is in actual or constructive possession thereof, Court-fee payable would be Rs. 10 under Art. 17 (vi), Sch. II, Court-Fees Act. But if the Court finds, on a plea being raised by the defendant, this allegation to be untrue, then ordinarily the suit will be dismissed solely on the ground that the plaintiff being out of possession is not entitled to sue for partition without asking for possession of the property in dispute, unless for special reasons the Court deems it proper to allow an amendment of the plaint on payment of the requisite Court-fee stamp. 15 L. 531=150 I.C. 994=36 P.L.R. 48(F.B.); (1941) Lah. 152 (F.B.) S. 7 (iv) (b) will not apply to cases where the plaintiff is in joint possession of the joint family property but it must apply to cases where he is out of possession of it and seeks partition. In the former case the court-fee is levied under Art. 17 (vi) of Sch. II. 1939 O.L.R. 607=1939 O.W.N. 1055=15 Luck. 76=1940 O. 47. In *Burma* also, in a suit for partition, the plaint must be stamped according to the plaintiff's valuation of his share which he seeks to recover, 9 Bur.L.T. 97=35 I.C. 731. (The value given by the plaintiff in this case does not seem to have been arbitrarily but the value assessed by the Divisional Judge.) See also 7 R. 164=1929 R. 211 holding that in a suit by a Mahomedan for a share of inheritance, *ad valorem* Court-fee is payable under the clause. See also 1937 R.L.R. 447 cited under Ch. II, Art. 17 (vii).

"ANY PROPERTY."—The terms are wide enough to include movable property.

"JOINT FAMILY PROPERTY."—The old decisions of the *Madras* High Court as to the distinction

between partition of joint family property and partition of other joint property are rendered obsolete by the Full Bench decision in I.L.R. (1940) Mad. 259=(1940) 1 M.L.J. 32. As for the previous decision on the point, see 90 I.C. 843=1926 M. 122; 1930 M.W.N. 508; 141 I.C. 80=64 M.L.J. 24; 129 I.C. 824=1931 M. 94; 43 M. 397=38 M.L.J. 92. See also for other High Court decisions as to the meaning of the words "joint family property" 20 I.C. 177; 1930 L. 839. See 7 R. 164=1929 R. 211, where the Rangoon High Court applied the clause to a suit by a Mahomedan for a share of inheritance.

SUIT BY PLAINTIFFS NOT IN POSSESSION.—Where the plaintiff is not in possession of the property, actual or constructive, Court-fee must be paid *ad valorem* as for suit for possession and partition. 27 I.C. 465=21 C.L.J. 253=20 C.W.N. 51; 137 I.C. 519=36 C.W.N. 291=1932 C. 353; See also 1941 Rang. L.R. 249=1941 Rang. 297. But mere denial by the defendant of the plaintiff's title and possession does not convert a partition suit into one of declaration of title and recovery of possession. 12 C.W.N. 37=6 C.L.J. 651. See also 38 C. 681; 35 C.W.N. 942. S. 7 (iv) (b) makes no difference between a plaintiff who is in actual possession and one who is merely in constructive possession of the property which is to be partitioned. Where a plaintiff never alleged that he was in actual or constructive possession but asked for delivery of his share to him and further asks for accounts and delivery to him of his share of the amount that might be found due to the estate, it clearly is not a case where a ten rupee stamp would be sufficient. 1941 Rang.L.R. 249=1941 Rang. 297. Taxing officers should be astute to see that a plaintiff should not avoid liability to pay Court-fee under S. 7 (iv) (c) or 7 (v) by merely omitting to insert a prayer for possession in what was essentially a title suit in the guise of a partition suit. 18 P.L.T. 438=16 P. 491=1937 P. 514. If a suit for partition of joint family property is really or actually in the nature of a title suit, *ad valorem* Court-fees are payable, whether the suit be regarded as falling under S. 7 (iv) (c), 7 (iii) or 7 (v). But where in substance the relief sought is the partition of the property of which the plaintiff claims to be in joint possession, the suit falls under Art. 17 (vi) of Sch. II and *ad valorem* Court-fee is not leviable. The plaint has to be construed as it is and care should be taken not to import into it anything which it does not contain, either actually or by necessary implication. A relief not asked for cannot be imported so as to charge Court-fee thereon. 20 Pat. 780. Where on the face of the plaint the suit was in fact a suit by a purchaser of an undivided share to establish his title to recover possession of the same, a claim for partition being added to make the relief sought effectual, it was held that an *ad valorem* Court-fee was payable on the plaint and not a fixed fee. 28 A. 340. See also the Patna High Court decisions cited *supra* on the point. A co-owner is to be presumed to be in constructive possession on the ground that possession of one co-owner in possession on behalf of all. 79 I.C. 713=5 P.L.T. 655; 20 C. 762; 44 C. 524.

VALUE FOR JURISDICTION—PARTITION SUIT.—

for a declaratory decree and consequential relief;

(c) to obtain a declaratory decree or order, where consequential relief is prayed,

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In a partition suit, it is the share claimed by the plaintiff which is the subject-matter of the claim and not the whole of the joint property which is sought to be divided. See 22 B. 315; 8 B. 31; 24 A. 381; 24 M.L.J. 233=18 I.C. 368 (F.B.); 20 M. 289=7 M.L.J. 90. See also 5 P.L.J. 540=58 I.C. 236; 1917 P.H.C.C. 301; 7 R. 164=1929 R. 211. But see the decision of the Calcutta High Court to the contrary in 10 C.W.N. 564=3 C.L.J. 257; 3 C.L.J. 197=10 C.W.N. 565 (foot-note); 4 C.L.J. 509; 12 C.W.N. 37=6 C.L.J. 651; 8 C. 757; 52 C. 128=29 C.W.N. 76=1925 C. 320 (S. 8 of the Suits Valuation Act does not apply.) In 2 P. 432=1923 P. 342, a distinction is made between suits for partition pure and simple, where the plaintiff is in joint possession and suits where the plaintiff seeks adjudication of his title or extent of share and for partition. In the former case, the value of the entire property is the value for jurisdiction and in the latter case, the value of the plaintiff's share. In a suit to establish plaintiff's right to share in joint family property, the value of the action is the value of the plaintiff's interest. 1929 P. 615.

WRITTEN STATEMENT CLAIMING SHARE.—A defendant in a partition suit, asking for a decree for his share need not pay Court-fee in order to make his claim effective. 55 M. 975=1929 Mad. 722=63 M.L.J. 845; I.L.R. (1940) Kar. 534=1941 Sind 50.

Sec. 7 (iv) (b) and (c), (iv-A) and (v) (as amended by Madras Act V of 1922).—Two Hindu sons filed a suit against their step-brothers and step-mother for a declaration that the properties in suit were the undivided ancestral properties of the family and that a sale-deed executed by their father in favour of their step-mother was invalid, and they prayed for separate possession of their shares after a partition by metes and bounds. They also alleged that there was a prior registered partition deed and that the sale-deed in favour of the step-mother was intended merely for the purpose of concealing the properties from them at that partition. Held, that S. 7 (v) of the Court-Fees Act governed the suit and that it did not fall under S. 7 (iv) (b) and (c) or under S. 7 (iv-A). 43 L.W. 582=1936 M. 411=70 M.L.J. 398. On this point, see also 68 M.L.J. 755; 1935 P. 452; 1935 A. 667; 1935 L. 698; 1935 C. 805; 62 C. 479; 68 M.L.J. 369.

Sec. 7 (iv) (c): CONSEQUENTIAL RELIEF.—Consequential relief means a substantial remedy in accordance with the title of which declaration is prayed for. 24 I.C. 316=1 L.W. 398. See also 24 C.W.N. 33 (P.C.); 42 P.L.R. 364. The expression "consequential relief" in S. 7 (iv)(c) means some relief which would follow directly from the declaration given, the valuation of which is not capable of being definitely ascertained which is not specifically provided for anywhere in the Act and cannot be claimed independently of the declaration as a substantive relief. 139 I.C. 32=1932 A.L.J. 684=1932 A. 485 (F.B.). [5 A. 331 (F.B.) Overruled.]. See also 171 I.C. 900=1937 Sind 248; I.L.R.

(1941) Lah. 451=43 P.L.R. 106=1941 Lah. 97 (F.B.). One declaration may be consequential relief to another. 44 C. 352=21 C.W.N. 834. The question whether there is really a prayer for consequential relief must depend upon the substance of the claim and not the words which the plaintiff chooses to use. 20 M.L.J. 791=5 I.C. 927; 30 M. 18; 38 M. 922 (F.B.). See also 35 I.C. 797=21 C.W.N. 375; 3 P. 915=80 I.C. 544; 1925 M. 713=48 M.L.J. 688; 29 L.W. 584=56 M.L.J. 394; 116 I.C. 895=1929 L. 463; 32 P.L.R. 729; 16 L. 752=37 P.L.R. 860; 152 I.C. 847; (1937) 1 M.L.J. 739=1937 M. 529=I.L.R. (1937) M. 672. When the first relief in the suit relates to a declaration as to the general title of the plaintiff to all the properties she inherited and the second to set aside a particular deed of transfer in respect of a particular property inherited by her, held, the reliefs are separate and necessary and *ad valorem* Court-fee must be paid. 5 P. 496=1926 P. 453. The prayer for the appointment of a receiver in a suit by a Hindu reversioner for a declaration that an alienation by the widow is not binding on the reversion cannot be regarded as a 'consequential relief' since both the reliefs are unconnected and independent of each other. The proper Court-fee payable is for declaration under Sch. II, Art. 17-B (Mad. Am. Act) and for Receiver under Sch. II, Art. 17-B (Mad. Am. Act). 51 M.L.J. 67=96 I.C. 129=1926 M. 678. But see 38 M. 922; 19 I.C. 859=93 P.R. 1913; 1931 A.L.J. 837; 36 I.C. 831 (M.); 62 I.C. 36 (P.). Even in 51 M.L.J. 67, cited above, there is an observation that it may be quite conceivable that the plaint may be so drafted that both the reliefs may be claimed on the strength of the same set of facts, in which case the second relief may be consequential upon the first. See also 45 L.W. 491=(1937) 1 M.L.J. 739. Consequential and substantial reliefs—Distinction—Suit for declaration that property is wakf and its alienation is void *ad valorem* Court-fee payable. 1941 Lah. 97 (F.B.).

CLAUSE INAPPLICABLE TO SUITS FOR BARE DECLARATION.—Under Sch. II, Art. 17 a fixed fee of Rs. 10 has to be paid on a plaint for a declaratory decree where no consequential relief is prayed for. 43 B. 507=46 I.A. 24=36 M.L.J. 437. See also 69 I.C. 577; 23 A.L.J. 344=47 A. 501=1925 A. 602. In such a case the Court need not go into the question whether the suit was bound to fail for not having prayed for consequential relief. 1932 A.L.J. 466=1932 A. 560. See also 20 P.L.T. 818=1939 P.W.N. 61=1939 P. 219. The question of Court-fee must no doubt be decided on the allegations in the plaint and the relief actually asked for. But it is a common fashion to attempt an evasion of Court-fees by casting the prayers in the plaint into a declaratory shape. The Court must therefore look into the substance of the relief claimed. When the allegations in the plaint clearly show that the plaintiff virtually seeks the cancellation of certain deeds, though in form the suit is declaratory, the suit, is one for a declaration with consequential relief, falling under S. 7 (iv) (c) of the Court-Fees Act,

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and *ad valorem* Court-fee must be paid. 152 I.C. 312=11 O.W.N. 1292=1934 O. 505. See also 141 I.C. 798=1933 O. 116=10 O.W.N. 19; 27 C.W.N. 972=1924 C. 183; 131 I.C. 604=1931 A.L.J. 235=1931 A. 369; 32 P.L.R. 745; 140 I.C. 191=1932 A. 316=1932 A.L.J. 165; 142 I.C. 699=10 O.W.N. 133=1933 O. 127. A suit for declaration that a sale deed executed by the plaintiff is void and inoperative against him on the ground that he was made to execute it because of coercion, undue influence, and fraud exercised upon him need only be stamped with a Court-fee of Rs. 10. 138 I.C. 147=9 O.W.N. 440; 10 O.W.N. 133. But see 142 I.C. 705=1933 R. 40. (Arbitrary under-valuation not allowed). A suit for declaration that a certain alienation made by the plaintiff's father should not be binding upon their reversionary interest comes under Art. 17 of Sch. II. 5 L. 137=1924 L. 530=83 I.C. 332. So also a suit by reversioners to have certain alienations by widow declared invalid even though there is mention in the prayer about the grant of any other relief to which plaintiff may be entitled to. 18 P. 756=20 P.L.T. 850=1940 P. 158. So also a suit for a declaration that the plaintiff is the real owner of a decree obtained by defendants against a third party and praying for transfer of the decree to the plaintiff. 47 P.R. 1911=9 I.C. 673. Also a suit by a decree-holder to the effect that a deed of gift and a sale-deed executed respectively by his judgment-debtor and his judgment-debtor's wife are fictitious and void and that the property caused by them is capable of being attached and sold in execution of his decree. 130 I.C. 344=1931 O. 72. Also a suit for a bare declaration that a certain decree is ineffectual and not binding on the plaintiff. 30 C. 788. See also 164 I.C. 1029=1936 Pesh. 180; 1936 L. 703; 131 I.C. 604=1931 A.L.J. 235=1931 A. 369. (Plaintiff cannot be deemed to have asked for consequential relief when he studiously refrains from asking for it); 1933 N. 214. See also 37 L.W. 806=64 M.L.J. 24; 63 M.L.J. 764; 1929 M. 668. Also suit for a declaration that the plaintiffs were occupancy tenants and not tenure holders and that the survey entry describing them as tenants was wrong and not binding on them. 53 I.C. 298=4 P.L.J. 302. Suit by landlord for declaration that order of Revenue Officer fixing rent roll is wrong, illegal and not binding on plaintiffs and for enhancement of reduced rent to old rent—Court is to be paid under Sch. II, Art. 17 (iii) and not under Art. 17 (iv). 22 P.L.T. 453=1941 P. 463. Also a suit for declaration that certain property belonged to plaintiff and was not liable to be sold under a mortgage decree for sale, to which plaintiff was not a party. 1 O.W.N. 582. Where plaintiff sues for a declaration that his share in certain property is not liable to attachment and sale in execution of a decree against his father; the suit is one for a mere declaration without consequential relief and *ad valorem* Court-fee need not be paid on the amount due under the decree. 11 O.W.N. 617=1934 O. 212 (2). Also a suit to declare will a forgery and for cancellation of the will and the Sub-Registrar's order registering

the same. 29 L.W. 584=1929 M. 396. See also 58 M. 448=1935 M. 203=68 M.L.J. 95. Also a suit for a declaration that a previous decree declaring certain wakfnamas invalid is not binding on the plaintiff. 34 C.W.N. 1129. See also 156 I.C. 13=1935 L. 611; 145 I.C. 206=1933 N. 214. A suit to set aside a decree for which plaintiff was not a party, the additional prayer for declaring order of attachment and sale as void being a surplusage. 1930 Lah. 755. See also 1929 Lah. 446. Suit for declaration of right to a cheque where drawee is not a party. 119 I.C. 158=1929 M. 572. Where an *ex-minor* sued alleging that he was a minor at the time of the execution of a mortgage deed by him and that it was therefore void against him, *held*, that all that was necessary for the minor was to ask that the document be declared to be void against him and the suit need not be treated as involving a prayer for a consequential relief, namely, the setting aside of the document. 11 R. 66=143 I.C. 541=1933 R. 109. As to other suits for bare declaratory relief, see 1939 O.W.N. 152.

SUITS WHICH FALL UNDER THE SUB-CLAUSE.—Suits for declaration and injunction. 17 B. 56; 18 B. 100; 17 S.L.R. 15=80 I.C. 969; 36 A. 500=24 I.C. 679=12 A.L.J. 844; 1922 N. 264; 1930 M.W.N. 656; 133 I.C. 120=1931 Lah. 307; 1936 L. 166; 43 P.L.R. 337=1941 Lah. 307; 43 P.L.R. 305=1941 Lah. 284; 41 Bom.L.R. 425. But a futile and denounceable claim for injunction is not a consequential relief. 42 P.L.R. 364. If there are other consequential reliefs prayed for along with an injunction, they should be valued according to law and the proper Court-fee would depend upon the total value. 43 I.C. 995=1918 M.W.N. 40. In a suit for a declaratory decree where consequential relief is prayed the plaintiff is entitled to put his own valuation on the suit subject to Ss. 4 and 9 of the Suits Valuation Act and he must do so by putting down one single and entire sum as representing the value of the total reliefs sought by him. He cannot put one valuation for purposes of Court-fee and another for purposes of jurisdiction. 57 C.L.J. 465. In a suit for declaration with consequential relief plaintiff is entitled to place any value on the suit and the value for purposes of Court-fee and jurisdiction is the value of the relief; but the defendant is entitled to take objection to the valuation given in the plaint, both as affecting the question of jurisdiction and as affecting the question of Court-fee. And when objection is taken the Court is obliged to enter into the question of whether the value is correct. 149 I.C. 109=1934 P. 234. A suit for a declaration that plaintiff is the sole shebait, and for an injunction restraining the defendant from interfering with his possession of the endowed properties, falls within S. 7 (iv) (c). 40 C. 245=16 C.L.J. 194=17 C.W.N. 591. See also 31 S.L.R. 442=1937 Sind 241 (S.B.); 1922 L. 236; 163 I.C. 277=38 P.L.R. 688=1936 L. 990; 1930 C. 41. Also a suit for a declaration of plaintiff's right to a jungle and for an injunction restraining defendants from cutting trees. 32 C. 734=9 C.W.N. 690. Also a suit for declaration that a tax is illegal and for injunction to restrain collection. 105 I.C. 80; 165 I.C.

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106=1937 N. 14; 1937 A.M.L.J. 28. Also a suit for declaration that a will is a forgery and that plaintiff is the legal heir and for an injunction restraining the defendant from interfering with his property. 9 L.L.J. 579=29 Punj.L.R. 27. A suit was filed for a declaration, but pending the suit an injunction was obtained. The suit being dismissed, an appeal was preferred, the injunction subsisting at the time of appeal. *Held*, for purposes of Court-fees, the appeal fell within S. 7 (iv) (c) and *ad valorem* fee was payable on the consequential relief. 5 P. 211=94 I.C. 22=1926 P. 249. Where however an appeal is preferred only against the declaration it may be valued under Sch. II, Art. 17. 3 P. 640=2 P.L.R. 193=80 I.C. 563=1924 P. 582. A suit by a beneficiary under a trust to set aside certain alienations of trust property falls under the clause and the Court-fee must be calculated according to the proviso to cl. (iv) (c) (Mad.). 130 I.C. 449=1931 M. 24=61 M.L.J. 39. Where provision for residence and maintenance of a female is made in a family arrangement a suit for declaration of such right and injunction comes under S. 7 (iv) (c) and not S. 7 (ii). 123 I.C. 240=1930 S. 198. A suit for partition and possession of half share alleged to be held adversely comes under this sub-clause. 58 M.L.J. 497. A suit by a husband for restitution of conjugal rights with a prayer for an injunction restraining the wife's parents from obstructing recovery of the wife falls under S. 7 (iv) (c) and Court-fee is payable *ad valorem* on the amount of valuation put by the plaintiff for purposes of jurisdiction—the value for Court-fee and for jurisdiction being the same. Art. 17 (vi) of Sch. II does not apply to the suit. 39 C.W.N. 131=60 C.L.J. 201. As to appeal questioning award in *land acquisition cases*, see 60 C.L.J. 216. Where in a suit for ejectment, there was an additional prayer for declaration of plaintiff's title as owner, the Court-fee, is payable under this clause and not under S. 7 (xi) (cc). 29 L.W. 760=1929 M. 529. The plaintiff, an inamdar, claimed that he was entitled to both warams in the inam land and though he had no proof of actually letting the defendants into possession he claimed the right to eject them after due notice by virtue of his title to the kudi-varam. The defendants did not dispute the plaintiff's right to melwaram but asserted occupancy right in the land. *Held*, that Court-fee was payable on the plaint under S. 7 (iv) (c) and not under S. 7 (v) or (xi) (cc) of the Act. 140 I.C. 462=63 M.L.J. 759. A suit to declare an execution sale illegal and for an injunction restraining the auction-purchaser and puisne mortgagee from taking possession falls under this clause. 58 C. 281=1930 C. 686. A suit for declaration that a revenue sale is invalid and for confirmation or restoration of possession falls under the clause. 46 I.C. 385=3 P.L.J. 448. See also 165 I.C. 213=17 P.L.T. 677; 70 M.L.J. 542. Also a suit for declaration of title as adopted son, a challenge having been directly thrown on the title, and for possession. 1922 P.H.C.C. 6 (C.W.N.); 1923 P. 100; 56 I.C. 422=5 P.L.J. 339. Also a suit by reversioner, after the death of the widow

for a declaration and possession against an alienee of the widow. 2 P.L.T. 607=61 I.C. 565=6 P.L.J. 10. Also a suit to set aside an illegal sale held for arrears of revenue and a declaration of right and for possession, 6 C.W.N. 157. See also 115 I.C. 655. The following suits have been held to come within the sub-clause:— Suit for possession of Math properties as its Mahant. 152 I.C. 1003=1934 P. 641. Suit for injunction or possession against co-trustees by one claiming to be a joint trustee. (1939) 1 M.L.J. 317=49 L.W. 270=1939 M. 380. A suit for a declaration that a sale held in execution of a decree against some members of a Hindu family was null and void. 1 P. 197=1922 P. 404. A suit for assessment of rent and recovery of a specific sum of money as damages for use and occupation. 4 P.L.J. 561=51 I.C. 16. A suit under S. 104-H of the B. T. Act for a declaration that the plaintiff is a raiyat and not a tenure-holder, and for settlement of fair rent. 18 I.C. 188=17 C.L.J. 426. See also 11 C.L.J. 156=5 I.C. 141; 6 P. 17=100 I.C. 913=1927 P. 123. A suit for a declaration that the plaintiff is a raiyat and the defendants, his under-raiyats and for ejectment of the latter. 65 I.C. 240 (P.). A suit for a declaration that plaintiff is entitled to a certain annuity and to recover the same as an heir. 27 Bom.L.R. 247=87 I.C. 801=1925 B. 282 (1). A suit for declaration of right to administration of the estate and appointment of an interim Receiver. 27 C.W.N. 457=1923 C. 326. A suit by an insolvent to declare a sale-deed by Official Receiver not binding upon him and for appointment of another Receiver. 32 M.L.J. 447=40 I.C. 620. A suit for a declaration that defendant is the wife of the plaintiff and for the restitution of conjugal rights. 28 C. 567. A suit to set aside a lease and to have the buildings erected by the lessee demolished. 4 A. 320 (F.B.). See also 62 C. 417=1935 C. 279. A suit to set aside a trust deed and for recovery of trust-money. 10 C. 380. See also 156 I.C. 13=1935 L. 611. A suit for a declaration that the defendant was not entitled to execute a certain decree. 40 P.L.R. 204. The plaintiff prayed to declare a prior partition and certain alienations not to be binding on them. They further prayed for a re-partition and for possession. *Held*, (1) that the suit has not to be valued on the value of the entire family property but only on the plaintiffs' shares; (2) that declarations sought were ancillary to the prayer for possession and the case fell within S. 7 (iv) (c) and not under S. 7 (iv-a); (3) that the valuation under S. 7 (v) should be adopted. 1932 M.W.N. 1322=140 I.C. 585=36 L.W. 793. See also 1930 M.W.N. 358=1931 M. 94=129 I.C. 824; 32 S.L.R. 124=1938 Sind 189. See also I.L.R. (1941) Kar. 102=1941 Sind 154 holding that Art. 17 (vi) has no application to the case. In *Bihar and Orissa* so far as a partition suit happens to be actually in the nature of a title suit, *ad valorem* court-fee is payable by the plaintiff, whether the suit is regarded as governed by S. 7 (iii) or S. 7 (v). It makes no practical difference whether the suit is to be regarded as a suit for declaration with consequential relief falling under 7 S. (iv) (c), or a suit for possession of

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movable and immovable property governed by S. 7 (iii) and (v), since in the Court in Bihar and Orissa, where the consequential relief sought is recovery of possession of land the plaintiff is not permitted to value the land at a lower rate than would be assessed under S. 7 (v). 18 P. 267=1939 P.W.N. 197=1939 Pat. 274.

SUITS NOT COMING UNDER THE SUB-CLAUSE.—A suit for declaration and consequential relief *prima facie* comes within S. 7, Cl. (iv) (c) but if at the same time it comes within any of the other clauses of suits specified in the section, it must be treated. 38 M. 922=28 M.L.J. 118. See also 38 M. 1184; 56 M. 212=63 M.L.J. 764; 41 L.W. 562; 1940 M. 273=68 M.L.J. 369=1935 M. 346; (1937) 1 M.L.J. 739=I.L.R. (1937) Mad. 672=45 L.W. 491 & 1937 Mad. 529.

Sec. 7 (iv) (c), proviso (as amended by Madras Act V of 1922).—Applicability.—Suit for declaration of right to get water free of irrigation tax claiming refund of tax levied. 59 M. 962=160 I.C. 939=43 L.W. 192=70 M.L.J. 625.

CASES UNDER CL. (V) AND (IV) (C).—See 45 L.W. 49=(1937) 1 M.L.J. 739; 1927 A.W.R. 417. If in a suit the principal relief claimed is one for possession and the relief for declaration is merely ancillary to it, it is enough to pay the Court-fee on the relief as to possession. On the other hand, if the principal relief is for a declaration and the plaintiff's right to possession depends upon his being entitled to the declaration, then the relief for possession must be regarded as a consequential relief and the Court-fee will be payable according to the amount at which the relief sought is valued in the plaint or in the memorandum of appeal. If a case falls under the first class the Court-fee is payable on five times the Government revenue. In the latter class the plaintiff must pay Court-fee on the valuation put by him on the disputed property for purposes of jurisdiction. Where a Hindu son sued questioning the validity of certain alienations made by his father and claimed a decree for possession of his share and a declaration that the father had no right to make the alienations, *held*, that the suit was one for declaration with a consequential relief and not merely one for possession for purposes of Court-fee. 6 O.W.N. 1105=1930 O. 104. See also 1930 O. 368. In all cases where possession is claimed, the plaintiff has to establish his title before he can get a decree for possession. Where a suit is in reality one for possession, the fact that the plaintiff asks in his plaint for something in the nature of a declaration will not make it a suit for declaration and consequential relief for the purposes of Court-fee. The suit being really one purely for possession, Court-fee is payable only on that basis. 193 I.C. 538=21 P.1063=1941 P. 167. Where the essential claim made by the plaintiff is one for possession, the fact that the plaintiff attempts to anticipate a possible defence and says that the defendants will rely upon certain dispositions of the property falsely alleged to have been made, the suit is one for possession under S. 7 (v) and there cannot be any pretence that the claim is one for a declaration with consequential relief falling under S. 7 (iv) (c). Merely because the

defendants challenge the title of the plaintiff, the suit does not become one for a declaration with consequential relief. 16 P. 766=18 P.L.T. 977=1938 P. 22 (S.B.). See also 21 P.L.T. 609. Where a plaintiff asks for declaration and a consequential relief, though it is enough for his purposes to merely ask for possession the suit must be treated as one falling under S. 7 (iv) (c). 1938 N.L.J. 130. In a suit by the Hindu sons for a declaration that a decree obtained by the defendant against their father is not binding on them and the joint family property, Court-fee is payable—not as one a mere declaration—but *ad valorem* because the obvious effect of the decree would be to save property from liability to the decretal amount. (24 O.C. 361; 10 M. 187; 5 P.L.J. 394; 8 L. 531, Foll.) 8 Luck. 668=150 I.C. 722=11 O.W.N. 488=1934 O. 212 (1). A prayer for confirmation of possession includes a prayer for recovery of possession if the Court thinks the plaintiff is out of possession. 2 P. 198=4 P.L.T. 71; 179 I.C. 586=1939 Pat. 254. Where a Magistrate passes an order under S. 146, Cr. P. Code, and interferes with possession, relief regarding possession should also be prayed for. 105 I.C. 351=1927 N. 316. A suit to set aside an execution sale of certain properties on the ground that the decree having been previously adjusted could not be executed and that the sale was therefore null and void, is one substantially for possession and comes under Cl. (v) and not under S. 7 (iv) (c). 49 C. 880=27 C.W.N. 566=38 C.L.J. 74=1922 C. 506. See also 94 I.C. 179=13 O.L.J. 124=1926 O. 380. Where the prayer was that upon the determination of the plaintiff's proprietary interest in a house, the defendants who were merely tenants at will may be ordered to vacate the house, *held*, the suit was one for ejectment falling under S. 7, Cl. (v). 5 P. 631. The clause is not applicable to a suit for recovery of possession by cancellation of a document. 1929 O. 419. But in Madras there is a special cl. (iv) which would apply. See 64 M.L.J. 127. As to a suit for the removal of the manager of the religious institution on the ground that it is a private one and that the plaintiff alone has the power to appoint and dismiss the manager, see 17 I.C. 270=216 P.L.R. 1912. Possession—Alternative relief for declaration that certain property was acquired with joint family funds and for joint possession also—Court-fees. 1937 A.W.R. 218=1937 A.L.J. 308=1937 A. 148. On the point, see also 12 M. 223; 15 M. 501. At partition suit, allegation of joint possession in respect of estate and subordinate tenure—Allegation that defendant in joint possession for maintenance but had set up proprietorship—Finding that plaintiff had no title or joint possession—Appeal from Court-fee payment payable—*ad valorem* fee. 18 P. L.T. 438=16 P. 491=1937 P. 514.

SUITS FOR CANCELLATION OF A DECREE OR DOCUMENT.—See 152 I.C. 847. [Separately provided for, so far as Madras is concerned, by Cl. (iv-a) inserted by Madras Act V of 1922.]

(1) **DECREE.**—S. 7 (iv) (c) is applicable to a suit in which having regard to the substance of the plaint, it is incumbent upon the plaintiff to obtain a declaratory decree or order to perfect his right to the consequential

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relief that he claims; for instance, where the plaintiff seeks relief to which he is not entitled unless and until some decree or document or alienation of property is avoided a suit in which a declaration in that behalf is claimed is within S. 7 (iv) (c). 9 R. 401=134 I.C. 1263=1931 R. 319. A suit to declare a decree or document to which the plaintiff was a party is not binding on him falls within this clause. 38 M. 922=28 M.L.J. 118. See also 43 I.C. 962=3 P.L.J. 92; 118 I.C. 465=1929 N. 71. Where a party to a decree sues for a declaration that it is illegal and void, the granting of such a declaration in his favour has the effect of setting aside that decree and relieving him of the obligations thereunder. Even though a consequential relief may not be expressly prayed for, yet if such a relief is implicit in the declaration and is a necessary consequence of it, it must be deemed to be included in the declaration prayed for. To such case it is S. 7 (iv) (c) which applies and not Art. 17 (iii) Sch. II and an *ad valorem* court-fee is payable. 13 Luck. 628=1938 O. 1 (F.B.). A suit in which the only prayer is to have the decree set aside as null and void is a suit for declaration without consequential relief falling under Art. 17 of Schedule II. 20 B. 736; 30 C. 788; 34 C.W.N. 1129; 150 I.C. 1030=1934 R. 152. See also under Art. 17 (3) of Schedule II. A suit to set aside a decree on the ground of fraud would fall under this sub-clause. 7 L.L.J. 15=86 I.C. 680=1925 Lah. 346; 16 N.L.R. 84=36 I.C. 360. See also 1934 Pesh. 109; 8 L. 531=9 L.L.J. 400=102 I.C. 46=1927 L. 399; 116 I.C. 895=1929 L. 463. A suit for a declaration that a decree was fraudulent and incapable of execution and that the family property should be released from execution falls under S. 7 (iv) (c) and is not a suit for possession under Cl. (iv). 40 C. 615=21 I.C. 404. See also 51 I.C. 536=24 M.L.T. 254; 56 I.C. 550. A person was a *bona fide* purchaser for value of lands which were found to be burdened with a charge of a maintenance decree. The person brought a suit for a declaration, "that the lands were not liable for the maintenance charge." Question was whether S. 7 (iv) (c) or Art. 17 (iii), Sch. II of the Court-Fees Act applied. Held, that the relief although asked for a mere declaration, yet it involved the consequential relief of amendment of the maintenance decree and hence S. 7 (iv) (c) applied. 174 I.C. 891=1938 N. 183. A suit for declaration that the decree obtained by the defendant is fraudulent and for an injunction restraining the defendant from interfering with the plaintiff's possession of the property in suit falls under Cl. (iv) (c). 40 C.L.J. 150=79 I.C. 982=1924 C. 969; 137 I.C. 240=33 P.L.R. 488; 1930 M.W.N. 656. Suit by a minor on attaining majority to set aside a mortgage decree against him as void, falls within Cl. (iv) (c). 65 I.C. 980=24 O.C. 361. See also 32 P.L.R. 729. In Madras such a suit would fall under Cl. (iv-a). 139 I.C. 317=1932 M. 605=43 N.L.J. 764; 141 I.C. 80=64 M.L.J. 124=1933 M. 430. A person not a party to the decree, may sue to have it declared void without asking for

any consequential relief and the suit is not governed by Cl. (iv) (c). 73 I.C. 767=1933 L. 373. The question whether a decree sought by a plaintiff is a mere declaratory decree without any consequential relief coming under Art. 17 (iii) of the second schedule of the Court-fees Act, or whether it is a decree with consequential relief governed by S. 7 (iv) (c) of the Court-Fees Act, depends not on whether or not the plaintiff was a party to the decree which he is seeking to avoid but on whether or not the relief claimed comes under S. 42 of the Specific Relief Act. 177 I.C. 550=1938 O.W.N. 889=1938 O. 201 (F.B.). A suit by certain members of a Malabar tarwad for declaration that a certain decree obtained against the Karnavan was not binding on them and for possession of tarwad properties sold in execution of the decree falls under this clause. 1930 M.W.N. 579.

(2) DOCUMENTS.—A suit for declaration of the in validity of a mortgage deed for cancellation and for an injunction restraining the defendant from enforcing its terms, would fall within the sub-cl. (iv) (c). 13 I.C. 864=7 N.L.R. 190. See also 1937 L. 698. So also a suit to declare a gift deed executed by the plaintiff's husband in favour of the defendant was void, as he was a lunatic, and praying that possession be delivered to plaintiff as manager on behalf of her lunatic husband comes under cl. (iv) (c). 22 A.L.J. 945=47 A. 78. Also a suit for declaration by a member of a joint Hindu family that a mortgage deed executed by a deceased coparcener is not binding on him and also for possession of the property. 26 A.L.J. 316=1928 A. 248. Even where the suit is framed as one for possession, the suit would fall under the sub-cl. (iv) (c) if the defendant holds the property under a document executed by the plaintiff and it is necessary first to obtain cancellation. 38 M. 321; 24 M.L.J. 592. Where the suit was for the cancellation of a sale-deed executed by the plaintiff and for recovery of possession of the land and the plaintiff paid Court-fee for the cancellation of the sale-deed on the amount of the consideration specified in the deed. Held, that the claim for recovery of possession was merely ancillary to the main claim, namely, setting aside the sale-deed, and that separate Court-fee was not payable in respect of the prayer for possession. 64 M.L.J. 127=56 M. 401=1933 M. 231. A suit for cancellation of a registered instrument under S. 39 of the Specific Relief Act, is a suit for declaration and consequential relief. 45 I.C. 238=3 P.L.J. 194. See also 23 M. 490; 29 B. 207=6 Bom.L.R. 1125; 35 P.R. 1914=25 I.C. 435; 1929 O. 491; 43 P.L.R. 252=1941 Lah. 265. But see 139 I.C. 32=1932 A.L.J. 684=1932 A. 485 (F.B.). So also suit for cancellation of a will falls under the clause. 36 I.C. 95=87 P.R. 1916. Where a will is attacked not only on the ground and it is not genuine and not properly registered, but is also attacked as being brought about by fraud, undue influence, etc., the plaintiff virtually asks for the cancellation of the will and it must be deemed to involve a consequential relief. The plaint has to be stamped *ad valorem* under S. 7 (iv) (c) of the Act. 14 Luck. 536=1939

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O. 125. A suit for a declaration that a deed is inoperative is in substance one for its cancellation. 20 M.L.J. 791=5 I.C. 927. See also 118 I.C. 465=1929 N. 71. If in substance the plaintiffs ask for cancellation of a deed of gift, they ask for a declaration with consequential relief and the case clearly falls under the clause. 10 P. 432=130 I.C. 46=1931 P. 78. Persons who are not parties to a document need not sue for its cancellation. Thus a suit for a declaration that mortgage deed is not binding on the plaintiff who was not a party to the same, falls under Sch. II, Art. 17-A and not S. 7 (iv) (c). 87 I.C. 660 (2)=1925 M. 713=48 M.L.J. 688; 10 O.W.N. 19=1933 O. 116. See also 5 A. 331; 1924 M.W.N. 210=78 I.C. 118 (2)=1924 M. 611 (2). A claim to have a registered agreement entered into before a Debt Conciliation Board, declared invalid, is equivalent to have it adjudged void or voidable and would therefore fall under S. 39 of the Specific Relief Act under which the Court may adjudge the document void or voidable and order it to be delivered up and cancelled. In such a case the plaintiff must be deemed to have asked for the relief which the Court can grant under S. 39 of the Specific Relief Act and this amounts to consequential relief and hence the suit would fall under S. 7 (iv) (c). 1940 N. L. J. 96. Where an ex-minor sued alleging that he was a minor at the time of the execution of a mortgage deed by him and that it was therefore void against him, *held*, that all that was necessary for the minor was to ask that the document be declared to be void against him and the suit need not be treated as involving a prayer for a consequential relief, namely, the setting aside of the document. 11 R. 66=1933 R. 109. Where the mother as the guardian of her minor sons executed a release deed on behalf of the minors, the release deed is not void but only voidable and must be set aside. Hence a suit for declaration by the sons after attaining majority that the release deed is invalid and for injunction must be treated as one for cancellation falling under cl. (iv-a). 1928 M. 663. Where however cancellation is specifically asked though unnecessarily, the suit would fall under this sub-clause. 44 A. 629=20 A.L.J. 587=1922 A. 358. A suit by a plaintiff for declaration of his title and injunction alleging the settlement deed relied on by defendant to be a sham one falls under cl. (iv) (c) and the document need not be set aside. 1929 M. 478=120 I.C. 378=30 L.W. 796. A suit to declare a sale fraudulent and fictitious does not involve a consequential relief and *ad valorem* court fee is not necessary. 1939 Cal. 363; 1941 O.W.N. 471. A suit for cancellation of a deed of adoption should be stamped, whether under S. 7 (iv) (c) or Sch. II, Art. 17 (v) at Rs. 10, for the Court-fee on a suit to declare an adoption invalid, where the consequential relief claimed is that of cancellation of the deed, cannot be more than the Court-fee to set aside an adoption, which is Rs. 10. 1937 R. 400. A plaintiff in possession suing for the cancellation of a sale deed alleged to have been obtained from her by fraud and undue influence

could not be required prior to the passing of the U. P. Court-Fees Amendment Act of 1938 to pay *ad valorem* Court-fee on the market-value of the property, namely, a house, which is the Court-fee payable in a suit for possession. 15 Luck. 531=1940 O.W.N. 389=1940 O. 248.

WHAT DETERMINES THE VALUE IN A SUIT UNDER THE CLAUSE.—Where the plaintiff prays for a declaration and consequential relief, the value of the consequential relief determines the Court-fee. 3 P. 640=80 I.C. 563. See also 4 P.L.J. 297=46 I.C. 24=5 P.L.J. 394; 133 I.C. 687=12 P.L.T. 656; 131 I.C. 808=1931 P. 195. A suit for a declaration that a certain decree is not binding on the plaintiffs or the properties in their hands and for possession of a portion of those properties which had been sold in execution of the decree is a suit for declaration and consequential relief and Court-fee is to be paid only on the relief for possession. 38 M. 1184=25 I.C. 683=1 L.W. 824. In a suit for a declaration and consequential relief, the plaintiff is bound to pay *ad valorem* fees in proportion to the loss from which he seeks to be relieved. 56 I.C. 316=4 P.L.J. 703. A suit by the next heir of an inalienable estate for a declaration that would prevent the then holder's contemplated sale should bear *ad valorem* Court-fee on the sum of the intended sale. 1928 N. 243. In a suit for declaration of right to office of the shebait of a temple and also for permanent injunction restraining the defendant from interfering with that right the plaint is to be valued for purposes of jurisdiction and Court-fee at the value of the debutter property. (28 B. 567, Dist.) 1930 C. 41. Such portion of the property only as is the subject-matter of dispute need be valued. (*Ibid.*) 89 I.C. 930=1925 M. 1143.

VALUATION IN SUITS FALLING UNDER THE CLAUSE.—There is considerable divergence of judicial opinion on the question whether in cases coming under sub-cl. (c) and (d) of Cl. (4) the plaintiff is absolutely at liberty to put his own valuation. The Calcutta High Court has recently held that he can give his own value and the remedy lies not in nullifying the words of the Act, but in the rule-making power of the High Court conferred on it by S. 9 of the Suits Valuation Act. See 34 C.W.N. 321=127 I.C. 665=1930 C. 473; 58 C. 281=1930 C. 686=34 C.W.N. 870. See for earlier decisions of that Court, 1928 C. 55=105 I.C. 80; 32 C. 734; 1922 C. 242; 79 I.C. 982=1924 C. 969. For decisions to the contrary, see 6 C.L.J. 427=11 C.W.N. 705; 40 C. 245=17 I.C. 162; 1941 C. 509. [In order to remove the doubts S. 8-C has been enacted in Bengal giving the Court power to revise value on enquiry, see 42 C. W. N. 504=I.L.R. (1938) 2 Cal. 64=1938 C. 865.] In a suit for a declaration of title to a certain property and for an injunction falling within Cls. (c) and (d) of S. 7 (iv) the amount of Court-fee is, no doubt, computed according to the amount at which the relief sought is valued in the plaint. But where it is possible for the Court on the facts stated to question the plaintiff's valuation, it can exercise its powers of correction under S. 8-C of the Act. 175 I.C. 261=66 C.L.J. 462=1938 C. 302. Where a suit is

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instituted for a declaration of title of the plaintiff to a certain provident fund money and for injunction restraining the defendant from withdrawing that money, it cannot be said that there is no objective standard of valuation, and the correct valuation of the relief claimed is the amount of the provident fund. 177 I.C. 893 = 42 C.W.N. 192 = 1938 C. 161. In a suit for rectification of a *solenama* upon which a preliminary decree was made in a partition suit, on the ground of fraud or mutual mistake of parties, the value of the property which would be affected by the preliminary decree which would be made in the partition suit if the plaintiff ultimately succeeded in his suit, cannot be taken as an objective standard for the purpose of determining the value of the relief in the suit. In the absence of any other satisfactory objective standard, the plaintiff's valuation must be taken as correct and final. 42 C.W.N. 614 = 68 C.L.J. 413. A Hindu widow brought a suit to cancel a deed of family settlement executed between her and her husband's brother alleging that she was induced to sign it by fraud and misrepresentation, and praying that a copy of the decree be sent to the registration office for a note being made that the document has been cancelled. She alleged in her plaint that her husband died separate from his brother and that on his death, she as his widow and heir got possession of his entire estate. The deed, however, recited that her husband and his brother were joint and that the plaintiff on her husband's death was entitled to maintenance in lieu of which she was given properties worth Rs. 20,000. She originally paid a court-fee of Rs. 15 as on a declaratory suit but on being directed by the Court to value the relief, she valued it at Rs. 5,100 on which amount court-fees were paid. It was held by the lower Court that she should pay court-fee on the market value of the properties involved, which came to about Rs. 41,000. *Held*, that the proper method of valuing the suit was according to the injury or loss from which plaintiff sought protection, and that loss could not be valued at the total value of the properties in suit, though such a value might be proper if the plaintiff were out of possession or if the document sought to be cancelled denied her any right and title whatsoever; in this case since the plaintiff came to Court for some more or better rights than what the document gave her, it was for her to value her relief in the suit. Since the valuation put by her was neither wholly unreasonable nor arbitrary, the Court should *prima facie* be disposed to accept the same, and was not justified in demanding court-fee on the market-value of the properties in suit. 20 P.L.T. 638 = 1939 P. 531. In a suit for a declaration that a compromise decree passed in a partition suit was obtained by fraud, and for partition, it is difficult to say that the value of the relief setting aside this decree can possibly be the total value of the joint property. There is really no objective standard of valuation at all, and in the absence of rules made under S. 9 of the Suits Valuation Act, it is impossible to say that the plaintiff's valuation of the relief is incorrect. 70 C.L.J. 158 = 43 C.W.N. 1116 = 1939 Cal. 627. Also 44 C.W.N. 1038 = 1940 C. 552. In a suit for a

declaration that a certain decree obtained by the defendant against the plaintiff is void and for an injunction restraining the defendant from executing that decree, it cannot be said that there is no objective standard for valuing the relief claimed, as such standard must be taken to be the value of the plaintiff's property which he would stand to lose if the decree against him is put into execution. It would follow, therefore, that if the value of the decree exceeds the value of the assets, the valuation should be based on the valuation of the assets, or, if the assets are of greater value than the decree, the valuation should be based upon the value of the decree. I.L.R. (1940) 1 Cal. 409 = 1940 Cal. 482. See also 44 C.W.N. 860. The Bombay High Court has always held that the plaintiff has the right to value his claim as he pleases. See 44 B. 331 = 56 I.C. 340 and other cases cited *supra* under the main Cl. (iv). So also the Lahore High Court. 137 I.C. 240 = 33 P.L.R. 488; 9 L. 366 = 1927 L. 890; 140 I.C. 73 = 33 P.L.R. 458; 9 L.L.J. 579 = 29 P.L.R. 27; 40 P.L.R. 204. Also the Nagpur Judicial Commissioner's Court. 1927 N. 375. But see 110 I.C. 163 = 1928 N. 243; 165 I.C. 106 = 1937 N. 14. But according to the later rulings of the Nagpur High Court—The Court can interfere with any value put on a relief sought by a plaintiff in a suit falling under S. 7 (iv) (c), if the valuation appears to be arbitrary and unreasonable. But a Court should not endeavour to correct a plaintiff's valuation except in a clear case where the disparity is so great as to show that the plaintiff has not endeavoured to fix a fair value at all, but has simply set down a figure which is unreasonable and bears no relation to the value of the right litigated. I.L.R. (1938) Nag. 558 = 1938 N.L.J. 327 (F.B.). The plaintiff cannot put any arbitrary value on his consequential relief. Where a person in possession of an item of gifted property sues for a declaration and consequential reliefs of cancellation of the gift and possession of the remaining items, then he has to pay a Court-fee only on the value of the properties, possession which is asked for. 1938 N.L.J. 130. Where a plaintiff sues for a declaratory decree and asks for consequential relief and puts his own valuation upon that consequential relief, then for the purpose of court-fee and also for the purposes of jurisdiction, it is the value that the plaintiff puts upon the plaint that determines both. It is not however open to the plaintiff to put an arbitrary value of his claim. 1937 N. 316. The Allahabad High Court expressed the opinion that the plaintiff cannot give an arbitrary value. See 36 A. 500. See also 50 A. 610 = 1928 A. 248 on the point. The Rangoon High Court has held that the plaintiff is not at liberty to place an arbitrary value to the suit. See 142 I.C. 705 = 1933 R. 40. But see 3 Bur.L.J. 128 = 1924 R. 378 (2). According to the Oudh Chief Court there is no direct authority for the Court to interfere with the valuation set up by the plaintiff unless the Court can take advantage of S. 151, C. P. Code. See 1928 O. 260 = 107 I.C. 330 (The case is of over-valuation and not under valuation). In Sind it has been held that a suit for injunction to restrain enforcement of a money decree should be valued according to the amount of the decree.

for an injunction ; (d) to obtain an injunction,

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130 I.C. 445=1931 Sind 15. The Patna High Court has uniformly held that the plaintiff cannot give an arbitrary value. See 2 P. 198 ; and other cases cited under cl. (iv). Although it is for the plaintiff to state the amount at which he values the relief sought, it is open to the Court to determine the question as to the true valuation of the suit if such question is raised. 1931 P. 195=131 I.C. 808. Where an order to succeed in a suit for possession, it is necessary for the plaintiff to obtain a declaration that a document or decree is void or inoperative, the Court-fee to be paid must be calculated on the actual value of the property. 43 I.C. 962=3 P.L.J. 92. See also 179 I.C. 586=1939 P. 254. P brought a suit for setting aside a sale held in a certificate case. The property had been found to be worth at least Rs. 12,000 in another proceeding *inter partes*, but it had been purchased by the certificate holder for one pice. P however was in possession. In the suit he prayed that the sale might be held to be illegal and might be set aside and that a permanent injunction should issue restraining the auction-purchaser from taking possession on the basis of the said auction sale. P framed the suit under S. 7, Cl. (iv), sub-cl. (e), Court-Fees Act, and put the valuation at the price for which it had been purchased, viz., one pice and paid court-fee thereon. Held, that as no objective standard of valuation was available in so far as P's claim was concerned he was entitled to put his own valuation. 184 I. C. 106=1939 Cal. 278. In a suit for permanent injunction restraining a decree-holder from executing his decree on the ground that the same was obtained by fraud and collusion and was therefore void and incapable of execution, the plaintiff must be required to value his suit according to the amount of the decree which he seeks to avoid, and to pay *ad valorem* Court-fee on that amount. 182 I. C. 188=1939 Pat. 572. In Madras, the plaintiff was at liberty to value the relief arbitrarily prior to the amendment of 1922. See 27 M. 480. Now under the proviso a suit for declaration and consequential relief regarding immovable property should be valued at one half the value computed under Cl. (v). See 1930 M.W.N. 656. A suit for cancellation of a document or a decree has to be valued under Cl. (iv-a). Where the plaintiff is interested only in a portion of the property in respect of which the decree was passed the suit must be valued only according to the extent of the plaintiff's claim. 42 C. 370=36 I.C. 111=19 C.W.N. 895. See also 4 P.L.J. 191=44 I.C. 891. In a suit to set aside a partition deed so far as the plaintiffs are concerned, Court-fee is payable only on the value of the plaintiff's share of the property. 138 I.C. 303=1932 M. 491=62 M.L.J. 712. As a general rule the amount at which the plaintiff values the relief sought by him for purposes of Court-fee is to be taken despite anything to the contrary in the plaint as the value for purposes of jurisdiction. 140 I.C. 73=33 P.L.R. 458. Under S. 8, Suits Valuation Act, the value for jurisdiction follows value for the Court-fee and not *vice versa*. 58 C. 281

=1930 Cal. 686. But where a person values his claim at a certain figure for purposes of jurisdiction and he is subsequently called on to pay Court-fee on the footing that the suit falls under S. 7 (iv) (c), it is not open to the plaintiff to modify the valuation for purposes of Court-fee. 32 P.L.R. 729 ; 40 P.L.R. 938=1938 Lah. 647. See also 36 A. 500 on the point. But see 1930 M.W.N. 358=129 I.C. 824=1931 M. 94 ; 58 C. 281=1930 C. 686.

SEC. 7 (iv) (c) AND SCH. II, ART. 17 (iii).—Sch. II, Art. 17 (iii) only applies when no consequential relief is sought where consequential relief by way of injunction is asked for then S. 7 (iv) applies and *ad valorem* court-fee on the value of the claim has to be paid, a single valuation covering both declaration and injunction. 1939 A.M.L.J. 80. The relief originally prayed for was a declaration that the plaintiff was the owner of certain property. A Court-fee of Rs. 10 was paid. Subsequently the prayer was sought to be amended thus : "On account of that (a particular) decree is null and void, and ineffectual, it may be declared, etc." Held, that the effect of the amendment was to add to the original relief a prayer for a further declaration for which a further Court-fee of Rs. 10 should be paid and that the second relief asked for was not consequential relief within the meaning of S. 7 (iv) (c) so as to necessitate the payment of *ad valorem* fees. 55 A. 274=1933 A.L.J. 311=1933 A. 350. See also 1935 A. 817. Suit for injunction in respect of easement as occupier of property situate in Hyderabad. The plaintiff can place any valuation which he chooses. 1941 M. 91=52 L.W. 610=I.L.R. (1941) Mad. 157=(1940) 2 M.L.J. 655.

Sec. 7, Cl. (iv) (d).—See 45 B. 567=59 I. C. 777 ; 46 I.C. 884=63 P.R. 1902. The valuation of the relief sought in a suit for an injunction is left entirely to the discretion of the plaintiff or appellant as the case may be and the Court is not entitled to question the correctness of the amount so declared. (43 B. 376 and 31 Bom. L.R. 841, Foll.) 12 R. 335=1934 R. 268. In a suit for injunction, relief cannot be valued differently for Court-fees and jurisdiction. 22 Bom.L.R. 1450 ; 99 I.C. 868 ; 92 I.C. 730=1926 M. 591 ; 1929 L. 566=116 I.C. 908. (See Suits Valuation Act, S. 8.) Plaintiff can put his own valuation and where the lower Court finds that the valuation is reasonable, the High Court will not interfere with it. 94 I.C. 103 (2)=1926 P.H.C.C. 102=1926 P. 334. As to declaratory suits where the plaintiffs asked for injunction, see 21 I.C. 771=19 C.L.J. 15 ; 11 N. 100 ; 31 C.W.N. 1045=1927 C. 775 ; 48 A. 412=94 I.C. 951=1926 A. 423. See also the cases noted under Cl. (iv) (c). A suit for rent and for declaration of title with injunction falls under S. 7 (1) (iv) (d) as the injunction is a distinct and independent relief. 17 I.C. 44=6 S.L.R. 114 ; 19 A. 60. See also 4 A. 329 on the sub-clause.

Sec. 7 (iv) (d) and Ben. Am. Act, S. 8-C.—In a suit for a permanent injunction restraining the defendant from executing a decree obtained by him against property in possession of the plaintiff, the plaintiff cannot place his own

for easements ;

for accounts ;

(e) for a right to some benefit (not herein otherwise provided for) to arise out of land, and

(f) for accounts—

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valuation on the relief claimed by him, nor can the relief be valued according to the value of the property which would be affected by the injunction. In a case of this sort the objective standard of valuation must be taken to be represented by the extent to which the plaintiff will be benefited if he succeeds in his suit. It would be necessary during the course of an enquiry under S. 8-C of the Court-Fees Act to estimate the value to the plaintiff of the property without the permanent injunction and also on the assumption that a permanent injunction could be obtained. The difference in the amounts of these two estimates would be the measure of the value of the relief sought by the plaintiff and it would be according to the figure thus obtained that the plaintiff's suit should be valued. I.L.R. (1940) 2 Cal. 33=44 C.W.N. 591=1940 Cal. 560.

Sec. 7 Cl. (iv) (e).—This sub-clause would apply to suits in respect of right of way, right to light and air and other rights of easements over immovable property. In a suit for injunction restraining municipality from demolishing thara, the plaintiff can put any valuation and R. 4, Cl. 10 (Vol. 3, Rules and Orders) of Lahore High Court are not applicable. 116 I.C. 908=1929 L. 566.

Sec. 7 Cl. (iv) (f): ARBITRARY VALUATION, NOT PERMISSIBLE.—The provisions of the Court-Fees Act are controlled by O. 7, r. 1 (2) and R. 11 (b), C. P. Code, and where the Court finds that the relief has been valued arbitrarily or improperly the Court can compel the plaintiff to revise valuation and pay proper Court-fee thereon. 1933 Sind 322. See also 31 S.L.R. 442=1937 Sind 241 (F. B.); 150 I. C. 1090=1934 A.L.J. 643=1934 A. 807; 163 I.C. 822=1936 M. 525=43 L.W. 300=70 M.L.J. 292. Where a plaintiff brings a suit for recovery of a sum of Rs. 900, the mere fact that he adds a prayer for relief for any other sum that may be found due, cannot have the effect of converting the money suit into a suit for accounts, and S. 7, Cl. (iv) (f) of the Court-Fee Act will not apply and the case would be governed by Art. 17 of Sch. II. 196 I.C. 441=1941 O. W. N. 1095=1941 Oudh 622. It cannot be laid down as an absolute rule of law that the right of a plaintiff in a suit for accounts of a partnership to put a notional value upon the relief he claims extends throughout the whole course of the proceedings up to second appeal and that it extends to appellants or respondents who file cross-objections. The Court is not bound in every case to accept the valuation put by the appellant upon the relief sought by him. As the suit proceeds and circumstances change and the preliminary decree is followed by a final decree, the relief claimed by an appellant in an appeal from the final decree is no longer tentative and uncertain, but is ascertained and can be accurately valued; and the Court therefore is not bound to apply in such an appeal the principle of notional valuation applied or accepted at the beginning of the suit

when everything was uncertain. If the appellant is able to ascertain the amount then remaining in dispute, he must pay Court-fee on the value of the relief he seeks in his appeal and cannot be allowed to put a mere notional value. 31 S.L.R. 37.

SCOPE AND APPLICABILITY OF SECTION.—The value of a suit for accounts is the approximate value stated in the plaint, which determines the Court-fees as well as the forum. 6 C.L.J. 225. See also 100 I.C. 632=8 P.L.J. 145; 37 B.L.R. 148; 1936 L. 978. A suit for accounts of the rent recovered by the defendants, falls under S. 7 (iv) (f) and the plaintiff is at liberty to value it as he pleases. The fact that the plaintiff issued, prior to the institution of his suit, a notice claiming a definite sum does not have the effect of making the suit fall under S. 7 (i). 162 I.C. 227=38 Bom.L.R. 218=1936 B. 166; 1936 M. 525. The plaintiff is entitled to value the relief at any figure he chooses and the stamp will have to be made up subsequently if relief of greater value is granted to him. 8 L.L.J. 78=94 I.C. 650=1926 L. 242 (1). It is open to the plaintiff to value a suit for account as he likes, even though such valuation may be arbitrary and even if during the course of the trial he should make admissions that for larger amounts are due to him it is not open to the Court to require him to revise the valuation and pay additional Court-fee. 139 I.C. 105=1932 M. 656. See also 156 I.C. 424=1935 B. 212; 156 I.C. 718=1935 L. 689; 1936 R.D. 237. The plaintiff is entitled to pay Court-fee on the value he has thought fit to give to the relief sought notwithstanding that he has through mistake or inadvertence stated the value for purposes of jurisdiction at a different figure. 35 L.W. 358=137 I.C. 871=1932 M. 565. (25 C.W.N. 768; 15 Bom.L.R. 1123 and 58 C. 281, Foll.) The Court trying such suit does not lose its jurisdiction because the amount found due exceeds the jurisdiction of the Court. 9 N.L.R. 112=20 I.C. 928; 25 M. 543; 40 M. 1=32 M.L.J. 221; 16 A. 286; 33 A. 97; 56 B. 23=34 Bom.L.R. 44=137 I.C. 702=1932 B. 111. The Calcutta High Court has however held that the Court can only award a sum up to the limits of its pecuniary jurisdiction. 13 C.W.N. 493. S. 11 provides the means of recovery of excess Court-fee due on the excess decreed. 46 I.C. 165=22 C.W.N. 669; 45 C. 634. In a partnership suit, the subject-matter would be the severance of the final relationship and determination of the relative shares of the partners. The aggregate of the specific amounts will represent the value of the subject-matter of the suit, even though the plaintiff's tentative value be less or more. 1930 L. 725.

SCOPE OF THE SUB-CL. (iv) (f).—The sub-clause would cover all suits which involve accounting between parties. Thus a claim for accounts in a partnership suit would fall under the sub-clause. 46 I.C. 165=22 C.W.N. 669; 15 Bom.L.R. 1123=22 I.C. 71; 7 B. 125; 13 C.L.R. 160; 64 M.L.J. 576. So also a

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal ;

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suit for administration and accounts. 39 B. 545=29 I.C. 940=17 Bom.L.R. 574 ; 45 C. 634=22 C.W.N. 115. See also 100 P.R. 1914=26 I.C. 342 ; 55 I.C. 258=12 Bur.L.T. 207 ; 44 C. 890=24 C.L.J. 448=21 C.W.N. 310 ; 24 I.C. 643=7 O.L.J. 281. An *administration suit* is a suit for an account and Court-fees thereon are payable under Cl. (iv) (f) of S. 7 of the Court-Fees Act. It is open to the plaintiff to value the relief that he claims as he pleases for purpose of Court-fee. 12 R. 512. In a suit for the administration of the estate of a Muhammadan lady, for accounts and for division of the assets among the heirs under the Muhammadan Law, on the question whether the provisions of S. 7 (iv) (f) or Art. 17-B of Sch. II applied to the case. *Held*, that as an administration suit is not merely a suit for accounts and ought not to be so regarded for any purpose relating to Court-fee, especially where the suit is not one by a creditor for the administration of the assets of a deceased but one where a division of properties may have to be made, it should be valued under Art. 17-B of Sch. II of the Court-Fees Act. (Judgment of Wadsworth, J., in C.M.A. No. 235 of 1938, Foll.) *Held, further*, that in such a case the jurisdiction is to be determined by the market-value of the property. Where the lower Court had erred in holding that it had jurisdiction the High Court can interfere in revision to correct such error when the suit was still in its earlier stages though if the suit had been decreed in favour of the plaintiff the defendant would have been entitled to raise the question of jurisdiction in appeal. 54 L.W. 663=(1941) 2 M.L.J. 962. A suit for administration is a suit for accounts and falls under sub-paragraph (f) of Cl. (iv) of S. 7, Court-Fees Act. The valuation for the purposes of jurisdiction must be the same as the valuation for the purposes of Court-fees. In such a suit the valuation for purposes of Court-fees and/or for jurisdiction made by the plaintiff cannot be questioned by the defendant. In the case of its turning out that too small a sum had been paid in Court-fees, provision is made in S. 11 for payment of additional Court-fees. 1941 Rang.L.R. 512=1941 Rang. 322 (F.B.). See also 1939 Rang. L. R. 134=1939 Rang. 115. In an appeal from a decree in a suit for administration the appellant is entitled to value his relief for purposes of court-fee at such figure as he may fix. He is not bound to pay court-fee on the *ad valorem* value of the appeal. 42 P.L.R. 101. The claim of the creditor in pursuance of the notification of Court after a preliminary decree in an administration suit cannot be deemed to be a 'plaint' as to require Court-fee to be paid thereon. 134 I.C. 1137 (2)=1931 M. 683=61 M.L.J. 933. A claim for mesne profits is not a claim, the value of which cannot be ascertained, and *ad valorem* Court-fee is to be paid thereon and plaintiff cannot recover anything in excess of the valuation put by him. 40 I.C. 579=3 P. L.J. 67. A suit for partition and accounts against karta of joint family is not a suit for account and would not fall under this sub-

clause. 10 Pat.L.T. 491=1930 Pat. 1. In a suit for partition by metes and bounds after division in status, a prayer for accounts is leviable to Court-fee under this clause. 64 M.L.J. 576=1933 M. 431=143 I.C. 755.

DUTY OF PLAINTIFF.—According to S. 8, Suits Valuation Act, the valuation for the purpose of jurisdiction and of assessment of Court-fees must be the same. The plaintiff must state an approximately correct valuation and S. 11 makes provisions for additional Court-fee if original valuation is found to be incorrect. But this does not mean that the plaintiff having valued his claim is entitled to select one or two items and leave the rest for assessment under S. 11 after the final decree has been obtained. 1929 P. 626.

APPEAL IN CASES FALLING UNDER THE SUB-CL. (iv) (f).—An appellant against a decree dismissing a suit for an account cannot in appeal change his valuation when the subject matter of the appeal is the same as in the trial Court. The scheme of the Court-Fees Act does not allow the plaintiff to change in appeal the valuation adopted by him in the plaint in the trial Court. I.L.R. (1938) Mad. 1031=1938 Mad. 887=(1938) 2 M.L.J. 557 (F.B.). A plaintiff in a suit for accounts is no doubt entitled to place his own valuation on the relief claimed. If his suit fails and he appeals against the refusal to take an account, the appeal would relate solely to a right to an account, and the appellant might place his own value on the memorandum of appeal. But if the suit results in a decree for a certain amount against the plaintiff, his appeal against such decree is not merely in relation to an account, but is really an appeal against a money decree and he must pay *ad valorem* of Court-fee on the amount of the decree. He cannot be permitted to place an arbitrary value on his appeal for purposes of Court-fee. I.L.R. (1941) Bom. 477=43 Bom.L.R. 475=1941 Bom. 242. Where a person appeals from a preliminary decree in a suit for account, he is allowed the option of placing his own valuation upon the memorandum of appeal and he is not bound by the valuation put upon the claim in the plaint. 44 A. 542=20 A.L.J. 416=1922 A. 228 ; 47 A. 756=23 A.L.J. 725=89 I.C. 122 ; 3 P. 146=1924 P. 161 ; 91 I.C. 32=1926 L. 189 ; 141 I.C. 277=1933 N. 127 ; 9 Rang. 165=133 I.C. 91=1931 R. 146 (F.B.). But see *contra* 1921 M.W.N. 558=70 I.C. 392 ; 39 M. 725=33 I.C. 602=30 M.L.J. 402 (F.B.) ; 23 M. 490=20 I.C. 328=9 N.L.R. 112 ; 79 I.C. 923 (Sind) ; 7 P.R. 1925=28 I.C. 262 ; 14 P. 658=159 I.C. 4=16 P.L.T. 433=1935 P. 396 ; 31 S.L.R. 37. See also 50 I.A. 232 cited below. It is no doubt, settled law that in an appeal against a preliminary decree in a suit for the taking of accounts, the defendant-appellant is not bound by the valuation of the relief made in the plaint and is at liberty to make a fresh valuation for the purposes of the appeal. But in an appeal against a final decree by which it has been decided that a certain specific sum of money is due by the defendant-appellant to the plaintiff-respondent, the only valuation which the defendant-appellant can

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be permitted to put upon his appeal is the amount of the decree which he seeks to have set aside. 1937 Rang.L.R. 369. A defendant appealing from a preliminary decree for an account has to stamp his memorandum of appeal according to the plaintiff's valuation and cannot value his appeal at whatever may seem to him to be approximately correct. Where a defendant appeals against a final decree, he should pay Court-fee on the amount of the decree passed against him, except in cases where he appeals only against a portion of the decree. S. 7 (iv) (f) applies to appeals by a defendant. I.L.R. (1938) Mad. 598=47 L.W. 488=1938 M. 435=(1938) 1 M.L.J. 628 (F.B.) It was held in a recent case in Sind that in an appeal from a preliminary decree passed in a suit for accounts, the valuation once fixed by the plaintiff must be adhered to in appeal unless the subject-matter of the appeal is not identical with that of the suit, in which case, it is open to the appellant to value the subject-matter of the appeal differently and to pay the Court-fee thereon. 21 S.L.R. 377=98 I.C. 909=1927 Sind 100. See also on the point 11 Pat.L.T. 629; 131 I.C. 337=1931 L. 143. On an appeal against the preliminary decree for winding up a partnership, a Court-fee of Rs. 10 is sufficient, other questions relating to allowing or disallowing certain items being incidental. 1 L. 6=19 P. L.R. 1920=57 I.C. 185. See also 1936 L. 458; 31 S.L.R. 37; 1937 A. L. J. 480=1937 A. 465 (Suit for accounts by principal against agent—Appeal by Defendant from preliminary decree—Court-fee). See also 1938 N.L.J. 341=1938 Nag. 527; I.L.R. (1941) Nag. 344. In a suit for dissolution of partnership and accounts a decree was passed in favour of the plaintiff for a sum of Rs. 10,000. The defendant appealed against the decree, claiming a decree in his favour for such sum as may be found due and valued the appeal at Rs. 1,000 and paid Court-fee of Rs. 107-8-0. Held, that the valuation was arbitrary and could not be accepted; and that the subject-matter of the appeal being the decree for Rs. 10,000 and interest, *ad valorem* Court-fee must be paid on that amount. 150 I. C. 1090=1934 A.L.J. 643=1934 A. 807. But see also 141 I.C. 277=29 N. L. R. 34=1933 N. 127; 31 S.L.R. 31; 18 Lah. 196=39 P.L.R. 884=1937 Lah. 694. Where in a suit for accounts the same party appeals first from a preliminary decree having paid *ad valorem* fee on the amount mentioned in the plaint and before the decision of that appeal appeals to the same Court from the final decree, he need not again pay *ad valorem* Court-fee on the entire amount awarded by the final decree but need only pay on the amount, if any, in excess of that on which Court-fee was already paid. 55 M. 664=1932 M. 453=62 M.L.J. 624. The mere fact that in such a case the plaintiff will have to pay fee under S. 11 of the Court-Fees Act to enforce the liability under the decree does not relieve the defendant-appellant from paying fee on the entire amount decreed. 33 C.W.N. 743=1929 C. 815. Art. 17 of the Act could not apply to such a case. Where a person with a definite decree for a particular sum of money seeks to set it aside. (*Ibid.*). Where there was a

claim for Rs. 3,000 and a cross-claim for Rs. 29,000 and plaintiff's claim was dismissed but cross-claim allowed for Rs. 19,000 and the plaintiff valued his appeal at Rs. 19,991 it was held that the valuation applied for the appeal in its entirety both to reverse the decree passed grant a decree in his favour inasmuch as he can fix his own valuation in appeal. 50 I.A. 232=57 M.L.J. 281=1929 P.C. 147 (P.C.). Where a plaintiff definitely fixes a certain sum as the amount of his claim, this must be considered as the value of the original suit as well as the appeal. But when he fixes a certain sum as the amount of his claim only approximately, the amount found due by Court determines the forum of appeal. 34 C. 954=11 C.W. N. 1133=6 C.L.J. 255; 31 C. 365; 9 L. 23; 52 B. 904=115 I.C. 391; 1933 Sind 322. But see 40 M. 8=32 M.L.J. 221. In a suit for accounts the determination of the forum of appeal from the preliminary decree depends upon the valuation of the suit for purposes of jurisdiction. 31 P.L.R. 536=1930 L. 832. On this clause, see also 144 I.C. 559=1933 L. 633; 38 Bom.L.R. 754=1936 B. 353 (Suit to declare will null and void and for administration of estates).

U. P. COURT-FEES AMENDMENT ACT, 1938, S. 7 (iv) (b).—S. 7 (iv) (b) applies to a suit in which the only relief claimed is one to obtain an injunction. 15 Luck. 415=1940 Oudh 24. See also 1941 O.W.N. 479 (Appeal in suit under S. 33 (3) Agri. Rel. Act; U. P. Court-fees). 1940 A.L.J. 689 (F.B.); I.L.R. (1940) All. 93=1940 A.L.J. 30=1940 All. 189 (Suit under S. 33, U. P. Agri. Rel. Act to declare amount payable).

AS AMENDED BY MADRAS ACT V OF 1922, S. 7 (iv-a) AND (v).—Where the suit was for the cancellation of a sale-deed executed by the plaintiff and for recovery of possession of the land and mesne profits, and the plaintiff paid Court-fee for the cancellation of the sale-deed on the amount of the consideration specified in the deed and also paid Court-fee on the mesne profits. Held, that the claim for recovery of possession was merely ancillary to the main claim, namely, setting aside the sale-deed, and that separate Court-fee was not payable in respect of the prayer for possession. 56 M. 401=142 I.C. 29=64 M.L.J. 127. See also 42 L. W. 860=1935 M. 863=69 M.L.J. 458; 42 L.W. 217=1935 M. 671=69 M.L.J. 45. An order of the liquidator under S. 42 (2) (b) of the Co-operative Societies Act is not a "decree for money" within the meaning of S. 7 (iv-a) of the Court-Fees Act as amended by Madras Act V of 1922, not having been passed by any Court in a suit. S. 7 (iv-A) cannot therefore apply to a suit for a declaration that an order of a liquidator determining the amount of contribution payable by the plaintiff under S. 42 (2) (b) of the Co-operative Societies Act is null and void. The suit is governed by Art. 17-A of Sch. II of the Court-Fees Act as amended in Madras. 169 I.C. 698=1937 M. 604=(1937) 1 M.L.J. 640. Hindu reversioner—Suit to declare money decree against widow collusive and not binding on plaintiff or his reversionary interest and for injunction to restrain execution—Valuation. 1937 M.W.

In all such suits, the plaintiff shall state the amount at which he values the relief sought ¹[* * * *];

LEG. REF.

¹ The words "and the provisions of the Code of Civil Procedure, section thirty-one, shall apply as if for the word 'claim' the words 'relief sought' were substituted" were repealed by the Repealing and Amending Act (XII of 1891).

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N. 230=45 L.W. 380. The worshippers of a temple representing the temple, brought a suit for a declaration that a decree obtained against the temple properties by a grocer in a suit on a promissory note executed by the hereditary trustee for goods supplied by the grocer, was not binding on the temple as it was collusively obtained. Both the temple and the trustee for the time being were put in the array of defendants. It was held that the plaintiffs were in substance praying on behalf of the temple for cancellation of the decree obtained against the temple, and the suit was therefore liable to court-fee under S. 7 (iv-a). I.L.R. (1941) Mad. 708=1941 Mad. 493=(1941) 1 M.L.J. 414. Suit to declare right to properties by survivorship as joint family properties and for possession—Allegation that will execute by deceased member is forgery—Claim for return of pronote on the ground of discharge—Court-fee payable. 163 I.C. 837=43 L.W. 696=70 M.L.J. 542. It is clear that the proper prayer in a suit by the creditors of a person under S. 53 of the Transfer of Property Act is a prayer for a declaration that the alienation complained of is not binding upon the creditors to the extent of their debts and not a prayer for the cancellation of the deed of alienation. The suit therefore falls in substance under Art. 17-A of Schedule as amended in Madras and does not come under S. 7 (iv-a). 50 L.W. 248=1939 M. 894=(1939) 2 M.L.J. 400. I.L.R. (1940) Mad. 73. The documents which require to be set aside are documents where by rights are transferred or released such as sales gifts, mortgages, leases, releases, etc., and to fall under S. 7 (iv-a), the document sought to be set aside must of itself have secured the property, i.e., there must have been a conveyance of the said property or a release of right thereunder which would operate to extinguish the right of the person conveying or releasing, and not merely a confirmation of an already existing right. 48 L.W. 623=1938 Mad. 824. A plea that a document purporting to be executed by another person in favour of the plaintiff does not amount to a due fulfilment of the contract entered into by that other with the plaintiff is certainly not what in law will be spoken of as a prayer for 'cancellation' of that document. So when such a plea is raised or when a prayer in respect of such plea is added by amending the plaint, the case will not fall under S. 7 (iv-a) of the Court-Fees Act, as amended in Madras. Nor will the addition of such a prayer in suit for money make the plaint one comprising distinct subjects within the meaning of S. 17. 161 I.C. 184=1936 M.W.N. 510=1936 M. 266. A suit by a

minor after attaining majority to set aside an alienation made by his guardian during his minority and for possession of the properties alienated is governed for purposes of Court-fee by S. 7 (iv-a) of the Court-Fees Act as amended in Madras. The plaintiff has to pay the Court-fee based on the actual value of the property as shown in the sale deed which he seeks to avoid; and not the artificial value prescribed by S. 7 (v) of the Act. 1938 M. 921=48 L.W. 277. Razinama decree—Suit to declare null and void—Plaintiffs minors in prior suit represented by defendants or guardians—Court-fee payable. 71 M.L.J. 383=1936 M. 470=43 L.W. 715; 141 I.C. 80=64 M.L.J. 24 (Suit for declaration that prior decree is not binding on plaintiff).

SUIT FOR PARTITION BY MINOR HINDU COPARCENER—DECREES ALSO IMPEACHED AS NOT BINDING—In respect of the decrees passed in suits in which plaintiff had been *eo nomine* impleaded as a party, he has to pay court-fee according to S. 7 (iv-a) as he must be held to have impliedly asked for a cancellation of the decree. He must pay *ad valorem* Court-fee on the amount of the decrees and not merely on his share fraction, as his liability is for the full amount though limited to the extent of his share in the family assets. It makes no difference that the plaintiff was a minor or merely a junior member. I.L.R. (1940) Mad. 259=1940 M. 113=(1940) 1 M.L.J. 32 (F.B.). That is a distinction between an obligation imposed on a party by a decree and an obligation imposed on a party by his personal law by which he is governed in pursuance of a decree. In one case he seeks to get rid of the obligation existing under the decree; in the other he seeks to have it declared that he or his interest in the property or estate, which is sought to be made liable, cannot be rendered liable under the decree by virtue of the said personal law. In the latter case he is not bound to sue for cancellation of the decree; in the former he is so bound. Where a Hindu reversioner brings a suit to have it declared that a decree obtained against the widow of the last male-holder is a collusive decree and does not affect the plaintiff or his vested remainder interest in the properties of the last male-holder, and that the decree-holder should be restrained by a permanent injunction from bringing to sale in execution the interest of the plaintiff, in the estate, the suit does not fall under S. 7 (iv-a) of the Act. 45 L.W. 380=1937 M. 449. Suit to reduce rate of maintenance awarded by a decree does not fall under this clause. 59 M. 159=69 M.L.J. 202=1935 M. 655=42 L.W. 42.

COMPUTATION OF VALUE UNDER S. 7 (IV-A) (MADRAS).—In a suit for cancellation of a deed of conveyance and for possession of the property, falling under S. 7 (iv-a) as amended in Madras, the proper method of calculating the value of the subject-matter is the market value of the property on the date of the plaint. The valuation should not be in accordance with S. 7 (v). I.L.R. (1939) Mad. 764=1939 M. 462=(1939) 1 M.L.J. 702 (F.B.).

for possession of lands,
houses and gardens ;

(v) In suits for the possession of lands, houses
and gardens—according to the value of the subject-
matter ; and such value shall be deemed to be—
where the subject-matter is land, and—

NOTES.

Sec. 7, Cl. (v) : APPLICABILITY.—See 45 L.W. 541; 45 L.W. 491 = (1937) 1 M.L.J. 73. The distinction which is drawn in S. 7 between land, houses and gardens indicates that lands with buildings upon them come within the definition of 'houses' and therefore a mill assessed to land revenue should be assessed for purposes of Court-fee on its market value. 1941 Pesh. 69. In a suit for possession of lands and buildings against the defendant alleging that the plaintiff is a Mahant of certain temple and that the property mentioned in the plaint is owned by the idol which is installed in that temple and that the defendant has taken illegal possession of the property, and for an injunction to the defendant restraining him from interfering with the plaintiff's management of the same, the plaintiff is bound to pay *ad valorem* Court-fee on the market value of the property. This, however, is subject to the proviso that where the properties are not capable of being valued owing to the character of the user to which they are put Court-fee under Art. 17 (vi) is payable in respect thereof. Such properties ordinarily are the materials and the site of the temple and the materials and the sites of such buildings as are adjunct to the temple and are not directly productive of any income for the temple. 40 P.L.R. 113. Where a plaintiff sues for possession of a temple on the strength of an agreement for management by rotation the Court-fees are payable according to Sch. II, Art. 17 (6) of the Court-Fees Act. The temple so long as it stands as a temple remains the property of the deity and has no market value within the meaning of S. 7 (v) (e) of the Act. 1938 N.L.J. 214 = 1938 Nag. 481. A suit which does not fall under S. 92, C. P. Code, and which is not for the administration of any trust but is in substance one for the administration of the property of a caste, wherein all the members of the caste are interested, after ejection of persons who are in exclusive possession thereof and who refuse to have the same administered for the common benefit, falls directly under S. 7 (v) of the Court-Fees Act and must be valued for purposes of Court-fee as a suit for possession. Recovery of possession being a necessary and substantial relief in such a suit, and being sought on behalf of all the members of the caste, the suit comes within the purview of S. 7 (v). 1937 M.W.N. 217 = 45 L.W. 510. A suit for declaration of title as adopted son and for possession is a suit that comes within Cl. (4) (c) and not within Cl. (5). 1923 P. 100; 5 P.L.J. 339 = 56 I.C. 422. See also 38 M. 1184 = 1 L.W. 824 = 25 I.C. 683. (Suit for declaration that a decree is void and for possession of properties sold in execution thereof). Where the declaration as to validity of adoption was neither claimed nor necessary the suit fell under Cl. (v) and not under Cl. (iv) (c). 9 R. 401 = 134 I.C. 1273 = 1931 R. 319. See also 1929 N. 276. Where the suit is by a junior member for partition of the Thavazhi properties for the purpose of

determining the Court-fee payable, the point to be considered is whether on the date of suit it can be said that the defendant's possession was possession on behalf of the Thavashi. If he is not in such possession, Court-fee should be paid under S. 7 (v). 1938 M.W.N. 131 = 1938 Mad. 474. Suit for possession—Defendant challenging plaintiff's title, and plaintiff anticipating possible defence on that ground—Suit, if one for possession or falls under S. 7 (iv) (c). 18 P.L.T. 977 = 1938 Pat. 22 (S.B.) In a suit for declaration that a decree obtained against the plaintiff was void on the ground that the plaintiff then a minor was not properly represented, and for recovery of possession of the properties covered by the decree, the main relief is recovery of possession and the suit falls under Cl. (v). 139 I.C. 317 = 1932 M. 605 = 63 M.L.J. 764. If a person is out of possession of property to which he considers he is entitled on the strength of any right title or interest that he claims in relation thereto, and seeks to obtain possession thereof from the person who is keeping it back from him, there being no jointness of possession or title between the two his suit is one for possession, bare and simple to which the provisions of S. 7 (v) of the Act apply and no occasion arises to invoke Art. 17 (vi) of Sch. II. I.L.R. (1938) Lah. 240 = 1938 Lah. 275. Where in a suit for partition and possession among co-sharers the plaintiff alleges his exclusion from possession of the property, the court-fee payable is *ad valorem* under S. 7 (v). I.L.R. (1938) Mad. 309 = 1938 M. 278 = (1938) 1 M.L.J. 29. Suit to avoid claim order—Court-fee payable—Value of suit for purposes of jurisdiction—Mode of determining value of land. 56 M. 716 = 1933 M. 439 = 64 M.L.J. 568. A suit for possession by a trustee or manager of a religious endowment falls under this clause and not Art. 17 (vi) of Sch. II. 1932 A.L.J. 773 = 1932 A. 593. In such a suit immovable property has to be valued under cl. (v) but the temple should be left out of account as having no market value (*ibid.*) A suit by a landlord against his tenants occupying a holding under him, to eject them from a *tank-bed* which they are alleged to have encroached upon, praying for an injunction restraining them from interfering with his possession and for a mandatory injunction directing them to remove the mud thrown by them on the land to make it cultivable, is governed by Art. 17-B of Sch. II, of the Court-Fees Act, as the *tank-bed* claimed had no market value. S. 7 (v) has no application to the case. 40 L.W. 718 = 1934 M. 714 = 67 M.L.J. 688. The plaintiff, an inamdar, claimed that he was entitled to both warams in the inam land and though he had no proof of actually letting the defendants into possession he claimed the right of eject them after due notice by virtue of his title to the kudivaram. The defendants did not dispute the plaintiff's right to melwaram but asserted occupancy rights in the land. *Held*, that court-fee was payable on the plaint under

- (a) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government,
or forms part of such an estate and is recorded in the Collector's register as separately assessed with such revenue,
and such revenue is permanently settled—
ten times the revenue so payable :
- (b) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid ;
and such revenue is settled, but not permanently—
five times the revenue so payable :

NOTES.

S. 7 (iv) (c) and not under S. 7 (v) or (xi) (cc) of the Act. 140 I.C. 462=93 M.L.J. 759. But see 41 L.W. 562 ; 58 M.L.J. 369=1935 M. 346 ; I.L.R. (1937) Mad. 672 ; (1937) 1 M.L.J. 739=45 L.W. 491=1937 Mad. 529. A suit by Hindu reversioners to recover possession of property gifted by Hindu widow after her death falls under Cl. (v) though the prayer was for declaration and consequential relief. 3 P.L.T. 704=1922 P. 615 (F.B.). see also 57 I.C. 494=18 A.L.J. 903. A suit by a tenant against the landlord and other tenants is governed by S. 7 (v) not cl. (xi). 25 I.C. 507=19 C.L.J. 418. See also 17 N.L.J. 478 ; 31 M. 14. Suit for possession and arrears of rent from a tenant, including a tenant holding over, falls under Cl. (xi) (cc) and not this clause. 33 Bom.L.R. 263=1931 B. 234. But a suit for possession against a tenant holding over in defiance of a notice to quit, is one against a trespasser and is governed by this clause and not by cl. (xi) (cc). 1923 N. 310=8 N.L.J. 63. See also 1933 O. 363. Also a suit to eject a licensee at will from a house with an incidental prayer for determining plaintiff's title. 5 P. 631=1927 P. 140. See for valuation. (*Ibid.*) A suit for possession questioning the validity of a certain compromise and a decree passed on the basis of such compromise. 1929 O. 419. A suit for possession and also for an order to compel defendant to execute and register a sale deed, the plaintiff alleging that the land had been sold to him and that the defendant had received part of the consideration is a suit for possession only within the clause and not also for specific performance. 60 I.C. 512 ; 14 C.L.J. 159. In a suit to enforce a mortgage by a decree for sale, Cls. (v) (vi), (ix) and (x) of S. 7 have no application and court-fee is payable on the *ad valorem* scale. 58 C. 829=130 I.C. 876=1931 C. 159. A suit by a mortgagee to recover possession under the terms of the deed of mortgage is one under cl. (ix) and not under this clause and the court-fee is payable on basis of principal. 1929 O. 321 (1). But a suit by mortgagee for possession from prior mortgagees was held to be governed by this clause and not clause (9). 134 I.C. 597=1931 O. 366. Valuing lands as per charts issued by District Judge setting out minimum value of lands in different parts of the district is improper. 1930 Cal. 65. Trees standing on specific items of land claimed need not be separately valued. They are included in the valuation of the items themselves. 105 I.C. 881=1927 M. 1002 ; 54 M.L.J. 67=40 M. 824=39 I.C. 254 ; where they were on poram-

bokes and the only rights claimed in them being accessory to ownership of other plots in the village. (*Ibid.*) In a suit for possession of paddy lands the plaintiff is entitled to pay Court-fee only on five times the land revenue due on the paddy fields. 1934 R. 313. See also 142 I.C. 195=1933 M. 367 ; 1935 Pesh. 30 (partition suit).

A suit by a person, alleging that he was a tenant dispossessed by his landlord, against the landlord and a third person who is in possession of the property, is not one between landlord and tenant and Court-fees should be paid according to S. 7 (v). (32 C. 268, Foll.) 29 N.L.R. 367=1933 N. 312. See also 1938 O.W.N. 453=1938 O. 139. In a suit for possession against a mortgagor who had not delivered possession of property mortgaged, an *ad valorem* Court-fee on the market-value must be paid as the defendants are allegedly in possession and as there is no special provisions in the Court-Fees Act as regards suits of this kind. 1940 A.M.L.J. 49.

APPEAL.—An appeal by alienee defendant against a decree setting aside a sale of joint family property on condition that plaintiff paid a certain sum of money, should be stamped under S. 7 (v). 47 M.L.J. 919=48 M. 652=1925 M. 323. An appeal claiming that the appellant must be appointed trustee of durgas in suit in the place of plaintiffs appointed by the Court falls under S. 7 (v) and not under Art. 17-B, Sch. II, 88 I.C. 209=1925 M. 804=48 M.L.J. 571. See also 1930 M. 597. In a suit for declaration of jote right and for possession, a decree was passed in trial Court. The appeal by the defendant was dismissed. The second appeal was governed by S. 7 (v) of the Court-Fees Act. 34 C.W.N. 217. Where in a suit for recovery of possession of certain property on payment of the necessary Court-fees on the value of the property, the claim is decreed and the defendant appeals against the decree, he is bound to pay the same Court-fee though he is in possession of the property. 1929 Sind 161.

Sec. 7 (v) (a).—A share in an under-proprietary tenure in a village is a definite share within sub-clause (a). 24 O.C. 29=58 I.C. 132. See also 7 O.W.N. 956. As to a suit by a subordinate tenure holder, see 8 C. 192.

Sec. 7 (v) (b).—'Definite share' of an estate means an undivided tangible fraction of an estate. 10 M.L.T. 206=33 I.C. 683. As to the meaning, see also 3 P.L.T. 511 ; 16 A. 286 ; 1937 N. 100 ; 167 I.C. 909=1937 A.L.J. 88=1937 A. 206 ; 55 A. 531=1933 A.L.J. 398=1933 A. 414. Individual field plots forming part of a holding but not separately assessed not a definite share. 2 Bur.L.J. 39=75 I.C.

(c) where the land pays no such revenue, or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue, and nett profits have arisen from the land during the year next before the date of presenting the plaint—

fifteen times, such nett profits :

but where no such nett profits have arisen therefrom—the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood :

(d) where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and is not separately assessed as above-mentioned—the market-value of the land :

NOTES.

217. On the point, *see also* 46 M.L.J. 345=77 I.C. 781=1924 M. 646; 34 M.L.J. 558=47 I.C. 543. The words "fractional shares" in Government notification No. 358, dated 10th September, 1921 cover also a case where the plaintiff claims a definite area within the survey number forming a complicated fraction of the whole. *See* 54 M.L.J. 67=105 I.C. 881=1927 M. 1022. But *see contra* 16 A. 493; 34 M.L.J. 558; 33 A. 630=11 I.C. 816; 1 R. 492=75 I.C. 217=1923 R. 246; 116 I.C. 209=1930 L. 182. Remissions of revenue granted in any particular year cannot be taken into account in calculating the value of land for purposes of Court-fee under S. 7 (v) of the Court-Fees Act; the calculation should be based on the revenue fixed at the settlement. The words "the revenue so payable" and the words "such revenue is settled" undoubtedly refer to the revenue fixed at the settlement and cannot refer to the revenue less remissions in any particular year. 1937 A.L.J. 838=1937 A.W.R. 747=1937 A. 657. Suits for possession of inam lands wrongly classed as ryotwari may be valued as such under Cl. (b). 41 I.C. 167 (Mad.). On this sub-clause, *see also* 1933 O. 505; 156 I.C. 884=1935 L. 331.

Sec. 7 (v) (c).—'Such revenue' means an annual revenue payable to Government on an entire estate or defined share thereof, fixed permanently or not. Lands subject to fluctuating assessment are within this sub-clause and not within S. 7 (v) (d). 40 P.R. 1919=50 I.C. 142. "The year next before the date of presenting the plaint"—Meaning. *See* 3 A.L.J. 244=28 A. 411. As to revenue free land, *see* 155 I.C. 668=1935 A. 642. If the subject-matter of the suit is land paying no revenue and has produced no profits during the year next preceding the suit, the valuation should be made with reference to similar land in the neighbourhood, irrespective of the fact that the land is 'religious land.' 60 I.C. 5=(1920) 3 U.B.R. 236. S. 7 (v) (c) does not give the Court any option to consider whether or not the nett profits for the year preceding the presentation of the plaint are exceptional or unusual. Such profits cannot be excluded from consideration for purposes of Court-fee on the ground that they partake of the nature of a windfall. 52 L.W. 146=1940 Mad. 821=(1940) 2 M.L.J. 176. Under S. 7 (v) (c), the plaintiffs must pay Court-fee on fifteen times the nett profits arising during the year immediately preceding the institution of the suit. If the amount of the nett profits stated by the

plaintiff in his valuation statement is accepted by the Court the matter ends. But if the Court sees reason to think that such profits have been wrongly estimated then it has to proceed to make enquiries on the two heads mentioned in the concluding portion of sub-cl. (a) of S. 7 (v). It must proceed to ascertain (1) the nett profits of the land, building or garden as the case may be in the year immediately preceding the presentation of the plaint; and (2) its market-value. If the nett profits are not readily ascertainable or assessable it is to ascertain the market-value, but if the nett profits are readily ascertainable or assessable it is under the obligation to direct its enquiry on both the heads—on the market-value also. It can then only require the additional Court-fee to be paid (if payable) on the lower of the two figures arrived at such enquiry. The Court cannot merely ascertain the amount of net profits and assess Court-fee on fifteen times such profits without determining the market-value. I.L.R. (1940) 2 Cal. 450=44 C.W.N. 822=1940 Cal. 438. A defendant is not estopped from valuing the appeal correctly, simply because he did not object to the valuation of the plaintiff in the suit. The plaintiff paid Court-fee on the market-value. The suit was decreed. The defendant in appeal paid Court-fee on fifteen times the nett profits. Defendant's valuation was correct. 49 A. 398=25 A.L.J. 258=1927 A. 308. On this section, *see also* 159 I.C. 636=42 L.W. 765.

Sec. 7 (v) (d).—A suit for possession of a plot of land but not a definite fractional share, sold out of a holding is governed by S. 7 (v) (d) and the Court-fee should be calculated on the market-value of the land where it is impossible to find out the actual revenue on the said plot, 33 A. 630=8 A.L.J. 798. *See also* 55 A. 531=1933 A.L.J. 398=1933 A. 414; 1 R. 492=1923 R. 246; 6 P.R. 1883; 16 A. 493; 1930 L. 182=116 I.C. 209; 1937 N. 100; 167 I.C. 909=1937 A.L.J. 88=1937 A. 206. But *see* 54 M.L.J. 67, cited under sub-clause (b). So also a suit for a portion of a Survey number not separately assessed. 34 M.L.J. 558=47 I.C. 543=8 L.W. 88; and a suit for a land forming an indefinite share of an estate. 41 C. 812=18 C.W.N. 659. Suit for declaration of title as ghatwal and for recovery of possession of ghatwali did not fall within Art. 17, Cl. (vi) of Sch. II, that as the ghatwali was part of an estate paying revenue to Government but not a definite share of such an estate and not separately assessed to Government revenue, the Court-fee ought to be calculated on the market-value of the land under S. 7 (v) (d) and not under

Proviso as to Bombay Presidency ;

Provided that, in the territories subject to the Governor of Bombay in Council the value of the land shall be deemed to be—

(1) where the land is held on settlement for a period not exceeding thirty years and pays the full assessment to Government—a sum equal to five times the survey-assessment ;

(2) where the land is held on a permanent settlement, or on a settlement for any period exceeding thirty years, and pays the full assessment to Government—a sum equal to ten times the survey-assessment ; and

(3) where the whole or any part of the annual survey-assessment is remitted—a sum computed under paragraph (1) or paragraph (2) of this proviso, as the case may be, in addition to ten times the assessment, or the portion of assessment, so remitted :

Explanation.—The word “estate” as used in this paragraph means any land subject to the payment of revenue, for which the proprietor or farmer or raiyat shall have executed a separate engagement to Government, or which, in the absence of such engagement, shall have been separately assessed with revenue :

For houses and gardens ;

(e) where the subject-matter is a house or garden—according to the market-value of the house or garden :

LEG. REF.

¹ See para-8 of the A.O. In view of this provision the expression “Governor of Bombay in Council” has been left unmodified.

NOTES.

S. 7 (v) (a). 13 P.L.T. 590=1932 P. 319. As to Khewat Kheta in U. P., see 1933 A.L.J. 398. A suit to recover land granted as building site on which a house has been built should be valued according to the market-value of the land and the buildings thereon. 1931 S. 6. See also 1928 L. 852. A ryoti land on which no building can be put up without the consent of the landlord cannot be valued as a building site. 142 I.C. 195=1933 M. 367. Basis of taxation under the Act is the actual value of the property and not its probable value under more efficient management. 62 I.C. 513=6 P.L.J. 411.

Sec. 7 (v) (e).—For purpose of computing valuation of the subject-matter in a suit for possession, the legislature had drawn a distinction between the case where the subject-matter is land and where the subject-matter is house or garden. If the subject-matter in suit is a garden, it would come under Cl. (e), sub-S. (v), S. 7 and Court-fee will have to be paid on the market value of the garden and not on the basis of annual revenue of land. 162 I.C. 810=1936 C. 264. As to the meaning of the word ‘garden,’ see 40 M. 824=39 I.C. 254=2 L.L.J. 362 ; 68 I.C. 345 ; 30 I.C. 845=18 M.L.T. 243. A suit for possession of garden land, though assessed to land revenue is governed by Cl. (v) (e). 71 P.R. 1914=25 I.C. 545 ; 146 P.R. 1908. See also 117 I.C. 781=1930 Sind 15. A person claiming under proprietary rights in land by virtue of a permanent lease executed in his favour brought a suit for possession of the land and the building and a guaga grove thereon. The building was not a tenant's house or any other building necessary for the enjoyment of the land but a substantial structure used as a tannery. Similarly the trees were not self-grown but were planted. Held, that in such circumstances the

building and grove could not be said to be appurtenant to the land and hence a separate Court-fee under S. 7 (v) (e) should be paid on the market-value of the building and the grove. 1938 O.W.N. 23=1938 O. 40. There is no market-value for a temple and a suit for recovery of possession of temple falls under Sch. II, Art. 17 (b) and not under S. 7 (v) (e). 46 M. 782=45 M.L.J. 274 (F.B.). Easement over land or building—Suit to establish right of—Court-fee. 100 I.C. 263=1927 M. 348=52 M.L.J. 121.

Sec. 7 (v) and Sch. II, Art. 17-B (as amended in Madras).—Mahomedan co-sharers—Suit by one for share of properties as his share—Claim to properties alienated by defendant co-sharer impeaching alienation as inoperative—Court-fee payable—Alienated and unalienated properties—Distinction. (1937) 1 M.L.J. 572=45 L.W. 720=1937 M. 402 ; 50 L.W. 154=1939 M. 776=(1939) 2 M.L.J. 226 (Suit for possession of office of member and manager of school committee) ; 49 L.W. 196=I.L.R. (1939) Mad. 367=1939 Mad. 360=(1939) 1 M.L.J. 268 (F.B.) (Suit for possession against stranger to contract alleged to be in wrongful possession.) 1939 M. 506=(1939) 1 M.L.J. 531.

Sec. 7 (v) and (x).—In a suit for specific performance of a contract for conveyance of immovable properties, there is no question of primary and secondary relief ; both the execution of the conveyance and delivery of possession are essential reliefs. In such a suit the purchaser seeks to enforce the terms of his contract. The seller as much agrees to put the purchaser in possession as he agrees to execute a conveyance in his favour. The fact that the purchaser claims possession in the suit will not make the suit one for possession, as the specific provision in Cl. (x) of S. 7 for specific performance will exclude the applicability of the general provision in S. 7 (v) relating to suits for possession where the claim to possession is involved in the claim to specific performance, the suit remains one for specific performance and must be dealt with on that basis. 1937 M.W.N. 236=1937 M. 831. See also 1936 A.M.L.J. 114.

(vi) In suits to enforce a right of pre-emption—according to the value (computed in accordance with paragraph (v) of this section) of the land, house or garden in respect of which the right is claimed :

to enforce a right of pre-emption.
for interest of assignee of land revenue ;

(vii) In suits for the interest of an assignee of land-revenue-fifteen times his nett profits as such for the year next before the date of presenting the plaint :

(viii) In suits to set aside an attachment of land or of an interest in land or revenue—according to the amount for which the land or interest was attached :

to set aside an attachment ;

Provided, that where such amount exceeds the value of the land or interest, the amount of fee shall be computed as if the suit were for the possession of such land or interest.

to redeem ;

(ix) In suits against a mortgagee for the recovery of the property mortgaged,

NOTES.

Sec. 7 (vi).—The Court-fees in a pre-emption suit in respect of a sale of land paying revenue should be calculated according to S. 7 (v). 15 P.R. 1919=49 I.C. 358. See also 1934 L. 424. In a suit for pre-emption in respect of separate plot of land which does not constitute any definite fraction of a distinct revenue paying area and is not separately assessed to revenue, the Court-fee should be paid on the market-value of the land in suit, and not, as is the case where the suit is for a definite fractional share, on five times the Government revenue. 1933 O. 533. In a suit for pre-emption, the Court-fee payable is to be calculated on ten times the land revenue assessed on land and the amount of Court-fee has nothing to do with the consideration of the sale or the amount of encumbrance on the property. 1933 L. 767 ; 32 A. 19=6 A.L.J. 905 ; 3 A.L.J. 244=28 A. 411. The market-value of the property in a suit for pre-emption is to be determined with reference to its value at the date of the sale and not with reference to its value at the date of the institution of the suit. 1924 L. 380. See also 1937 L. 239=39 P.L.R. 511.

APPEAL IN CASES COMING UNDER THE CLAUSE.—Where appeal is by the vendees objecting that plaintiff is not entitled to the land, the Court-fee to be fixed will be in accordance with S. 7 (vi). 76 P.R. 1913=19 I.C. 961. See also 6 A. 488 ; 1929 L. 879. But where the objection is only to the amount to be paid by the pre-emptor, it should be calculated *ad valorem* on the difference between the amount awarded and that claimed are admitted. 32 A. 19 ; 1929 L. 190=113 I.C. 538 ; 117 I.C. 480=1929 O. 240 (2). See also 40 A. 353=44 I.C. 666=16 A.L.J. 174.

Sec. 7 (viii).—A suit to set aside a sale on the ground that the attachment was not binding is virtually a suit to set aside the attachment within the clause. 14 M.L.J. 144. As to suit by unsuccessful claimant of property attached, see 35 C. 202=12 C.W.N. 169 (P.C.). See also 80 P.R. 1886. A suit by decree-holder for restoration of attachment falls under this clause. U.B.R. (1897-1901), Vol. II, p. 355.

Sec. 7 (ix).—See 69 M.L.J. 45 ; 154 I.C. 550=1935 B. 693 ; 1935 Pesh. 8 ; 63 C. 657. In a second appeal from a decree in a suit against a mortgagee for the recovery of the mortgaged

property the Court-fees must according to S. 7 (ix) of the Court-fees Act, be calculated *ad valorem* on the principal money expressed to be secured by the instrument of mortgage. Though the result may seem to be somewhat extraordinary the Act has to be construed as it stands. I.L.R. (1941) All. 469=1941 A.L.J. 409=1941 All. 357. The phrase "recovery of property mortgaged" in Cl. (ix) of S. 7 does not mean recovery of possession of the mortgaged property from the mortgagee, but is a phrase convertible with the word "redeem," the ordinary significance of the term to "redeem" being to recover a pledge, to get property freed from a charge or mortgage. 63 C. 657. The Court-fee payable in a suit to redeem *kanam* is in accordance with the provisions of this clause. 23 L.W. 758=95 I.C. 26 (1)=1926 M. 667. Where in a suit for redemption of a *kanom*, the plaintiff seeks to deduct from the *kanom* amount certain damages to which he claimed to be entitled, he is not bound to pay Court-fee on the amount of damages till after it is ascertained and a set-off is allowed. 50 M.L.J. 493=1926 M. 764.

SUITS FOR REDEMPTION, FORECLOSURE, ETC.—In such suits Court-fee is payable only upon the principal amount secured by the mortgage. 57 I.C. 673. The plaintiff is not bound to pay Court-fee upon the surplus amount claimed as mesne profits. 45 A. 154=1923 A. 261. See also 60 M.L.J. 698=132 I.C. 317=1931 M. 479 ; 19 M. 16 ; 29 A. 471. But see the observation to the contrary in 17 I.C. 442=12 M.L.T. 493. See also 13 O.C. 32=5 I.C. 444 ; 1924 N. 346 ; 31 A. 44 ; 113 I.C. 34=1929 N. 1. Nor on interest due on the mortgage. 13 A. 94 ; 14 M. 480. The jurisdiction value in a redemption suit is also the principal amount though S. 8 of the Suits Valuation Act does not apply. 60 M.L.J. 698=1931 M. 479, relying on 5 M. 284 (F.B.) and 39 M. 447 ; 31 A. 44. But see 1927 R. 304 holding that it is the value of the mortgaged property. See also 13 B. 489 ; 51 C. 737=1924 C. 783. Suit for sale on mortgage is not governed by the clause. 7 B.L.R. 194 ; 58 C. 829=1931 C. 159. Also a suit for possession brought after a decree for foreclosure has been obtained. 1 C.L.R. 473. See also 134 I.C. 597=1931 O. 366. The proper valuation of a suit for redemption is the amount of the mortgag

and in suits by a mortgagee to foreclose the mortgage, or, where the mortgage is made by conditional sale, to have the sale declared absolute—

to foreclose ;
according to the principal money expressed to be secured by the instrument of mortgage ;
for specific performance.

(x) In suits for specific performance—

NOTES.

admitted by the plaintiff to be binding on him and not that of the mortgages set up by the defendant. 37 M. 420=15 I.C. 587. In a suit for redemption by a co-mortgagor of his share of the mortgaged property, the Court-fee is to be calculated on the amount of the mortgage debt charged on his share of the property. 45 I.C. 300=5 O.L.J. 43. See also 6 B. 324. A suit by a mortgagee to recover possession of the mortgaged property under the terms of the deed is one under cl. (ix) and Court-fees on the principal amount secured should be paid. 1929 Oudh 321. But in a suit by a mortgagee with possession for recovery of the mortgaged property from prior mortgagees it was held that Cl. (v) and not this clause was applicable. 134 I.C. 597=1931 O. 366. On this section, see also 63 C. 657; 40 C.W.N. 90.

APPEAL FROM MORTGAGE DECREE DISPUTING ONLY PERSONAL LIABILITY—COURT-FEE.—Where, in an appeal from a mortgage decree ordering the sale of the mortgaged property and enabling the plaintiff to apply for a personal decree for any balance left after the sale, the appellant does not dispute the liability of the property but disputes only his personal liability, the value of the subject-matter of the appeal is not the whole mortgage amount but the excess of the mortgage amount over the net sale proceeds for which alone he is by the decree likely to be made liable. 1933 M.W.N. 1408.

APPEALS IN SUITS FOR REDEMPTION AND FORECLOSURE.—There is a conflict of rulings on the question whether the clause is applicable to appeals and whether the fee in such appeals should also be calculated on the principal amount under the clause or on the amount in dispute under Art. 1, Sch. I, according to Allahabad High Court, the Court-fees should be calculated on the value of the subject-matter of the appeal. 35 A. 94=18 I.C. 365; 30 A. 547; 36 A. 40=21 I.C. 723 (F.B.); 31 A. 295; 47 A. 926=88 I.C. 888=1925 A. 734 (13 A. 94 not now good law). So also according to the Punjab High Court. 14 I.C. 78=54 P.R. 1912; 1 L. 234=3 L.L.J. 370. So also in Oudh. 1930 O. 329; 2 O.L.J. 257=30 I.C. 322. (54 I.C. 733=22 O.C. 289, *contra*.) The Madras High Court also was of the same view in 29 M. 367=16 M.L.J. 287; but in a later case (20 M.L.J. 121=3 I.C. 459) it was held that, where there is a denial of the right to redeem, the fee should be computed according to the principal amount secured by the mortgage. This view is to be found also in earlier cases (14 M. 480 and 16 M. 326). In Bombay it was held that Court-fee should be calculated on the principal debt as in original suits. 10 B. 44. See also under Art. 1, Sch. I. In an appeal, where the question raised is the right to redeem or foreclosure for an adjudged sum, Court-fee is payable on the principal mortgage money. 54 I.C. 733=22 O.C. 289;

67 I.C. 130=3 Lah.L.J. 156. See also 20 I.C. 257=9 N.L.R. 86; 6 N.L.R. 164=8 I.C. 1125; 1933 L. 155; 134 I.C. 124=1931 L. 633; 134 I.C. 604=1931 O. 353. Thus if a suit for redemption were dismissed, the plaintiff-appellant can prefer an appeal paying Court-fee under Cl. (ix). 134 I.C. 124=1931 O. 633. But in an appeal by the mortgagor against a decree for redemption, seeking reduction of the decretal amount, *ad valorem* Court-fee must be paid on the amount sought to be reduced; and not on the principal amount of the mortgage. 1 L. 234=57 I.C. 215; 1923 L. 309; 58 P.R. 1915=30 I.C. 104; 55 I.C. 177=156 P.W.R. 1910 (second appeal against enhancement of the amount by the appellate Court). See also 30 I.C. 322=2 O.L.J. 257; 5 N.L.R. 130=3 I.C. 920; 1930 L. 601=122 I.C. 736; I.L.R. (1937) Nag. 49=1937 Nag. 295. (F.B.) So also where the respondents in an appeal by the mortgagee, file cross-objections to the same effect. 134 P.W.R. 1911=11 I.C. 198=213 P.L.R. 1911. So also where enhancement of amount is sought, fee is to be paid on the amount sought to be recovered. 54 I.C. 733=22 O.C. 289. See also 25 O.C. 30=1932 O. 82; 11 N.L.R. 83=29 I.C. 609; 1931 N. 180; 134 I.C. 124=1931 L. 633. Where the plaintiffs in a redemption suit file appeals both from the preliminary decree and final decree, claiming a reduction of amount fixed as payable by them the appeal against the final decree is only of a formal nature and it is enough if a Court-fee of Rs. 2 is paid thereon, if *ad valorem* Court-fees are paid in the other appeal. 4 L. 406=1923 L. 632. See also 39 A. 452=41 I.C. 346=15 A.L.J. 464. Where the mortgagee in an appeal against a decree in a redemption suit contests not only the finding of the lower Court as to the amount payable by the mortgagor before he can redeem the mortgage but also that the transaction is a sale and not a mortgage as held by the lower Court, the Court-fee on the appeal is payable on the principal sum secured on the mortgage and not on the amount claimed. 1933 L. 155. The expression "suits" used in cl. (ix) of S. 7 means "appeal" as well, as the expression has been used to cover the entire litigation from its beginning to the end. 167 I.C. 577=1937 N. 6. In a suit for redemption, or for foreclosure or for enforcement of a mortgage by conditional sale, the claim cannot be properly valued in accordance with the value of the property, but an artificial value has to be fixed in accordance with S. 7 (ix), Court-Fees Act, and the value so fixed cannot vary, but must remain constant throughout all stages of the litigation, because the word "suit" in cl. (ix) covers both the claim in the original Court, as well as that in appeal. 167 I.C. 577=1937 N. 6. In an appeal from a decree for redemption of a mortgage and surplus profits, where the appellant challenges *bona fide* both the right of redemption and the amount

- (a) of a contract of sale—according to the amount of the consideration ;
- (b) of contract of mortgage—according to the amount agreed to be secured ;
- (c) of a contract of lease—according to the aggregate amount of the fine or premium (if any) and of the rent agreed to be paid during the first year of the term ;
- (d) of an award—according to the amount or value of the property in dispute :

between landlord and tenant.

(xi) In the following suits between landlord and

tenant :—

- (a) for the delivery by a tenant of the counterpart of a lease,
- (b) to enhance the rent of a tenant having a right of occupancy,
- (c) for the delivery by a landlord of a lease,

¹[(cc) for the recovery of immovable property from a tenant, including a tenant holding over after the determination of a tenancy,]

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¹ Inserted by S. 2 (1) of the Court-Fees (Amendment) Act (VI of 1905).

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of profits, the appellant is liable to pay Court-fees under S. 7 (ix) of the Court-Fees Act only on the principal sum secured by the mortgage. I.L.R. 1937 N. 49 (F.B.). No doubt in the case of a mortgage where the right to redeem or foreclose is challenged, amount of Court-fee payable on appeal is provided for in S. 7 (ix), for "suit" there includes "appeal." But when none of these is challenged as where only the amount of the price fixed for redemption is challenged, such a relief is neither for foreclosure nor for sale, nor is it for redemption. The only dispute is with reference to the difference between the amount fixed in the lower Court, and the amount claimed in appeal. Such a claim does not come under S. 7, Cl. (ix), nor does it fall under any other provision in the Act. It is therefore not "otherwise provided for" and so Court-fee must be paid on the memorandum of appeal in accordance with Art. 1, Sch. I, that is, the fee must be paid *ad valorem* on the value of the subject-matter in appeal. 167 I.C. 577=1937 N. 6.

Sec. 7 (x) (a).—See 40 C.W.N. 90=62 C.L.J. 405 ; 63 C. 657. S. 7, Cl. (x) (a) applies to a suit for specific performance of a contract to sell, in which the plaintiff seeks to force the vendor to execute and register a sale-deed and also to hand over possession of the property. 38 A. 292=14 A.L.J. 434 ; 45 M.L.J. 431=47 M. 150=1924 M. 360. See also 1937 M.W.N. 236=1937 M. 831. But in Punjab such suit was held to fall under S. 7 (v) and not under S. 7 (x) (a). 128 P.W.R. 1918=46 I.C. 534 ; 60 I.C. 512 ; 107 P.W.R. 1916=34 I.C. 192. But now in Punjab also such suits are held to fall under S. 7, Cl. (x) (a). 1923 L. 456 ; 1924 L. 439=5 L. 75 ; 1928 L. 635. In Calcutta such a suit falls under Cl. (v). 14 C.L.J. 159=11 I.C. 228. So also in Patna. 118 I.C. 134=1929 P. 645. For Court-fee for such suits in Bombay, see Bom.P.J. 1890, p. 204. Court-fees are payable on both the reliefs according to 60 I.C. 654 (O.). The clause covers also exchange. 1923 L. 456.

Sec. 7 (x) (c).—A suit for specific performance of a contract of lease should first be valued for Court-fees under S. 7 (x) (c) and the same is the value for purposes of jurisdiction. 34 C.L.J. 94=66 I.C. 268=25 C.W.N. 768.

As to suits falling under the clause, see 17 C.W.N. 160=15 I.C. 46 ; 25 C.W.N. 768=34 C.L.J. 94 ; 1939 A.M.L.J. 80 ; I.L.R. (1939) Mad. 367=1939 Mad. 360=(1939) 1 M.L.J. 268 (F. B.) ; 1936 A.M.L.J. 114. A suit for possession by lessee is not a suit for specific performance but one falling under cl. (v). 16 C.L.J. 375=16 I.C. 963 ; 5 A.L.J. 586 ; 14 L.R. 539 (Rev.)=1933 O. 363. A executing lease of property in favour of B—Death of A—Court of Wards taking superintendence leasing same property to C and D—Suit by B for possession is one for specific performance and Court-fee payable as such. 1937 Sind 93. See also 1936 A.M.L.J. 114.

Sec. 7 (xi).—A suit for fixation of rent under S. 45 of the Agra Tenancy Act has to be valued for purposes of Court-fee at the annual rent asked for by the plaintiff, as required by S. 7 (xi). 1936 R.D. 390. In a suit for assessment of rent, there being no rent previously, cl. (xi) does not apply. 1927 P. 123.

Sec. 7 (xi) (b).—A tenure-holder is a tenant within the meaning of S. 7 (xi) and the words "right of occupancy" used in cl. (b) of the section are to be understood in the popular and more general sense of a right by virtue of which a tenant remains in actual and physical possession as it were of the tenancy and so does not include the rights of a tenure-holder. 61 C. 513=38 C.W.N. 527=1934 C. 674.

Sec. 7 (xi) (cc) : PUNJAB.—Holding over after determination of tenancy. See 154 I.C. 615=1935 P. 90. Where a fiscal distinction is made between two causes of action, they can properly be regarded as two distinct causes of action. 1935 A.M.L.J. 4. This section is not confined to cases where the defendant is clearly estopped from denying the plaintiff's title. 99 I.C. 981=1927 M. 331=52 M.L.J. 100. See also 116 I.C. 374. The word "tenant" means a person who was a tenant but had ceased to be so. 33 C.W.N. 769=1930 C. 42. In a suit for ejectment of an under-raiyat, the Court-fee payable is one year's rental. 133 I.C. 689=54 C.L.J. 68. The words "including a tenant holding over" are sufficient to indicate that the provision is meant to cover even those cases where a person was a tenant before but his tenancy has been determined since. 14 P.L.T. 616=1933 P. 664 ; 42 P.L.R. 784=1941 L. 39. See also I.L.R. (1940) Nag. 391=1938 Nag. 162 (Suit against former tenant who set up an adverse title himself). Where a person claimed to be on the land on payment of rent and it ap-

(d) to contest a notice of ejectment,

(e) to recover the occupancy of ¹[immovable property] from which a tenant has been illegally ejected by the landlord, and

(f) for abatement of rent—

according to the amount of the rent of the ¹[immovable property] to which the suit refers, payable for the year next before the date of presenting the plaint.

8. The amount of fee payable under this Act on a memorandum of appeal against an order relating to compensation under any

Fee on memorandum of appeal against order relating to compensation.

Act for the time being in force for the ²acquisition of land for public purposes shall be computed according to the difference between the amount awarded and the

amount claimed by the appellant.

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¹ Substituted for the word "land" by S. 2 (2) of the Court-Fees (Amendment) Act, (VI of 1905.)

² See now the Land Acquisition Act (I of 1894).

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peared that his father had during his lifetime held over the land for a number of years after the expiration of the lease, and the landlord instituted a suit in ejectment. *Held*, that the suit was governed by S. 7 (xi) (cc). 1933 C. 822. Tenant holding over—Assignee from lessor—Suit by for possession—If one by landlord against tenant—Jurisdiction—Determination. 44 L.W. 800=71 M.L.J. 342. Suits between landlord and tenant have to be valued for Court-fees upon the rent for the previous year and the same is the value for jurisdiction. 25 I.C. 975=12 A.L.J. 933. A suit to recover possession of land from a tenant is valued according to a year's rental next before date of presenting the plaint under S. 7 (xi) (cc) and not under S. 7, Cl. (v) (d). 39 M. 873=29 M.L.J. 572; 27 P.R. 1910=5 I.C. 910; 2 P. 260=4 P.L.T. 662; L.R. 5 A. 709; 83 I.C. 1=1925 A. 142. See also 38 M. 795=24 I.C. 374=26 M.L.J. 573; 99 I.C. 438 (2)=1927 N. 156; 93 I.C. 291. This is so even where plaintiff is in possession of part of a house and wants to recover another part from his alleged tenant. 104 I.C. 412=1927 Sind 248. In such a case Court-fee is payable on proportionate rent. 139 I.C. 95=1932 Sind 73. A suit by a landlord against his tenants holding over after the period of their tenancy, for recovery of possession also falls under this clause. 55 I.C. 178=24 C.W.N. 151; 33 Bom.L.R. 263=1931 B. 234. But where the tenant holds over in spite of notice to quit, he is a trespasser and a suit for possession against him falls under S. 7 (v). 1923 N. 310=8 N.L.J. 63; 20 N.L.R. 124; 84 I.C. 202=1925 N. 131. See also 1928 C. 753. Where a relief against a trespasser is claimed along with a relief against a tenant, the former portion does not fall under the clause. 91 I.C. 488=1926 C. 504. In suits under the clause, the Court will not go into the question of title. 27 I.C. 162=27 M.L.J. 475; 5 P. 208=1936 P. 251. But see 91 I.C. 488=1926 C. 504. Where in a suit for ejectment there was an additional prayer for declaration of plaintiff's title as owner, the Court-fee is payable under S. 7, Cl. (iv) (c) and not under this sub-clause. 29 L.W. 760=1929 M. 529. See also 5 P. 208=94 I.C.

19=1926 P. 251. But where in an ejectment suit the question of title was raised by the defendant, the suit should be valued under this sub-clause. 33 C.W.N. 769=1930 C. 42. See also 138 I.C. 88=1932 M. 409. A suit for declaration of kudiwaram right and ejectment of tenant falls under Cl. (iv) (c) and not under this clause. 63 M.L.J. 759=140 I.C. 462. In suit for possession of properties from tenants, if a decree is passed conditional on the plaintiff paying a certain sum of money for value of improvements due to the defendants, the plaintiff appealing against the decree awarding compensation, there being no question about possession, must pay Court-fee on the value of improvements. The subject of the appeal is the value of improvements and not possession of land as in the suit in the lower Court, and it is not therefore enough if the appeal be valued as a suit for possession. 48 L.W. 661=(1938) 2 M.L.J. 840.

Sec. 7 (xi) (d).—In a case to contest a notice of ejectment the relief claimed may be in the alternative (a) non-ejectment, (b) compensation, but the suit is valued on the rental of the land without any regard for compensation claimed, the claim for compensation being regarded as ancillary. If ejectment were decreed with compensation and the tenant appealed claiming still non-ejectment and in the alternative more compensation, he would still pay on the original subject-matter that is the rent. But where the landlord defendant appeals and the relief which he denies to get rid of is simply the amount of the compensation, he should pay *ad valorem* Court-fee. 11 L.L.T. 116. See also 20 L.L.T. 155.

Sec. 7 (xi) (e).—A suit for possession by a tenant against his landlord falls within S. 7, Cl. (xi) (e). 16 C.L.J. 375. The clause should not be limited to suits where the landlord and tenant alone are parties. It applies to cases where to avoid delay, etc., other persons also are impleaded. 87 I.C. 1002=1925 S. 275. But see 32 C. 268 where the clauses have been held not to apply to such cases. A suit for possession by a tenant against the landlord and persons claiming only melwaram rights is not governed by this clause but by Cl. (5). 31 M. 11=17 M.L.J. 478. The value for purposes of jurisdiction also is the same as that for Court-fee. 39 M. 873=29 M.L.J. 572=31 I.C. 104.

Sec. 8 : SCOPE AND APPLICABILITY.—S. 8 is a special provision applicable to appeals against all orders of awards relating to compen-

9. If the Court sees reason to think that the annual nett profits or the market-value of any such land, house or garden as is mentioned in section 7, paragraphs 5 and 6, have or has been wrongly estimated, the Court may, for the purpose of computing the fee payable in any suit therein mentioned, issue a commission to any proper person directing him to make such local or other investigation as may be necessary, and to report thereon to the Court.

10. (i) If in the result of any such investigation the Court finds that the nett profits or market-value have or has been wrongly estimated, the Court, if the estimation has been excessive, may in its discretion refund the excess paid as such fee; but, if the estimation has been insufficient, the Court shall require the plaintiff to pay so much additional fee as would have been payable had the said market-value or nett profits been rightly estimated.

(ii) In such case the suit shall be stayed until the additional fee is paid. I

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sation under the Land Acquisition Act, and overrides the general provision contained in Art. 17 (iv) of Sch. II. 21 M. 269; 159 I.C. 274=1935 L. 448. See also on the section, 21 A. 354; 21 M. 309; 39 C. 906; 17 I.C. 724=17 C.W.N. 933; 35 C.W.N. 1103. An appellant is bound to include in the valuation of his appeal the amount of 15 per cent. of the excess market-value and pay Court-fee thereon. 57 M.L.J. 357=1930 M. 45. Section inapplicable to appeal by the Crown on the ground that the award is excessive. 46 M.L.J. 150=1924 M. 489 (2); 1928 R. 197=6 R. 281; 138 I.C. 199=1932 O. 224. The memorandum of appeal by a claimant to land acquired in a Land Acquisition proceeding should bear a Court-fee stamp *ad valorem* on the value of the land claimed. 45 Bom. 277=64 I.C. 582 (584)=23 Bom.L.R. 148. In appeals against orders passed in reference under S. 30, Land Acquisition Act, *ad valorem* Court-fee payable under Art. 1, Sch. I, and S. 8 is inapplicable. 56 M.L.J. 337=1929 M. 223. See also 60 C.L.J. 216. Where the appellant definitely claims a share in the compensation awarded for the land acquired by Government under the Land Acquisition Act, Court-fee is payable on the *ad valorem* scale on the value of the appellant's claim. 134 I.C. 127=1931 L. 343. Where the compensation money is in *custodia legis* and the question in the appeal merely is, which of the rival claimants is entitled to it, a mere declaration by the appellate Court will be sufficient and Court-fee is therefore payable only on that basis. 55 M. 641=1932 M. 438=62 M.L.J. 541. The Court-fee payable in respect of a memorandum of appeal against an award by a tribunal constituted under the U. P. Town Improvement Act, is under S. 8 of the Court-Fees Act which applies to the case, on the difference between the claimed and awarded amount. The appeal will not come under Sch. II, Art. 17 (iv). I.L.R. (1939) All. 142=1938 A.L.J. 1124=1939 All. 127.

Sec. 9.—The Court is not bound to appoint a commissioner to hold an investigation. It may itself hold an enquiry. 29 A. 749=4 A.L.J. 636. The decision of the Court as to the market-value of immovable property passed after objection made, if final, even though no enquiry was made under a commission.

14 W.R. 451. The commission may issue at any stage of the suit. 2 M. 308=4 Ind. Jur. 285. If a commission is ordered under S. 9 not at the instance of the plaintiff, there is no power to make the plaintiff deposit the costs of the commission. 33 C.W.N. 952=50 C.L.J. 164=1930 C. 65. Where the question of deficit Court-fees was not apparent on the face of the record, payment of Court-fees cannot be made a condition precedent to the filing of appeal. The proper course is to order judicial enquiry under this section after the appeal is filed. (*Ibid.*) See also 1929 C. 717.

Secs. 9 to 11: SCOPE AND APPLICATION.—Ss. 9 to 11 do not relate to appeals. 12 A. 129 (F.B.). The sections are not in conflict with S. 28. (*Ibid.*) As to the effect of dismissal of a suit under the sections, see 12 A. 129; 8 A. 282.

Sec. 10: SCOPE AND APPLICATION.—See 12 A. 129. The specific provisions of S. 28 are not cut down by the section. (*Ibid.*) The Court has no jurisdiction to order the deficit Court to be paid by the plaintiff after the dismissal of his suit and on his default, to order, the attachment of his properties. 46 C. 520; 52 I.C. 435. See also 152 I.C. 799=1935 L. 75; 32 I.C. 534=9 Bur.L.T. 43; 1925 L. 131; 142 I.C. 225=1933 M. 321. If the Court finds that sufficient Court-fee has not been paid it is bound to stay the suit and to fix a time within which the additional fee can be paid, without any regard to the fact, whether that be a time within or beyond, the period of limitation. 4 A.L.J. 636=29 A. 749. If the fee is paid within the time so fixed, the plaint is as valid as if it had been properly stamped in the first instance. 29 A. 749. See also 34 C. 20 (F.B.). A plaintiff who fails to pay additional Court-fee within the time allowed by the Court, is liable to have his suit dismissed under S. 10 and not to have his plaint rejected under O. 7, r. 11, C. P. Code. 26 I.C. 746=16 Bom.L.R. 763; 29 A. 749. But only a Court having jurisdiction to try the suit can so dismiss it. 51 B. 236=29 B.L.R. 280=101 I.C. 343=1927 Bom. 257. The dismissal, however, has the same effect as rejection. 12 A. 129. It could not operate as *res judicata*. 8 A. 282. An order rejecting a memorandum of appeal for deficient Court-fee is not a decree or final order and does not preclude the appellant

the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed.

(ii) 1[* * * * *]

11. In suits for mesne profits or for immovable property and mesne profits, or for an account, if the profits or amount decreed are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amount so decreed shall have been paid to the proper officer.

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¹ Cl. (iii) was repealed by the Repealing and Amending Act, 1891 (XII of 1891). The clause was as follows:—"S. 180 of the Code of Civil Procedure shall be construed as if the words 'the market-value of any property or' were inserted after the word 'ascertaining' and as if the words 'or annual net profits' were inserted after the word 'damages.'"

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from presenting a fresh memorandum on proper Court-fee. 59 C. 388=138 I.C. 643=1932 C. 482. A suit can be dismissed under the section at any stage of the case. 2 M. 308. See also 56 I.C. 316=4 P.L.J. 703. Once a Court finds that the market-value of the property is different to that alleged in the plaint, the plaintiff should be at once called upon to make up the proper Court-fee as determined, before the trial of the suit takes place. It is obviously improper for the Court to hold up the decision on the question of Court-fee until the end of the suit and incorporate the order passed in the decree which is perfectly useless. (1935 L. 75 Rel. on.) 40 P.L.R. 88=1938 Lah. 311. The plaintiff can abandon a portion of the claim and retain that part for which he had already paid Court-fee. 27 A. 151. But see *contra* 16 Bom.L.R. 763=26 I.C. 746. Where a Court returns a plaint for presentation to a proper Court, the latter Court to which the plaint is presented should give credit to the fee already paid. 51 B. 236=29 Bom.L.R. 280=1927 B. 257; 35 M. 567=21 M.L.J. 533.

Sec. 11: SCOPE AND APPLICATION.—See 12 A. 129. S. 11 of the Court-Fees Act casts a duty on the executing Court to collect the deficit Court-fee when it finds that execution is sought for the recovery of an amount over and above what was claimed in the plaint. The power of the executing Court in this behalf does not depend on any direction in the final decree. The executing Court has also the power to determine whether this amount should be borne by the decree-holder himself or can be recovered by him from the judgment-debtors as costs relating to execution. 38 L.W. 572=1933 M. 787=65 M.L.J. 526. S. 11 refers only to suits for mesne profits for immovable property or for accounts and does not apply to mortgage suits where on account of the interest *pendente lite* a decree for a much larger amount than was claimed is passed. 3 P.L.T. 146=1922 P. 59. See also 105 I.C. 395=1 P.L.T. 331. There is no provision of law authorising the assessment of additional Court-fee by reason of the accrual

of interest *pendente lite*. 1927 P. 230; 1928 P. 58; 17 B. 41; 1928 P. 58. In cases within the first paragraph of S. 11 of the Court-Fees Act non-payment of the balance of Court-fee merely postpones the date on which the decree can be executed while the second paragraph under which the Court has power to dismiss the suit is only applicable "where the amount of mesne profits is left to be ascertained in the course of the execution of the decree." Where the account directed by a decree is not an account of mesne profits nor is it so described, and it involves among other things an account of the sums received from a money-lending business, and further the amount due to the plaintiff thereon is not "left to be ascertained in the course of the execution of the decree," the case does not fall within the second paragraph and the Court has, therefore, no jurisdiction to dismiss the suit for non-payment of the additional Court-fee. Further, an order dismissing a suit for non-payment of additional Court-fee is improper, if passed with a minimum of circumspection and no warning. Where, therefore, at no time was there in existence an order fixing the amount of additional Court-fee and limiting a time for payment still less was there a peremptory order on the footing that the plaintiff was in default, an order dismissing the suit for non-payment is not a reasonable one and cannot be allowed to stand. 64 I.A. 191=18 Lah. 502=(1937) 2 M.L.J. 1=1937 P.C. 163 (P.C.). In the case of suits for accounts, S. 11 of the Court-Fees Act only furnishes one method for protecting the interest of the Crown. The proper procedure, if the appellate Court after the hearing and consideration of the appeal comes to a conclusion in favour of the appellant in respect of a larger amount than what he has paid Court-fees for, would be to post the case for orders and direct the appellant to pay additional Court-fee and only then the judgment should be delivered and the decree allowed to be drawn up. 64 M.L.J. 122=141 I.C. 602=1933 M. 330. The penalty mentioned in the final provisions of S. 11 does not apply to the cases coming under the first para. 11 I.C. 73 (C.). The Court has no power to fix any time for payment, in such cases; only the decree cannot be executed until the additional fee is paid. 59 I.C. 385 (M.). See also 30 M. 82. If the appellate Court grants a decree for an amount larger than that claimed in the Court below, Court-fee must be paid on the difference and unless this is done the decree cannot be executed. 3 P.L.T. 813=1923 P. 28. The word 'decree' in S. 11, para. 2 as

Where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed, the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed.

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applied to a suit for partition and mesne profits means the final and not the *interim* decree. 59 I.C. 385 (M.). Where the value of the reliefs is ascertained after trial, the Court-fee on the difference between the plaint valuation and the amount decreed should be paid, under the 2nd paragraph. 24 I.C. 643=1 O.L.J. 281. A Court has discretionary power under S. 11 to enlarge the time originally fixed for the payment of the Court-fees in such cases, even when application to enlarge the time is made after the expiry of the time originally granted. 10 I.C. 268=13 C.L.J. 432. Where a plaintiff claimed mesne profits from a certain date till delivery of possession of property, but no Court-fee was paid on that claim but a statement was made that Court-fee on that relief would be paid when ordered by the Court. *Held*, that the plaintiff ought to have given a tentative valuation for the claim for mesne profits and on that valuation Court-fees ought to have been paid, and that an amendment of the plaint so as to remove that technical defect could be permitted even in appeal. 72 C.L.J. 14=1941 Cal. 1.

MESNE PROFITS.—A decree for mesne profits does not become operative till after the amount has been ascertained, and the Court-fee under S. 11 paid. 27 I.C. 300 (P.). The second part of S. 11 applies only to a claim for mesne profits accruing subsequently to the date of suit of which the plaintiff is unable to calculate the approximate value because he cannot say for how long a period he is likely to be kept out of possession. 13 P.L.T. 810=12 P. 188=1933 P. 81. The Court-fee payable is an *ad valorem* fee. 55 I.C. 24=1 P.L.T. 235. On this point, see also 50 M. 488=52 M.L.J. 128. The mere fact that Court-fee had not been paid on a decree granted does not prevent the decree-holder from making an application for execution and all that S. 11 provides is that the decree should not be executed (34 Bom. 189 and 1930 Nag. 241 Rel. on.) 178 I.C. 202=1938 Lah. 326. The plaintiff can obtain execution of a portion of the decree granting reliefs other than mesne profits without paying Court-fee on such mesne profits. 12 B. 98. See also 24 C. 174; 54 M. 98=1931 M. 717=61 M.L.J. 424. The term 'suit' is to be construed as confined to that part of the suit which relates to mesne profits. 12 B. 98. So in case of default, the claim in respect of mesne profits alone is to be dismissed. 24 C. 173=1 C.W.N. 243. After such dismissal, application for execution of the decree for mesne profits cannot be entertained. 24 C. 173. Approximate amount to be stated for mesne profits accrued due before suit. 24 I.C. 232 (C.). The plaintiff in a suit having omitted to claim future mesne profits, subsequently applied for permission to amend his plaint by including a claim therefor, but the application was rejected. Against the decree

for possession the defendant appealed to the High Court and the plaintiff filed a memorandum of objections claiming future mesne profits, but, his contention that no Court-fee was payable on the claim for mesne profits was overruled by the Taxing Officer, who held that *ad valorem* Court-fee was payable on the amount claimed. At the time of the hearing of the appeal, plaintiff questioned the decision of the Taxing Officer and claimed refund of the amount of Court-fee paid by him on the claim for future mesne profits. *Held*, (1) that no Court-fee was payable in respect of claim for future mesne profits, and under S. 11 of the Court-Fees Act, as amended in Madras, no Court-fee is payable in respect of future mesne profits before the final decree is passed, a claim to mesne profits being in respect of a cause of action not arising at the date of the suit, although the Court is empowered to grant the same by way of exception to the general rule, and that the decision of the Taxing Officer was therefore wrong; (2) that under S. 5 of the Court-Fees Act, the decision of the Taxing Officer had become final for every purpose and could not be impeached before the Court at the time of the hearing of the appeal and the Court could not consequently make an order granting a refund of the Court-fee paid. 165 I.C. 972=44 L.W. 763=71 M.L.J. 677.

COURT-FEES IN APPEAL.—Where in a suit for partition and mesne profits, the Court awarded in the preliminary decree mesne profits for three years before suit but made provision for its subsequent determination, in the appeal therefrom, the defendant need not pay any Court-fees in respect of this decree for mesne profits. 58 M.L.J. 497=1930 M. 597 (52 M.L.J. 128 to the contrary not approved). But see 8 P. 906=1929 P. 731. Where the applicant for the recovery of mesne profits appeals from the decision of the trial Court awarding him a smaller amount than what he claimed he is not bound to pay *ad valorem* Court-fee on the amount of his claim. No Court-fee apart from the fixed fee can be claimed from him until the amount of mesne profits actually due to him has been ascertained. 11 P.L.T. 703.

FUTURE MESNE PROFITS.—As to whether Court-fee is payable on future mesne profits under the section, there is a conflict of rulings between the various High Courts. See 20 M.L.J. 98=5 I.C. 880; 15 B. 416; 17 B. 41; 6 O.C. 351; 13 C.W.N. 815; 24 I.C. 232; 21 M. 371 (appeal); 2 A. 642; 3 C.L.J. 94; 16 C.L.J. 564; 15 I.C. 572; 1938 M. 727= (1938) 1 M.L.J. 750. A direction in a decree for payment of extra fee in respect of such mesne profits does not form part of the decree. The execution of the decree is not conditional upon the payment of the extra-fee. 30 M. 32=16 M.L.J. 543. See also 33 C. 1232. The law on the subject has been made clear so far as Madra

12. (i) Every question relating to valuation for the purpose of determining

the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit:

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is concerned. See para 3 of S. 11 substituted by Madras Act V of 1922. See I.L.R. (1938) Mad. 1050=1938 M. 727=(1938) 1 M.L.J. 750. Court-fee is payable on future mesne profits but it can only be exacted after the amount has been ascertained by enquiry and the Court has no jurisdiction to dismiss such an application for non-payment of Court-fee in advance. 5 P. 361=93 I.C. 939=1926 P. 218 (F.B.). See also 108 I.C. 801=9 P.L.T. 657; 1930 R. 246. Fees are payable on the difference between the amount paid on the mesne profits claimed in the plaint and the amount ascertained to be due subsequent to the filing of the suit. 10 L.B.R. 276=62 I.C. 175; 1929 L. 753. Collection of excess Court-fee. See 152 I.C. 608=1935 L. 40.

ACCOUNT SUITS.—The plaintiff has a right to value his claim on estimate and the Court has power to decree larger amount. 24 O.C. 209=64 I.C. 101. See also 25 M. 543; 12 M.L.J. 35; 9 B. 22; 27 Punj.L.R. 187=94 I.C. 650=1926 L. 242 (1).

ADMINISTRATION SUIT.—The Court-Fees Act is a fiscal statute and must be construed strictly and S. 11 of the Act, therefore, cannot be applied by analogy. In an administration suit by a creditor, till the decree is passed it is the plaintiff who is the *dominus litis* and has the carriage and conduct of the proceedings. Other creditors impleaded as defendants cannot be said to occupy the position of a plaintiff up to that stage at any rate. Though administration suit is analogous to an account suit up to a certain stage, the two are not identical for all purposes, at least so far as the ultimate decision of the Court is concerned. Hence where in a suit by a creditor for administration of the estate of a deceased debtor, other creditors are impleaded as party defendants before the preliminary decree and they set out in their written statements their claims against the estate of the deceased aggregating to certain amount, but the Court has allowed certain dividends to be paid to the creditors on a basis of certain percent, upon the amounts found to have been due to them, those creditors cannot be ordered to pay Court-fees upon the entire amount of their claims, irrespective of what are being actually paid to them as dividends. 43 C.W.N. 52=68 C.L.J. 345=1938 Cal. 785. See also 54 L.W. 663=(1941) 2 M.L.J. 692; 1941 Rang.L.R. 512=1941 Rang. 312; 42 P.L.R. 101. It is the practice in the *moffusil* to demand payment of Court-fees from defendants, who come in under a preliminary decree in administration suits and they cannot obtain relief under the decree without payment of the proper Court-fee. 1939 Rang.L.R. 134=1939 Rang. 115. See also 17 Pat. 542.

POWER OF COURT TO PASS DECREES FOR SUMS BEYOND PECUNIARY JURISDICTION.—In suits for accounts and mesne profits, even if the

sum found due exceeds the pecuniary jurisdiction of the Court, it is competent to the Court to give a decree for such amount. 40 M. 1=32 M.L.J. 221=39 I.C. 439 (F.B.); 33 A. 97; 28 Bom.L.R. 1461=1927 B. 83; 89 I.C. 353=1925 Sind 324. But see the decisions of the Calcutta High Court to the contrary. 13 C.W.N. 493; 21 C.W.N. 310; 43 C. 650=15 C.W.N. 506=13 C.L.J. 132. See also 1929 L. 107; 49 P.R. 1906=94 P.L.R. 1906; 2 R. 408. The case of future mesne profits stands on a different footing from a suit for accounts, see 53 C. 14=1925 C. 1076 (F.B.).

Sec. 12: CONSTRUCTION OF SECTION.—The provisions of section are to be strictly construed. The additional fees should be levied in exact conformity with the words of the statute. 39 C.L.J. 217=82 I.C. 292=1924 C. 953. The question of the sufficiency of the stamp on the memorandum of appeal should always be regarded as open until the appeal is finally heard and disposed of. 14 P.L.T. 180=12 P. 694=1933 P. 234. When a Court has passed a judicial order fixing the correct court-fee payable on a memorandum of appeal, it is not open to that Court to vary it afterwards either at the instance of a party or of its own motion. [(1937) 1 M.L.J. 89 and (1935) 69 M.L.J. 439 followed]. 48 L.W. 461=(1938) 2 M.L.J. 647. After the suit is decided, the Court is no longer seized of the case and has no jurisdiction to require the plaintiff to make good the alleged deficiency in Court-fee. (82 I.C. 588 and 52 I.C. 435, foll.) 34 P.L.R. 84=1933 L. 208. See also 18 P.L.T. 864. Once on an objection taken by the office or by a defendant, the Court applies its mind and gives its considered decision, holding that the Court-fee paid was sufficient and correct, the decision is final under S. 12 (1) and the Court has no power to revise the valuation. Nor can the High Court, in revision against an order of the lower Court from the later order passed in supersession of the first order, act under S. 12 (2) of the Act, because the suit itself is not before the High Court. The condition precedent to the exercise of powers under S. 12 (2) is that the suit, i.e., the subject-matter of the suit, should be before the Court of appeal, reference or review. 45 L.W. 206=1937 M. 325=(1937) 1 M.L.J. 89. The expression "every question relating to valuation" in S. 12 (1) is of a comprehensive nature and cannot be construed in the restricted sense of a question relating to appraisal of Court-fee as distinguished from the question of category; nor is there any justification for putting the same limited interpretation on the words "the said question" in cl. (ii) of the section. I.L.R. (1937) M. 275=1937 M. 81=(1937) 1 M.L.J. 1 (F.B.).

SCOPE OF THE SECTION.—A decision on the question of Court-fee in the Court of First Instance is final between the parties under S. 12 (1) but can be reopened by an appellate

(ii) But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided

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Court under S. 12 (2) in the interest of revenue. 25 I.C. 506 (M.). See also 60 C.L.J. 201=39 C.W.N. 131; 43 B. 507 (P.C.); 40 I.C. 904=106 P.W.R. 1917; 90 I.C. 321 (2)=1925 P. 488. The valuation made by the Court of first instance for the purpose of assessing Court-fee is final and cannot be challenged in appeal, when there is no question as to the class in which the suit falls and the question is merely of valuation in that class. I.L.R. (1940) 2 Cal. 166=44 C.W.N. 745=1940 Cal. 451. It cannot be held that a decision would be final under S. 12 (1) only if it has been finally arrived at after both parties have been heard. The words "decided" and "decision" are used without any qualifications at all and they must clearly apply to any adjudication by the Court whether both parties have been heard or only one party has been heard or even if no party at all has been heard. The only essential is that the Court should apply its mind to the questions at issue in arriving at the true calculation of the Court-fee. The real object of S. 12 (1) is to ensure that the Court at as early a stage as possible should finally determine what was the amount of the Court-fee payable before the subject-matter of the suit itself was to be embarked upon; and once the Court did so determine, the parties were not to be permitted to raise the question again before it. 1941 M.W.N. 406=53 L.W. 740=1941 Mad. 626=(1941) 1 M.L.J. 796. The decision is not final within the meaning of S. 12 unless it is reached after both sides have had a chance to be heard. After a plaint is filed and summons is issued to the other side, it is open to the other side to contend that the Court-fee paid is insufficient. It is on deciding such a plea that the Court would come to a 'decision' which under S. 12 of the Act would be final as between the parties. 1941 N.L.J. 303=1941 Nag. 217. If the Court comes to the conclusion under S. 7 (v) (a) of the Court-Fees Act that a certain amount is the net profit in the year immediately preceding the institution of the suit or investigates the question of market value and arrives at a certain figure, its finding is final and conclusive under S. 12 (1) only as regards the amount or figure so arrived at. I.L.R. (1940) 2 Cal. 450=44 C.W.N. 822=1940 Cal. 438. Appeal requiring *ad valorem* Court-fee filed as miscellaneous appeal and allowed—Application by respondent after remand for stay of proceedings until payment of proper Court-fee—Order rejecting—Revision—High Court would not interfere if the order is mandatory correct. 18 P.L.T. 864=1937 P.W.N. 893.

FINALITY OF DECISION UNDER SUB-S. (1).—An appeal would lie from the decision of a Court in respect of the class in which a suit ranks but no appeal would lie from a decision in respect of the valuation of the suit in that class. 28 A. 411; 23 B. 486. See also 1935 L. 698; 1935 A. 455; 27 B. 140; 17 B. 56; 15 B. 82; 16 I.C. 963=16 C.L.J. 375; 6 C. 249; 23 C. 723; 28 C. 334; 51 C. 216=28 C.W.N. 683=1924 C. 731; 14 M. 169; 1925 M. 713=48 M.L.J. 688; 90 I.C. 321 (2)=

1925 P. 488; 3 P. 930=1924 P. 673; 87 I.C. 911=1925 N. 4; 49 I.C. 442; 16 P.R. 1919=49 I.C. 711; 16 I.C. 773=6 S.L.R. 72; 105 I.C. 610; 106 I.C. 817; 130 I.C. 643=1931 Lah. 378; 33 Bom.L.R. 263=1931 Bom. 234. Nor is such an order revisable. 1927 M. 1021. Though there is no appeal against a decision as to the correct valuation for any particular class of suits, still there is an appeal against a decision that any particular suit falls within a particular class, where, though the suit is nominally one for accounts, still it is part of the case for the defendants that the suit is really one for an ascertained sum of money, there is a conflict between the plaintiffs and the defendants as to the class within which the suit falls, and there is, therefore, an appeal available. 162 I.C. 227=38 Bom.L.R. 218=1936 B. 166. S. 12 makes the valuation for the purposes of Court-fees final. It has got nothing to do with the question of valuation for the purposes of jurisdiction. If, therefore, a trial Court comes to the conclusion that the value of the subject-matter of a suit is beyond its jurisdiction and returns the plaint under O. 7, R. 10, in an appeal from that order the appellate Court can enter into the question of valuation, and if it finds that it is within the jurisdiction of the trial Court it should direct it to entertain the suit. 44 C.W.N. 394. See also 1938 N.L.J. 214=1938 Nag. 481. Where, in a suit for declaration that a certain revenue sale is illegal and *ultra vires* and not binding on the plaintiff, the plaintiff values the suit as one for a declaration only and pays a Court-fee of Rs. 200, and the Court decides the question of Court-fee as a preliminary issue and decides that that Court-fee paid is sufficient, no appeal lies against such decision. The order of the Court holding that the Court-fee paid was correct cannot also be taken to be a decree which would be appealable under the C. P. Code. 63 C.L.J. 16=1936 C. 784. Where an order rejecting a plaint necessarily involves a decision of the category or class under which a suit falls, even though it incidentally decides a question of valuation, the order is appealable. 49 I.C. 442=4 P.L.J. 57. If the dispute involves questions of principle as to the nature of the suit and the retrospective operation of statutes an appeal against an order for payment of Court-fee is maintainable. 51 C. 216=28 C.W.N. 683=1924 C. 731. The section does not also apply where the question relates to the competency of the Court of first instance to entertain the suit. 17 C.W.N. 503=16 I.C. 575=16 C.L.J. 371; 3 P. 930=1924 P. 673. Thus an order returning a plaint for representation on the basis of the valuation made by the Court, is appealable. 52 I.C. 1001=1919 M.W.N. 599. See also 47 I.C. 7=151 P.W.R. 1918. The decision to be final must be a decision made between the parties on the record after plaint is filed. 20 A. 11 (F.B.).

Sec. 12 (ii) : SCOPE OF.—Under S. 12 (ii) of the Court-fees Act, the appellate Court has power to require a party to make good the deficiency in the Court-fee payable by him in the lower Court in cases in which

to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of S. 10, paragraph ii, shall apply.

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the lower Court has expressly or impliedly decided the question of the category in which the suit ought to be placed for purposes of Court-fee, but which decision is, in the opinion of the appellate Court, erroneous. I.L.R. 1937 M. 275=1937 M. 81=(1937) 1 M.L.J. 1 (F.B.). The words "any such suit" in S. 12 (ii) cannot be construed to mean the entire suit and not a part of the suit. S. 12 (ii) therefore applies not only when the whole decree has been appealed against but also when the appeal is only with regard to a portion of the claim in suit. 63 C. 720=40 C.W.N. 406. There is nothing in S. 12 (2) of the Act to justify the view that a Court may not reconsider an order which it has already passed under the sub-section. 53 L.W. 740=1941 Mad. 626=(1941) 1 M.L.J. 796. There is no warrant for holding that S. 12 (2) applies only to cases where the plaintiff is the appellant. Applying S. 10 (2) to appeals and reading it with S. 12 (2), the word "suit" should be deemed to include an appeal. The actual wording of S. 12 (2) shows that the appeal is considered as an extension of the suit. 51 L.W. 434 (2)=1940 M.W.N. 348=1940 M. 674=(1940) 1 M.L.J. 478 (2). Where only a part of the subject-matter of the suit is the subject of appeal and is before the appellate Court, that Court acting under S. 12 (ii) of the Court-Fees Act can realise the deficit Court-fee only in respect of that part and not on the entire subject-matter of the suit. I.L.R. (1938) Mad. 309=47 L.W. 70=1938 Mad. 278=(1938) 1 M.L.J. 29. The jurisdiction of the Taxing Officer is limited to cases in which it is alleged that a document filed, exhibited or received in the High Court is not sufficiently stamped. It does not extend to cases in which it is alleged that a party paid insufficient Court-fee on his plaint or memorandum of appeal in the lower appellate Court. To this class of cases, S. 12 (ii) is clearly applicable. 1934 A.L.J. 957=1934 A. 805. An appellate Court cannot under S. 12 (ii) order payment of additional Court-fee stamps, unless the first Court has decided the question of valuation. 36 I.C. 957=10 Bur. L.T. 242. But see *contra* 31 C.W.N. 1045=1927 C. 775. But where the Court proceeds to the trial of the suit, it must be assumed that the Court has tacitly decided that the fees paid is correct. 109 P.R. 1912=15 I.C. 463. S. 12 (2) gives an appellate Court power when an appeal comes before it to correct a mistake made below, and has jurisdiction to require payment of the difference between the Court-fee actually paid and the proper Court-fee payable, although no question was raised when the case was in that Court. I.L.R. (1940) Mad. 646=1940 Mad. 383=(1940) 2 M.L.J. 425. The act of the chief ministerial officer entrusted with the duty of receiving plaints and seeing that proper Court-fee is paid thereon, in accepting the plaint amounts to such decision. 1926 M. 96=49 M.L.J. 608. The question of deficit Court-fees should be dealt with by the

appellate Court as soon as it is discovered, though it may be postponed at the Court's discretion in exceptional cases. 62 I.C. 43=6 P.L.J. 293. If the question arises on appeal, the appeal should first be admitted so as to remove doubts, as to jurisdiction, and this point should be decided before other issues, and appeal should be stayed till the deficit is paid. 62 I.C. 43=6 P.L.J. 293. See also 58 I.C. 271=5 P.L.J. 508. Until the appeal is admitted, it is not competent to the appellate Court to pass an order dismissing the suit for non-payment of Court-fee. 1 M.L.J. 528. So also where deficit Court-fee was not paid on a document in the lower Court, the same cannot be recovered as a condition precedent to the filing of the appeal. The proper procedure is to allow the filing of the appeal and thereafter take steps to recover the deficit Court-fees. 33 C.W.N. 952=50 C.L.J. 164=1930 C. 65. See also 31 C.W.N. 1045=1927 C. 775. It is the duty of the High Court to see that proper Court-fees are paid to the High Courts as well as in the Courts below. 43 I.C. 489=3 P.L.J. 101. See also 235 P.L.R. 1913=19 I.C. 856. If the appellant has failed to pay sufficient Court-fees in the Court below, his appeal will not be heard till the deficiency has been made good. Where it was the respondent who was in default, no decree shall be executed in his favour till the deficiency has been made good. 3 P.L.J. 443=44 I.C. 53. One effective way of enforcing payment of deficiency of Court-fees is to refuse in second appeal to hear counsel of that party. 1929 A. 577=27 A.L.J. 808. See also 58 I.C. 271=5 P.L.J. 508. If a plaintiff-respondent fails to make good a deficiency in the Court-fee paid on the plaint, it is competent to the appellate Court, to call upon him to pay the deficit; and in the event of his failure, dismiss the suit. 56 I.C. 316=4 P.L.J. 703; 60 I.C. 654=23 O.C. 388; the procedure prescribed in S. 10 (2) being applicable. 20 A. 362. The Court cannot dismiss the appeal for non-prosecution in such a case. 33 C.W.N. 845=1929 C. 717. Where there was deficiency in the Court-fee paid on cross-objections in the lower appellate Court, the High Court can insist on the payment of the same even though the second appeal does not relate to the subject-matter of such memorandum of cross-objections. 1 P. 471=1922 P. 284. Once an appeal has been dismissed, the High Court ceases to have seisin of the appeal or case and is powerless to call upon the respondent to pay any deficiency. 4 P.L.J. 472=51 I.C. 756. See also 58 I.C. 271=5 P.L.J. 508; 1925 L. 131 (1); 7 A. 528; 18 M. 415; 142 I.C. 25=1933 M. 321. Nor can an appellant be required to pay additional Court-fees after the disposal of the appeal. 1929 O. 483 (1). See also 141 I.C. 175=1933 L. 208. Once the decree in a suit has been signed and sealed, the Judge making that decree becomes *functus officio* and cannot thereafter make order for payment of deficient Court-Fee, but

13. If an appeal or plaint, which has been rejected by the lower Court on any of the grounds mentioned in the Code of Civil Procedure, is ordered to be received, or if a suit is remanded in appeal, on any of the grounds mentioned in S. 351¹ of the same Code for a second decision by the lower Court, the Appellate Court shall grant to the appellant a certificate, authorising him to receive back from the Collector the full amount of fee paid on the memorandum of appeal:

Provided that if, in the case of a remand in appeal, the order of remand shall not cover the whole of the subject-matter of the suit, the certificate so granted shall not authorize the appellant to receive back more than so much fee as would have been originally payable on the part or parts of such subject-matter in respect whereof the suit has been remanded.

LEG. REF.

¹ This reference should now be read as applying to the corresponding provision of Act V of 1908, O. 41, R. 23.

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of the matter comes to the High Court in revision the High Court has power, if it considers that the question as to Court-fees has been wrongly decided, to require payment of such additional fee as would be payable. I.L.R. (1939) Kar. 469=1939 Sind 279. See also 41 P.L.R. 491. Where a plaint is returned for presentation to the proper Court, as being beyond the Court's jurisdiction and an appeal is preferred against that order, it is open to the appellate Court to go into the question relating to the Court-fee and decide that the lower Court had jurisdiction to entertain the suit. S. 12 of the Court-Fees Act is not a bar to such a course. It only makes a decision final as to any question which relates to valuation for the purpose of determining the amount of any fee. It does not apply where there is a dispute as to the class in which the suit falls. If there is any doubt as to what section would apply to a suit, then it raises a question of principle, the jurisdiction to determine which is not impaired by S. 12 of the Court-Fees Act. 178 I.C. 97=1938 N.L.J. 214=1938 Nag. 481. See also 44 C.W.N. 394. The Act does not apply to decided cases but applies only to pending cases. 32 I.C. 534=9 Bur.L.T. 43; 1925 L. 131.

WHETHER APPELLANT CAN ABANDON A PORTION OF CLAIM.—The appellant who has not properly stamped the appeal and is unable to do so may leave a part of the claim retaining only that much as is covered by the stamp. 10 I.C. 207=11 P.R. 1912; 29 Punj.L.R. 64; 1926 L. 477. There is nothing to prevent an appellant from attacking only a portion of the decree by paying Court-fee only thereon, though the reason for the attack might cover the whole decree. 38 M. 18=16 I.C. 877. A defendant appealing on the ground that the suit ought to have been dismissed *in toto* as time barred must appeal on the whole case and pay stamp duty on the whole claim. 44 I.C. 890=14 P.W.R. 1918. Whether an appellate Court has power to allow a valuation of claim in the Court below to be reduced in order to relieve a party from liability to pay the proper Court-fee, see 43 I.C. 489=3 P.L.J. 101.

Secs. 12 (ii) and 28.—Where a written statement claiming a set-off is accepted by the

trial Judge, through mistake or inadvertence although not stamped, and the trial Judge although he subsequently directs the party to pay the Court-fees does not realise the full Court-fees, the High Court can in second appeal under S. 12 (ii), and S. 149, C. P. Code, direct the payment of the additional Court-fees. 1936 C. 277.

Sec. 13: SCOPE OF SECTION.—The Court has the power under S. 151 to grant a certificate for refund of Court-fee, in cases not covered by Ss. 13, 14 and 15 of the Court-Fees Act. The discretion of the Court is not barred by the fact that the excess fee was paid by the mistake of the party and not in consequence of any direction by the Court. (55 M. 641, Foll.) 38 L.W. 983=66 M.L.J. 35. See also I.L.R. (1937) Nag. 519=1937 N. 268; 1939 M.W.N. 1143=(1939) 2 M.L.J. 867; 41 P.L.R. 96=1939 Lah. 257; 1940 Mad. 208; 18 P.L.T. 804; 1937 P.W.N. 893. S. 13 of the Court-Fees Act is not exhaustive; the High Court in suitable cases may exercise its inherent powers vested in it by S. 151, C. P. Code, and order refund of Court-fees paid. Where therefore, the memorandum of appeal was not registered as out of time and the delay was due—not to any negligence on the part of the plaintiff but to some gross negligence on the part of his legal adviser *held*, it was a fit case, for refund. 152 I.C. 215=38 C.W.N. 185=1934 C. 615. See also 39 C.W.N. 1074. If a remand can be deemed to have been made on any of the grounds mentioned in O. 41, r. 23, C. P. Code, the appellant is entitled to a refund certificate under S. 13 of the Court-Fees Act, although the appellate Court erroneously purports to make the remand under S. 151, C. P. Code. 40 L.W. 372=1934 M. 643.

APPLICABILITY OF THE SECTION.—The section applies where a decree in favour of the respondents is set aside and the case is sent back for a second decision. Where the decision in favour of the respondents is set aside *qua* a portion only of the subject-matter of the suit, the proviso applies. 39 I.C. 28=14 A.L.J. 671. But where the decree is set aside against some respondents only and the case remanded, the successful appellant cannot get a refund of Court-fee. (*Ibid.*). Where the plaintiff appealed to the High Court only against the order in favour of some of the defendants and the High Court remanded the case to the Court of first instance only to that extent, *held*, that the certificate to be granted under S. 13 should authorise the appellant to

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receive only so much of the fee as would have been originally payable on the part, of the subject-matter of the suit remanded. 54 A. 523=140 I.C. 466=1932 A.L.J. 320=1932 A. 550. See also 14 R. 173 (F.B.). The words of S. 13 do not appear to contemplate the grant of a certificate in respect of Court-fee paid in the lower appellate Courts. 47 L.W. 300=1938 M. 479. If an appeal is remanded, the Court is bound to grant a certificate under S. 13. Refusal to grant such certificate is a material irregularity within S. 115, C. P. Code. 42 B. 363=45 I.C. 552. Where the High Court reverses the decision of the first Court on a preliminary point, an order under S. 13 for refund of fee should be made. 15 I.C. 610=15 C.L.J. 658; 54 A. 523=1932 A. 550. Where the Court of second appeal remands a case to the lower appellate Court on any of the grounds mentioned in O. 41, r. 23, C. P. Code, a suit is remanded within the meaning of S. 13 of the Court-Fees Act and the appellant is entitled to claim a refund of the Court-fee paid on the memorandum of appeal. 140 I.C. 56=1932 A.L.J. 745=1932 A. 641 (F.B.). Where an appellate Court remands a case for re-trial in a case not coming within O. 41, r. 23, C. P. Code, no order for refund of Court-fee can be passed. 42 I.C. 304. See also 36 I.C. 241=12 N.L.R. 126; 3 P.L.J. 116=43 I.C. 855; 18 P.L.T. 864; 100 I.C. 49=1927 L. 196; 1927 C.W.N. 761. (But see the cases cited below). Where an order of remand does not cover the whole of the subject-matter of the suit, an order directing refund of the whole Court-fees paid is wrong according to the provisions on the proviso to S. 13. I.L.R. (1940) Nag. 538=1940 Nag. 349. Where a Court remands a case under its inherent powers it can also order refund of Court-fee under the same inherent powers. 34 P.L.R. 270; 141 I.C. 400=1933 L. 135; 136 I.C. 559=1932 L. 219. Where a remand is made under the inherent powers, the refund of the stamp duty is discretionary while in the case of a remand under O. 41, r. 23, the refund is mandatory under S. 13. 1930 L. 441. See also I.L.R. (1937) Nag. 519=1937 Nag. 268. A certificate under this rule should be granted when the suit is dismissed because a document relied upon is inadmissible. 102 I.C. 298 (1)=1927 L. 592. S. 13 does not apply to the case of an appeal against a preliminary decree. 3 P.L.J. 116=43 I.C. 855. The trial Court dismissed the suit against defendants 4, 5 and 6 and decreed the claim against defendants 1, 2 and 3. The plaintiffs appealed to the District Judge claiming that the decree should be passed in their favour against defendants 4, 5 and 6 also. They made defendants 1, 2 and 3 *pro forma* respondents. The District Judge dismissed the appeal. On second appeal against the same parties, the High Court allowed the appeal and set aside the decree of the lower appellate Court as well as that of the first Court and sent the case back to the first Court. *Held*, that the plaintiff was entitled to a refund of the Court-fee paid in the High Court but not in the lower appellate Court. 56 A. 526=1934 A.L.J. 41=1934 A. 106 (F.B.). As to the

scope of the proviso, see 6 W.R. 65. An application under S. 13 for refund of Court-fee is covered by S. 19, Cl. (xx) and no Court-fee is chargeable in it. 1932 A.L.J. 601=1932 A. 590.

REFUND IN GENERAL.—Where counsel stamps the memorandum a time-barred appeal and is heard on the point of limitation and the appeal is dismissed, he cannot set up the plea of the failure of the Court Clerk to inform him of the practice about stamping appeal memoranda as a ground of claiming refund of the Court-fee paid. 22 I.C. 884=7 L.B.R. 90. Where excess Court-fee is paid, credit for the excess paid in the Original Court may be allowed in appeal to the plaintiff-appellant. 1886 A.W. N. 228. The Court has power to make an order for refund of excess Court-fee paid under a *bona fide* mistake. 107 I.C. 320=9 P.L.T. 240; 102 I.C. 193 (1)=1927 Sind 192; 40 C. 365=20 I.C. 498. See also 1928 P. 35; 107 I.C. 825 (P.). The High Court can under its inherent powers assist an appellant who has erroneously paid excess Court-fee on his memorandum of appeal. What it does judicially in such a case is to decide what is the proper Court-fee and then issue a certificate to the party that excess Court-fee has been levied. It still lies with the revenue authorities to decide whether or not they will refund the excess in the circumstances. 55 M. 641=62 M.L.J. 541=1932 M. 438. See also 40 C. 365; 57 I.C. 26. The High Court has no power to issue a certificate authorizing the Collector to refund the excess stamp duty paid by a suitor by reason of over-valuation of his suit. 20 W.R. 106; 102 I.C. 193=1927 S. 192. So also with regard to excess fee paid according to the wrong decision of the taxing officer. 39 P.R. 1907. See also 1925 P.H.C.C. 359=92 I.C. 626 (1)=1926 P. 147. But see 3 P.L.J. 452=46 I.C. 27; 40 C. 365=20 I.C. 428. Government however may order such refund, notwithstanding the absence of any special provision in the law authorizing them to do so. 39 P.R. 1907. Where owing to an erroneous order of the lower Court the defendant was obliged to pay Court-fee in excess of what was really payable and though ultimately he succeeded in second appeal the High Court then did not include the excess Court-fee paid by the defendant in his costs and the lower Court, when applied to, held it had no power in the matter, *held*, that justice should be done and the excess should be refunded. 36 C.W.N. 190=1932 C. 450=137 I.C. 791. Court-fees paid on appeal from final decree during pendency of appeal from preliminary decree should be refunded. 83 I.C. 829=1925 O. 39. Where appeal is dismissed for non-payment of additional Court-fee, Court-fee already paid cannot be refunded. 105 I.C. 742=6 P. 602. Whether High Court can order refund of Court-fee when second appeal is dismissed for want of jurisdiction, see 6 Pat. 599. The Chief Court has jurisdiction to order a refund of Court-fee even in cases which do not fall within Ss. 13, 14 and 15. Where the appeal was found to be wholly unnecessary and no proceedings except the admission of the appeal had taken place in respect thereof, *held*, that an order for refund

14. Where an application¹ for a review of judgment is presented on or after the ninetieth day from the date of the decree, the Court, unless the delay was caused by the applicant's laches, may, in its discretion, grant him a certificate authorizing him to receive back from the Collector so much of the fee paid on the application as exceeds the fee which would have been payable had it been presented before² such day.

15. Where an application for a review of judgment is admitted, and where, on the rehearing, the Court reverses or modifies its former decision on the ground of mistake in law or fact, the applicant shall be entitled to a certificate from the Court authorizing him to receive back from the Collector so much of the fee paid on the ³[application] as exceeds the fee payable on any other application to such Court under the second schedule to this Act, No. 1, clause (b) or clause (d).

But nothing in the former part of this section shall entitle the applicant to such certificate where the reversal or modification is due, wholly or in part, to fresh evidence which might have been produced at the original hearing.

16. [Additional fee where respondent takes objection to unappealed part of decree.]
Rep. by Act V of 1908.

LEG. REF.

¹ As to refund of fees paid on applications to the Chief Court or the Court of the Financial Commissioner of the Punjab for the exercise of its revisional jurisdiction under the Code of Civil Procedure—See the Punjab Courts Act (XVIII of 1884), S. 72 as amended by the Punjab Courts Act (XXV of 1829), P. and N. W. Code. As to application for review of judgment, see the Code of Civil Procedure, 1908 (Act V of 1908).

² See Sch. I, Nos. 4 and 5, *infra*.

³ The word "application" was substituted for the original words "plaint or memorandum of appeal" by the Court-Fees Amendment Act (XX of 1870), S. 1 (amending this Act.)

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of Court-fee might be passed. 7 Luck. 588=1933 O. 170.

Secs. 13, 14 and 20.—Custody fees though paid in Court-fee stamps as a matter of convenience are not Court-fees paid for any particular document under the Court-Fees Act. The money is legally payable in advance and hence no question of mistake or inadvertence, as in Ss. 13 and 14, Court-Fees Act comes in, Ss. 13 and 14 of the Act therefore do not apply to this case. The payment is contingent payment and if contingency does not happen the person depositing the fees in advance is entitled to get them back. Apart from any rules, the Court has inherent jurisdiction to grant a refund of the custody fees when lying unspent. 64 C.L.J. 492=1937 C. 86=I.L.R. (1937) 1 Cal. 624.

Secs. 13 to 15.—The Court has no power, after the appeal has been disposed of, to recover the deficient Court-fee on the memorandum of objections. [140 I.C. 191; 46 C. 520; 82 I.C. 588; 51 I.C. 756 (F.B.), Foll.] 142 I.C. 25=37 L.W. 300=1933 M. 321. In cases not falling under Ss. 13, 14 and 15 of the

Court-Fees Act, the Revenue Authorities are not bound to make a refund to the party even if he has obtained a certificate of the Court. In such cases the Court has no power to order refund or to give a certificate to say that a party is entitled to it. All that the Court can under those circumstances certify is that he has paid excess Court-fee. 38 L.W. 983=66 M.L.J. 35. See also 39 C.W.N. 1074.

Sec. 14.—In calculating 89 days referred to in Art. 5, Sch. I, the time during which the Court is closed for vacation cannot be excluded. 9 M. 134. The apparent intention of S. 14 is to require full stamp in every case of delay after the 89th day from the date of the decree and to permit refund at the discretion of the Judge when the delay is not due to the appellant's laches (*Ibid.*) see also 9 C.L.R. 479. On the section. See also 39 C.L.J. 344=80 I.C. 794=1924 C. 994.

The requirements of S. 15 are perfectly definite: (1) the admission of the application for review of judgment irrespective of the correctness of the grounds for the admission; (2) a reversal or modification of the former decision on the ground of mistake in law or in fact, such reversal or modification not being due wholly or in part to fresh evidence which might have been produced at the original hearing. A delay of six months in making the application was considered to be no bar to the relief under section. 10 P. 649. When a case came clearly within O. 47, R. 1, C. P. Code and conditions requisite under S. 15 of the Court-Fees Act were present, refund was ordered though the Court proposed to act under S. 151, C. P. Code, instead of O. 47, r. 1. 1924 C. 1054=28 C.W.N. 928. See also 7 R. 88=1929 R. 158, where the Court ordered refund for the ends of justice and to prevent the abuse of the process of the Court although S. 15 was not applicable to the case. See also I.L.R. (1937) Nag. 519=1937 Nag. 268.

17. Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act.

Nothing in the former part of this section shall be deemed to affect the power conferred by the Code of Civil Procedure, section 9.¹

LEG. REF.

¹ The reference to S. 9 of C. P. Code, 1889, should be read as applying to O. 2, R. 6 of Act V of 1908.

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Sec. 17 : SCOPE AND APPLICATION OF SECTION.—The object of the section is to prevent loss of revenue to the State. 6 I.C. 715. This section applies to cumulative reliefs for several distinct causes of action and has no application to distinct reliefs arising out of the same cause of action. 2 B. 219; 21 A. 200. See also 78 I.C. 415=1924 P. 596; 50 I.C. 470=4 P.L.J. 195. The words 'distinct subjects' are synonymous with distinct causes of action. 5 L.B.R. 95 (F.B.). See also 16 A. 401; 158 I.C. 780=39 C.W.N. 1146=1935 C. 573; 27 A. 184; 2 A. 679 (F.B.); 1 P.L.T. 444=57 I. C. 685; 110 I.C. 191=1928 P. 274; 156 I.C. 135=1935 M. 262=68 M.L.J. 316 (two security bonds by the same judgment-debtor—Suit on—They constitute distinct subjects for purpose of Court-fee); 68 M.L.J. 280 (declaration as regards adoption and wills). They are not to be interpreted with reference to S. 7. 50 I.C. 470=1922 P. 359; 57 I.C. 685=1 P.L.T. 444. As to the meaning of the word 'subject,' see 47 M. 150=45 M.L.J. 431=1924 M. 360; 9 P.L.T. 199=7 P. 402=1928 P. 274. The word 'distinct subjects' in S. 17, Court-Fees Act, means distinct causes of action. Where a suit is on more than one mortgage the Court-fee shall be paid on each mortgage. S. 67-A of the T. P. Act does not control S. 17 of the Court-Fees Act. When a subsequent general enactment cannot override or interfere with a special Act, one special Act cannot override or interfere with the provisions of another special Act. 1940 Rang.L.R. 767=1941 Rang. 95. Where two reliefs are claimed in the alternative in respect of the same cause of action, they cannot be considered to be "distinct subjects" within the meaning of S. 17 of the Court-Fees Act. 47 L.W. 64=1938 Mad. 241=(1938) 1 M.L.J. 139; 1925 Pat. 193. S. 17 applies to suits and appeals from suits and not to applications and appeals from orders passed on applications. 27 S.L.R. 312=1933 Sind 343. A suit for *khas* possession of *zerait* lands against several persons holding the same, is based upon a single right and the Court-fee payable is upon a single cause of action. 9 P.L.T. 199. S. 17 applies to alternative reliefs claimed with reference to more causes of action than one. The section is not necessarily confined to cases where cumulative reliefs are claimed. 47 I.C. 866 (N.); 11 O.C. 173; 16 M.L.J. 462=30 M. 61. But see 44 I.C. 143 (P.). Where it has been held that Court-fee must be paid on the relief which appears to be of the higher value. See also 78 I.C. 530=1925 P. 193 (2); 6 B. 302; 16

O.C. 354; 15 B. 82. Where reliefs claimed are alternative S. 17 of the Court-Fees Act does not apply and the Court-fee is payable on the relief which bears the highest valuation. 1939 A.M.L.J. 80. See also 1925 Pat. 193. Where plaintiff has paid Court-fee on smaller of two alternative reliefs, that relief alone should be tried. 1923 L. 456. Where however the alternative reliefs are based exactly on the same cause of action they are not two distinct subjects within the section. 5 L. 114=1924 L. 494; 39 C.L.J. 209; 96 I.C. 826=1926 L. 467. See also 62 M.L.J. 150=55 M. 336; 120 I.C. 411=1930 N. 55 (2). In such a case, Court-fee must be paid on the higher relief. But if a fixed Court-fee is payable in respect of one relief and *ad valorem* Court-fee in respect of another, even though the former is valued higher than the latter, the higher Court-fee should be paid. 55 M. 336=62 M.L.J. 150. Where in respect of a settlement deed executed by the last male holder, his reversioner sues for a declaration that the said deed is not binding on him as having been brought about by fraud, coercion and undue influence, also praying for an alternative relief that if the deed is found to be valid, he should be given a decree for the amount payable under the deed, the cause of action is only one, namely, the execution of the deed; and though two reliefs are claimed in respect thereof, one on the footing of its validity and the other on the footing of its invalidity, they are not distinct subjects and the plaintiff need not therefore pay separate Court-fees on each of the two reliefs. 47 L.W. 664=1938 M. 241=(1938) 1 M.L.J. 139. Suit for money on a promissory note from legal representatives of the executant or in the alternative from an alleged agent of the executant is on alternative reliefs based on the same cause of action. 1930 N. 55. The plaintiff sued as endorsee of a promissory note. The defence was that the note offended the provisions of the Paper Currency Act. Thereupon the plaintiff obtained an assignment of the original obligation and applied to add it in his plaint. There was no question of limitation: *Held*, the amendment introduced a fresh cause of action, extraneous to the old and so the plaintiff should be directed to pay Court-fees afresh on the new cause of action. 131 I.C. 1=1931 M. 533. See also 159 I.C. 340=1934 L. 605. (independent reliefs).

SUIT FOR IMMOVABLE PROPERTY AND PAST MESNE PROFITS.—A suit for possession and for mesne profits is not a suit embracing two distinct subjects. 16 A. 401. See also 8 C. 593 (F.B.); 19 C. 615. For decisions to the contrary, see 12 B. 96; 2 A. 676; 4 P.L.J. 195=50 I.C. 470 (each case depends on its own peculiar circumstances). In Madras, the question is now settled by the Full Bench decisions cited below. In a suit for possession of movable property and past mesne profits Court-fee is

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payable on the aggregate value of both the reliefs and not separately on the value of each relief. 1930 M. 833 (F.B.) [8 C. 593 (F.B.) ; and 16 A. 401, Rel. on ; 38 M. 829 (F.B.). Expl. and Dist.] ; they are not "distinct subjects within the meaning of S. 17 (*ibid.*). A plaintiff suing for redemption of a mortgage and asking for surplus profits is not asking for two distinct reliefs, and the suit does not comprise distinct subjects, within the meaning of S. 17 of the Court-Fees Act. The value which the plaintiff places on the relief for redemption covers the relief in regard to surplus profits as well, and the latter need not be valued separately. 1940 M.W.N. 1153=1941 Mad. 115=(1940) 2 M.L.J. 867. O. 2, rr. 2 and 4. C. P. Code, clearly indicate that a claim for mesne profits would not be barred under O. 2, R. 2, C. P. Code, if such a claim was not included in a previous suit for possession and that the claims for possession and mesne profits are not based on the same cause of action. The cause of action in respect of the claim for arrears of royalty is also separate and distinct from the cause of action for *khas* possession and mesne profits. Consequently, a suit for *khas* possession, mesne profits and arrears of royalty being based on three separate and distinct causes of action is a multifarious suit and falls within the purview of S. 17. 1942 C. 40. See also 45 C.W.N. 996.

SUITS FALLING WITHIN THE SECTION.—S. 17 of the Act applies to suits where the plaintiff in the same suit united several causes of action against the same defendant or the same defendants jointly and to appeals arising out of those suits. 15 Luck. 395=1940 O.W.N. 165=1940 O. 243. Suits on different hundies affording distinct causes of action (9 A. 252) ; suit on several promissory notes executed in plaintiff's favour by defendant (5 L.B.R. 94=4 I.C. 289) ; suit against the principal debtor and several persons who have guaranteed the amount by separate pro-notes or mortgages (8 Bur. L.T. 217=30 I.C. 705). A suit to enforce two different mortgages executed by the same person in respect of the same properties. 2 P. 874=1924 P. 77 ; 57 I.C. 685=1 P.L.T. 444 ; 63 C. 720=40 C.W.N. 406. Suit to recover moneys due to plaintiff under three deposits made on different dates. 1931 M. 712=61 M.L.J. 680. Suit to enforce specific performance of an agreement to sell land with an alternative claim for pre-emption (29 A. 155=4 A.L.J. 127 ; 96 P.R. 1895) ; claims for rent in suits for redemption (16 M. 415) ; suit by landlord against several sets of tenants for declaration that their several lands were held under the *Batai* system (4 P.L.J. 299=51 I.C. 767). Suit by ryots in respect of several holdings for declaration that rent accorded by the settlement authority was much higher than the rents payable. 50 I.C. 328=4 P.L.J. 297. Suit for declaration arising from distinct cause of action. 1923 A. 306 ; 18 M. 459 (declarations in respect of various alienations) ; and claim for costs on appeal independently of the result of the main contest between the parties. (3 P.L.J. 443=4 P.L.W. 223=44 I.C. 50) have been held to come within the section. See also 53 M. 248=1930 M. 376=58 M.L.J. 510 (F.B.) ; 53 M. 262=1930 M. 381=58 M.L.J. 521 (F.B.).

Where the plaintiff in whose favour the first defendant had surrendered the suit lands for consideration, finding the land belong to another person files a suit against both, asking for possession against the latter or for refund from the former of the consideration paid the suit embraces two distinct reliefs. 78 I.C. 703=1924 N. 169. Where the plaintiffs who are not in possession of any portion of the properties sought to be partitioned, pray for joint possession and partition they are bound to pay Court-fee on two subject-matters within S. 17. The plaintiffs must pay the fixed fee for partition in addition to *ad valorem* fee in a suit for possession. 3 P. 618=81 I.C. 1052=1924 P. 558. A declaratory suit in respect of properties, partly in the Collector's possession and partly, in the plaintiff's possession, each valued separately, is for two distinct subjects and the aggregate value of both the properties constitutes the value of the suit. 36 B. 628=14 Bom.L.R. 757=16 I.C. 1005. [On appeal, 50 I.C. 280=43 Bom. 507 (P.C.).] Where the plaintiff claims a sum of money as being due from the defendant on dealings between the parties, and also includes in the suit claims to certain items of money spent by him in connection with a lawyer's notice issued by him to the defendant and registration charges thereof, the latter items cannot be valued as separate and distinct subjects from the other items relating to the dealings, so as to be leviable to separate Court-fee under S. 17 of the Court-Fees Act. 59 M. 739=1936 M. 420=70 M.L.J. 308.

"DISTINCT SUBJECTS."—Suit for money—Plea in plaint that deed executed by defendant was not a due fulfilment of agreement between parties—If separate claim for cancellation liable to separate Court-fee. 1936 M. 266.

SUITS NOT COMING WITHIN THE SECTION.—Suit for pre-emption of shares in two villages conveyed by a single sale deed does not comprise two distinct subjects as there was only one cause of action. 27 A. 186=1904 A.W.N. 210. So also a suit to recover a rent or mesne profits for a number of years. 7 A. 761 ; a suit to recover land and trees thereon. 40 M. 824=39 I.C. 254. Sale of land. Suit by plaintiff for his possession as owner or in alternative, by pre-emption, Sec. 17 not applicable. 40 P.L.R. 33. Where certain creditors, who had taken for their common protection a mortgage for the entire sum due to them in lieu of their separate claims against the debtor sued to enforce the mortgage as a whole for their common benefit, *held*, that Court-fee was payable on the entire amount claimed as one subject and that the suit did not embrace distinct subjects within the meaning of S. 17. 1932 M. 737=63 M.L.J. 316. S. 17 is inapplicable to a suit by an assignee of mortgagee rights against mortgagee the mortgagor and his surety, as the cause of action against the mortgagee is not distinct from the cause of action against the mortgagor and his surety, and separate Court-fee is therefore not payable. 40 P.L.R. 528=1938 L. 566. A suit to set aside a mortgage of family property and a subsequent charge created over it for a subsequent loan, which was to be redeemed along with the mortgage, does not embrace two subjects. 142 I.C. 641=1933 L. 382. Where in respect of a deed of relinquishment dealing with a number of

18. When the first or only examination of a person who complains of the offence of wrongful confinement, or of wrongful restraint, or of any offence other than an offence for which police-officers may arrest without a warrant, and who has not already presented a petition on which a fee has been levied under this Act, is reduced to writing under the provisions of the Code of Criminal Procedure,¹ the complainant shall pay a fee of eight annas, unless the Court thinks fit to remit such payment.

Exemption of certain documents.

19. Nothing contained in this Act shall render the following documents chargeable with any fee.

(i) Power-of-attorney to institute or defend a suit when executed by an officer, warrant-officer, non-commissioned officer or private of Her Majesty's army not in civil employment.

(ii) [*Rep. by the Repealing and Amending Act, 1891 (XII of 1891).*]

(iii) Written statements called for by the Court after the first hearing of a suit.

(iv) [*Rep. by the Cantonments Act, 1889 (XIII of 1889).*]

(v) Plaints in suits tried by Village Munsiffs² in the Presidency of Fort St. George.

(vi) Plaints and processes in suits before District Panchayats in the same Presidency.

(vii) Plaints in suits before Collectors under Madras Regulation XII of 1816.

LEG. REF.

¹ This reference should now be read as referring to the Code of Criminal Procedure (Act V of 1898), see S. 3 of that Act.

² See the Madras Village Courts Act, 1889 (I of 1889), Madras Code.

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items of property several declarations are asked for in respect of the various items, only a single Court-fee is payable as the relief arises only out of a single cause of action, namely, the deed of relinquishment. 1939 A.M.L.J. 80. A suit filed by a landholder against the ryots of a village, under S. 193 of the Madras Estates Land Act does not comprise "distinct subjects" within the meaning of S. 17 of the Court-fees Act. The Court-fee payable is on the total of the annual rents of the immovable property to which the suit relates and not on the aggregate of the Court-fees separately payable in respect of the rent of the holding of each particular ryot calculated in accordance with the provisions of S. 7 (xi) (b) of the Act. 1932 M. 667=63 M.L.J. 73. As to appeal against disallowance of claim made under S. 9 of the United Provinces Encumbered Estates Act. 15 Luck. 395=1940 O.W.N. 165=1940 O. 243. For such a case the Bengal Government have framed a Rule Notification No. 6954, L.R., dated 21st July, 1922, according to which Court-fee is to be paid separately for each tenancy. See 59 C. 997=1932 C. 674. See also 3 Pat.L.J. 299=51 I.C. 767, *supra*. Claim for possession and damages for use and occupation after the tenancy terminates are not distinct subjects within S. 17 as they arise out of the tenancy having come to an end. A claim for rent however is a distinct subject as it arises out of the contract of tenancy and can be enforced by a separate suit. 10 Bur.L.T. 60=36 I.C. 883. A suit for recovery of possession of lands with mesne profits from

defendants who held different parcels of land separately is based on a single right and S. 17 did not apply. 1928 P. 274. In a suit for specific performance and possession, Court-fee need be paid only for one prayer. 47 M. 150=45 M.L.J. 431. But see 60 I.C. 654=23 O.C. 388. See also the cases noted under S. 7, cl. (x). In a suit for cancellation of a compromise, the preliminary decree and the final decree, Court-fee is payable on the value of the final decree only, as they are not distinct subjects. 1932 A.L.J. 684=1932 A. 485 (F.B.). In a suit for a balance on a Khata (accounts), which would ordinarily contain a number of items, each item does not constitute a distinct subject. The subject-matter of the suit is the balance due on the account and Court-fee is payable on the aggregate amount. 64 I.C. 486 (2)=23 Bom.L.R. 995.

MAXIMUM FEE.—The rule laid down in the section is subject to Sch. I, Art. 1, proviso and the maximum fee in a multifarious suit is Rs. 3,000. 3 A. 101 (F.B.). See also 29 C. 140.

CONSOLIDATION OF APPEALS.—In a case of consolidation of appeals for purposes of hearing, the appeals are to be separately treated for purposes of stamp on memorandum of appeal. 117 I.C. 692=1929 C. 135. If two sums of Rs. 600 and Rs. 400 respectively are claimed in a suit on two pro-notes, Court-fee is payable on the two sums separately, the lower scale prescribed under Art. 2 being payable for the second sum. 1933 M. 178=65 M.L.J. 252. S. 17 as amended in Bengal. See 45 C.W.N. 996; 1942 Cal. 40.

Sec. 19 (iii).—Written statement pleading a set-off is not exempt. The exemption from stamp duty on written statements in S. 19 (iii), Court-Fees Act, is not limited to written statements in suits, but also applies to written statements in miscellaneous cases. Written statements filed in answer to an application by the official

(viii) Probate of a will, letters of administration, ¹[and, save as regards debts and securities, a certificate under Bombay Regulation VIII of 1827] where the amount or value of the property in respect of which the probate or letters or certificate shall be granted does not exceed one thousand rupees.

(ix) Application or petition to a Collector or other officer making a settlement of land-revenue, or to a Board of Revenue, or a Commissioner of Revenue, relating to matters connected with the assessment of land or the ascertainment of rights thereto or interests therein, if presented previous to the final confirmation of such settlement.

(x) Application relating to a supply for irrigation of water belonging to Government.

(xi) Application for leave to extend cultivation, or to relinquish land, when presented to an officer of land-revenue by a person holding, under direct engagement with Government, land of which the revenue is settled, but not permanently.

(xii) Application for service of notice of relinquishment of land or of enhancement of rent.

(xiii) Written authority to an agent to distrain.

(xiv) First application (other than a petition containing a criminal charge or information) for the summons of a witness or other person to attend either to give evidence or to produce a document or in respect of the production or filing of an exhibit not being an affidavit made for the immediate purpose of being produced in Court.

(xv) Bail-bonds in criminal cases, recognizances to prosecute or give evidence, and recognizances for personal appearance or otherwise.

(xvi) Petition, application, charge or information respecting any offence when presented, made or laid to or before a Police-officer, or to or before the Heads of ²Villages or the Village Police³ in the territories respectively subject to the Provincial Governments of Madras and Bombay.

(xvii) Petition by a prisoner, or other person in duress or under restraint of any Court or its officers.

LEG. REF.

¹ These words were substituted for the original words and figures "and certificate mentioned in the First Schedule to this Act annexed, No. 12," by the Succession Certificate Act (VII of 1889), S. 13 (2).

² See Madras Regulations XI of 1816 and (IV of 1821), S. 6, Mad. Code.

³ See Bombay Village Police Act (VII of 1867), Ss. 14, 15, and 16, Bom. Code.

NOTES.

liquidator of a company to set aside transfers as fraudulent are therefore exempt from Court-fees under S. 19 (iii). 4 A.W.R. 1196=148 I.C. 642=1934 A.L.J. 881=1934 A. 332.

Sec. 19, cl. (viii).—No duty is payable in respect of a grant of probate or letters of administration where the net value of the estate after the reductions specified in Sch. III, Annexures A and B, is less than Rs. 1,000. 40 A. 279=46 I.C. 865; 7 Bur.L.T. 275=24 I.C. 823. According to the Calcutta High Court, where the gross value is above and the net value below Rs. 1,000 a fee of 2 per cent. is payable, on the net value. 15 I.C. 621=17 C.W.N. 21. See also 18 C.W.N. 121=18 C.L.J. 308; 24 I.C. 823=20 C.W.N. 591. Where, in an application for letters of administration, the widow claimed provident fund amount in her own right, the amount is not liable to probate duty. 33 C.W.N. 1148=1930 C. 252.

Sec. 19 (xvii).—Sub-S. (xvii) of S.19 of the

Court-Fees Act contemplates a petition by a prisoner claiming some relief or indulgence or right on behalf of himself in his capacity as a prisoner. An application by a prisoner praying that an order of acquittal of the opposite party should be set aside and that they should be convicted and sentenced according to law, is wholly unconnected with the applicant's condition or status as a prisoner and asks for no relief affecting him in his capacity as a prisoner. That being so, his application does not fall within sub-S. (xvii) of S. 19 and is, therefore, not exempt from stamp fees. 1936 A.L.J. 453=1936 A. 318. The petition mentioned in Cl. (xvii) of S. 19 must be a petition in respect of, or connected with or arising out of, the matter in connection with which the petitioner is in prison, in duress or under restraint. 1941 A.W.R. (H.C.) 357=1941 A.L.W. 1083. No Court-fee is leviable on the memorandum of appeal against an order rejecting an application by a judgment-debtor whilst in custody, to be declared an insolvent. 10 C. 61. A petition of appeal or revision presented by a pleader on behalf of the prisoner is exempted from Court-fees. 45 I.C. 158=14 N.L.R. 77; 1 R. 510=1924 R. 160. So also an application for bail by the advocate of a prisoner in jail. 23 Cr.L.J. 121=(1921) 4 U.B.R. 72=1922 U.B. 14. So also an adjournment application by the Counsel. 1930 Cr. C. 373=1930 A. 261. But a petition from an accused in his defence in summons cases, appears to be liable to the

(xviii) Complaint of a public servant (as defined in the Indian Penal Code), a municipal officer, or an officer or servant of a Railway Company.

(xix) Application for permission to cut timber in Government forests, or otherwise relating to such forests.

(xx) Application for the payment of money due by Government to the applicant.

(xxi) Petition of appeal against the ¹chaukidari assessment under Act No. XX of 1856, or against any municipal tax.

(xxii) Applications for compensation under any law for the time being in force relating to the acquisition of property for public purposes.²

(xxiii) Petitions presented to the Special Commissioner appointed under Bengal Act No. II of 1869 (*to ascertain, regulate and record certain tenures in Chota Nagpur.*)

³(xxiv) [Petitions under the Indian Christian Marriage Act, 1872, Ss. 45 and 48.]

CHAPTER III-A.⁴

PROBATES, LETTERS OF ADMINISTRATION AND CERTIFICATES OF ADMINISTRATION.

19-A. Where any person on applying for the probate of a will or letters of administration has estimated the property of the deceased to be of greater value than the same has afterwards proved to be, and has consequently paid too high a court-fee thereon, if, within six months after the true value of the property has been ascertained, such person produces the probate or letters to the Chief Controlling Revenue authority ⁵[for the local area] in which the probate or letters has or have been granted.

and delivers to such authority a particular inventory and valuation of the property of the deceased, verified by affidavit or affirmation,

and if such authority is satisfied that a greater fee was paid on the probate or letters than the law required,

the said Authority may—

(a) cancel the stamp on the probate or letters if such stamp has not been already cancelled ;

(b) substitute another stamp for denoting the court-fee which should have been paid thereon ; and

(c) make an allowance for the difference between them as in the case of spoiled stamps, or repay the same in money, at his discretion.

19-B. Whenever it is proved to the satisfaction of such authority that an

LEG. REF.

¹ U. P. Code.

² See now the Land Acquisition Act, 1894, (I of 1894).

³ This clause was substituted for the original clause by the Indian Christian Marriage Act (XV of 1872), S. 2. The original clause was as follows :—"Petitions under the 14th and 15th of Victoria, c. 40 (*an Act for marriages in India*), S. 5, or under Act No. V of 1852, S. 9."

⁴ Chapter III-A was inserted by the Probate and Administration Act (XIII of 1875), S. 6.

⁵ Substituted for the words "of the Province" by S. 3 (1) of the Court-Fees (Amendment) Act (X of 1901).

NOTES.

payment of Court-fee. U.B.R. (1892-1896) Vol. I, p. 9.

Sec. 19 (xviii).—See 5 B.H.C.R. 104; 16 M.

⁴²³ Sec. 19 (xx).—An application for refund of

money deposited for the cost of preparing a paper book, etc., is not an application for payment of money due by Government within cl. (xx). On the other hand it is an application or petition presented to the High Court within the provisions of Sch. II, Art. 1. 27 C.W.N. 646=1923 C. 599. An application under S. 13 for refund of Court-fee is covered by the clause. 1932 A.L.J. 601=1932 A. 590.

Sec. 19-A.—On an application for probate, the Court-fee chargeable is to be assessed on the value of the estate at the time of application. Subsequent changes in value do not alter the amount of Court-fee payable. 80 I.C. 4=5 Bur.L.T. 39. The uncertainty of recovering a debt is no ground for reducing the proportionate duty payable thereon. 24 C. 567; nor the fact that an item of property is the subject of litigation. 24 M. 241. But see cases cited under Art. 11, Sch. I.

Sec. 19-B.—On this section, see N.W.P. 214; 1 B. 118; 8 B.L.R. (App.) 43=16 W.R. 253.

Relief where debts due from a deceased person have been paid out of his estate.

executor or administrator has paid debts due from the deceased to such an amount as, being deducted out of the amount or value of the estate, reduces the same to a sum which, if it had been the whole gross amount

or value of the estate, would have occasioned a less court-fee to be paid on the probate or letters of administration granted in respect of such estate than has been actually paid thereon under this Act.

Such authority may return the difference, provided the same be claimed within three years after the date of such probate or letters.

But when, by reason of any legal proceeding, the debts due from the deceased have not been ascertained and paid, or his effects have not been recovered and made available, and in consequence thereof the executor or administrator is prevented from claiming the return of such difference within the said term of three years, the said Authority may allow such further time for making the claim as may appear to be reasonable under the circumstances.

19-C. Whenever¹ a grant of probate or letters of administration has been or is made in respect of the whole of the property

Relief in case of several grants.

belonging to an estate, and the full fee chargeable under this Act has been or is paid thereon, no fee

shall be chargeable under the said Act when a like grant is made in respect of the whole or any part of the same property belonging to the same estate.

Whenever such a grant has been or is made in respect of any property forming part of an estate, the amount of fees then actually paid under this Act shall be deducted when a like grant is made in respect of property belonging to the same estate, identical with or including the property to which the former grant relates.

19-D. The probate of the will or the letters of administration of the effects

Probates declared valid as to trust-property though not covered by court-fees.

of any person deceased heretofore or hereafter granted shall be deemed valid and available by his executors or administrators for recovering, transferring or assigning any movable or immovable property whereof or

whereto the deceased was possessed or entitled, either wholly or partially as a

LEG. REF.

¹ The word "such" was repealed by the Repealing and Amending Act (XII of 1891).

NOTES.

Sec. 19-C.—The section does not apply where property in question has never yet paid any duty in India under the Succession Act. 4 C. 725. But see also 21 B. 673. Where a full fee chargeable on the probate at the time it was granted has been paid, no further fee shall be chargeable when the second grant is made in respect of that property as comprised in that estate. 43 C. 625=20 C.W.N. 472=30 I.C. 394. The full fee chargeable must be determined with reference to the point of time when the second grant is sought. (*ibid.*). When an executor to whom probate is granted dies leaving a part of the testator's estate unadministered and a new representative is appointed for completing the administration, there is no new succession and no new devolution of the estate. Therefore no fresh succession duty should be levied. (*ibid.*). (3 C. 733, Foll.) In the case of an appointment *de bonis non* there is no new succession and no new devolution of the estate, which would justify demand of fresh Court-fees. 3 R. 90=88 I.C. 759=1925 R. 217. An applicant for probate of his wife's will is bound to pay the full Court-fees due even though the bulk of the property dealt with in the will was included in the wife's father's

will of which probate had been granted on full payment of Court-fees. 5 P.L.J. 36=54 I.C. 703.

Sec. 19-D.—Trust properties are exempted from payment of 2 per cent. *ad valorem* fee prescribed by Sch. I, Art. 11. 11 B.L.R. (App.)39=19 W.R. 230. See also 33 M. 93=19 M.L.J. 591=4 I.C. 1064; 29 B. 161. When a person chooses to apply for Letters of Administration, whether the Letters are absolutely necessary or not and they are granted, he must pay the proper Court-fee according to Art. 11, Sch. I, of the Court-Fees Act. S. 19-D does not in any way exempt from payment of Court-fee letters obtained by a coparcener of a Hindu joint family in respect of property which he takes by survivorship, and not by inheritance as heir. A co-sharer member of a joint Hindu family interested to the extent of an undivided share in the whole of the joint family property cannot be held to be "trustee" for the other co-sharers within the meaning of S. 19-D. Whether an application by the surviving coparceners for Letters of Administration in respect of the undivided share of a deceased coparcener is necessary or not, is not a matter to be decided by the Court to which the application is made; when once an application has been made for Letters of Administration, it is necessary to pay the Court-fee according to the Act and no exemption can be had. 17 Pat. 542. Where property is joint

trustee, notwithstanding the amount or value of such property is not included in the amount or value of the estate in respect of which a court-fee was paid on such probate or letters of administration.

19-E. ¹Where any person on applying for probate or letters of administration has estimated the estate of the deceased to be of less value than the same has afterwards proved to be, and has in consequence paid too low a court-fee thereon, the Chief Controlling Revenue authority ¹[for the local area] in which the probate or letters has or have been granted may, on the value of the estate of the deceased being verified by affidavit or affirmation, cause the probate or letters of administration to be duly stamped on payment of the full court-fee which ought to have been originally paid thereon in respect of such value and of the further penalty, if the probate or letters is or are produced within one year from the date of grant, of five times, or, if it or they is or are produced after one year from such date, of twenty times, such proper court-fee, without any deduction of the court-fee originally paid on such probate or letters :

Provided that, if the application be made within six months after the ascertainment of the true value of the estate and the discovery that too low a court-fee was at first paid on the probate or letters, and if the said Authority is satisfied that such fee was paid in consequence of a mistake or of its not being known at the time that some particular part of the estate belonged to the deceased, and without any intention of fraud or to delay the payment of the proper court-fee, the said Authority may remit the said penalty, and cause the probate or letters to be duly stamped on payment only of the sum wanting to make up the fee which should have been at first paid thereon.

19-F. In case of letters of administration on which too low a court-fee has been paid at first, the said Authority shall not cause the same to be duly stamped in manner aforesaid until the administrator has given such security to the Court by which the letters of administration have been granted as ought by law to have been given on the granting thereof in case the full value of the estate of the deceased had been then ascertained.

19-G. Where too low a court-fee has been paid on any probate or letters

LEG. REF.

¹ Substituted for the words " of the Province " by S. 3 (1) of the Court-Fees (Amendment) Act X of 1901.

NOTES.

purchased by four brothers and one of them dies leaving a will and appointing others as trustees, such property is not liable to probate duty. 23 C. 980=1 C.W.N. 31. A son applying for letters of administration limited to joint family property left by his father, need not pay any Court-fee. 25 Bom.L.R. 1240=48 Bom. 75=1924 B. 228 (F.B.). But *see contra* 19 M.L.J. 591=4 I.C. 1064=33 M. 93. As to the conflict of rulings on this point, *see also* cases noted below. In obtaining probate on a will, the legatees must pay full duty leviable on the property comprised in the will. No exemption is allowed to persons capable of inheriting in their natural rights. A Hindu, getting residue of his father's property under the will, is not entitled to any exemption on the ground that he is entitled to the property by survivorship. 5 P.L.J. 510=58 I.C. 1007=1 P.L.T. 710. *See also* 1935 A. 449. A will purporting to dispose of properties held jointly between the testator and his minor son as members of a joint Hindu family, is not exempt from

probate duty. 39 B. 245=28 I.C. 475=17 Bom.L.R. 169. A widow who was an executor under a will owning life interest in the property bequeathed jointly to her and certain others was not a trustee, and the other legatees applying for letters of administration after her death, under the will cannot claim exemption under the section read with Sch. III, Annexure B. 30 Bom.L.R. 54. A private company in which a provident fund is deposited cannot be deemed to be trustee for the dependent or the nominee of the depositor and such a deposit is not exempt from Court-fees in letters of administration by the nominee. 6 R. 558=1928 R. 312.

Sec. 19-E : APPLICATION OF THE SECTION.—S. 19-E contemplates an application on the part of a person who has taken out probate and produces the same as duly stamped. Where the estimated value of the estate is less than what the value has afterwards been proved to be, then only a Revenue Court can impose penalty. Where there is no determination of value by the Probate Court, S. 19-E has no application. 43 C. 230=20 C.W.N. 504. A suit lies in the Civil Court by the Secretary of State for recovery of a penalty lawfully imposed under S. 19-E. 43 C. 230.

Sec. 19-G.—As to recovery of penalties or

Executors, etc., not paying full court-fee on probates, etc., within six months after discovery of under-payment.

* * *

known at the time to have belonged to the deceased, apply to the said authority and pay what is wanting to make up the court-fee which ought to have been paid at first on such probate or letters, he shall forfeit the sum of one thousand rupees and also a further sum at the rate of ten rupees per cent. on the amount of the sum wanting to make up the proper court-fee.

Notice of application for probate or letters of administration to be given to Revenue authorities, and procedure thereon.

of administration in consequence of any mistake, or of its not being known at the time that some particular part of the estate belonged to the deceased, if any executor or administrator acting under such probate or letters does not within six months ¹[* *

after the discovery of the mistake or of any effects not known at the time to have belonged to the deceased, apply to the said authority and pay what is wanting to make up the court-fee which ought to have been paid at first on such probate or letters, he shall forfeit the sum of one thousand rupees and also a further sum at the rate of ten rupees per cent. on the amount of the sum wanting to make up the proper court-fee.

²19-H. (1) Where an application for probate or letters of administration is made to any Court other than a High Court, the Court shall cause notice³ of the application to be given to the Collector.

(2) Where such an application as aforesaid is made to a High Court, the High Court shall cause notice of the application to be given to the Chief Controlling Revenue Authority ⁴[for the local area in which the High Court is situated.]

(3) The Collector within the local limits of whose revenue-jurisdiction the property of the deceased or any part thereof is, may at any time inspect or cause to be inspected, and take or cause to be taken copies of, the record of any case in which application for probate or letters of administration has been made; and if, on such inspection or otherwise, he is of opinion that the petitioner has under-estimated the value of the property of the deceased, the Collector may, if he thinks fit, require the attendance of the petitioner, (either in person or by agent) and take evidence and inquire into the matter in such manner as he may think fit, and, if he is still of opinion that the value of the property has been under-estimated, may require the petitioner to amend the valuation.

(4) If the petitioner does not amend the valuation to the satisfaction of the Collector, the Collector may move the Court before which the application for probate or letters of administration was made, to hold an inquiry into the true value of the property :

LEG. REF.

¹ The words and figures "after the first day of April, 1875, or "were repealed by the Repealing and Amending Act (XII of 1891).

² Ss. 19-H, 19-I, 19-J and 19-K were inserted by the Court-fees Amendment Act, 1899 (XI of 1899), S. 2.

³ For form of notice under this clause prescribed by the Chief Court of Lower Burma, see Burma Gazette, 1902, Pt. IV, p. 625.

⁴ Substituted for the words "of the Provinces" by S. 3 (1) of the Court-fees Amendment Act X of 1901.

NOTES.

forfeitures under S. 19-G, see *infra*, S. 19-J. S. 19-G refers to any mistake, not merely to a mistake of fact. 30 S.L.R. 201=1936 Sind 150.

Sec. 19-H.—The grant of probate cannot be delayed on account of the Collector's omission in making the motion under S. 19 (H) (4). 40 I.C. 576 (C.). As to procedure under the section, see 6 C.W.N. 898. The valuation fixed by the Dt. Judge after objection made by Collector is final and no appeal lies therefrom. 78 I.C. 901=1925 C. 357. A proceeding under S. 19-H merely decides a revenue dispute between the Collector and the holder of probate. The Court has no power to award costs in such proceeding. 50 C. 239=1923 C. 406.

(3) : CONSTRUCTION — UNDER-ESTIMATION OF VALUE.—MEANING OF.—The value of an estate is under-estimated if part of it is wrongly exempted on the ground that it is held in trust. The valuation is for the purposes of assessing the duty payable and such valuation is under-estimated if assets which should not have been excluded from that valuation, are excluded. 62 C. 114=1935 C. 509.

(4).—Scope.—Application for letters of administration—Claim to exemption from Court-fee on the ground of the fund being held in trust not beneficially—Certificate by Registrar of High Court exempting from Court-fee—If bars application by Collector. 62 C. 114. Per *Curiam*.—If a husband enters any shares in the names of himself and his wife, then it is an advancement for the benefit of the wife absolutely if she survives her husband. Hence on the wife's survival, such shares are not property of her deceased husband. The wife then is not liable to pay Court-fees on the value of the shares (English cases considered). 9 Luck. 370=1934 O. 72.

STARTING POINT.—Per *Smith, J.*, in order of Reference.—The period of six months prescribed in the proviso to sub-S. 4, S. 19-H must be taken to run from the time of the presentation of the revised inventory. (41 Cal. 556 (P.C.) Rel. on.) 9 Luck. 370=1934 O. 72.

Provided that no such motion shall be made after the expiration of six months from the date of the exhibition of the inventory required by section 277 of the Indian Succession Act, 1865, or, as the case may be, by section 98 of the Probate and Administration Act, 1881.

(5) The Court, when so moved as aforesaid, shall hold, or cause to be held, an inquiry accordingly, and shall record a finding as to the true value, as near as may be, at which the property of the deceased should have been estimated. The Collector shall be deemed to be a party to the inquiry.

(6) For the purposes of any such inquiry, the Court or person authorized by the Court to hold the inquiry may examine the petitioner for probate or letters of administration on oath (whether in person or by commission), and may take such further evidence as may be produced to prove the true value of the property. The person authorized as aforesaid to hold the inquiry shall return to the Court the evidence taken by him and report the result of the inquiry, and such report and the evidence so taken shall be evidence in the proceeding, and the Court may record a finding in accordance with the report, unless it is satisfied that it is erroneous.

(7) The finding of the Court recorded under sub-section (5) shall be final, but shall not bar the entertainment and disposal by the Chief Controlling Revenue authority of any application under section 19-E.

(8) The Provincial Government may make rules for the guidance of Collectors in the exercise of the powers conferred by sub-section (3).

¹[19-I. (1) No order entitling the petitioner to the grant of probate or letters of administration shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule, and the Court is satisfied that the fee mentioned in No. 17 of the first schedule has been paid on such valuation.

(2) The grant of probate or letters of administration shall not be delayed by reason of any motion made by the Collector under section 19-H, sub-section (4).]

LEG. REF.

¹ Inserted by S. 2 of the Court-Fees Amendment Act (XI of 1899).

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Sec. 19-I : CONSTRUCTION.—The word “property” in S. 19-I is used in its inclusive and not in its exclusive sense, and means all the property of the deceased. What the section requires is a full and honest account of all the property of the estate in respect of which a grant is applied for. 30 S.L.R. 201=165 I.C. 202=1936 Sind 150. The expression “valuation of the property” in S. 19 means valuation of the property of the deceased. 9 Luck. 370=1934 O. 72. Court-fee payable on the value as on the date of the application and subsequent alteration of law, enhancing the Court-fee does not affect the petitioner’s rights. 39 C.L.J. 209=1924 C. 987. The practice in Calcutta is to pay Court-fees to the Registrar whose certificate should be produced in Court to obtain the grant. 26 C. 404; 26 C. 407. See also L.B.R. (1893-1900) 623. In Subordinate Courts the fees must be paid to the Court clerk who will certify the amount to the Court. L.B.R. (1893-1900) 623. A Court will hear the application for Probate or Letters of Administration where the applicant has not paid but has undertaken to pay whatever fees would be found due. 14 O.C. 14=8 I.C. 695. On this section, see also 31 I.C. 460. On a petition for letters

of administration for part of property Court-fee on the value of the whole property cannot be levied. 90 I.C. 620=1925 L. 493. See also 1935 Sind 150. The section does not apply to provident fund money. 1925 N. 108 (1)=82 I.C. 128. An executor cannot be compelled to pay probate duty until the Collector has finished his work with regard to valuation of the property. 1929 C. 733. The question whether a certain property is or is not trust property comes under S. 19-I and an order in respect of that property by a Financial Commissioner under S. 19-G without proceeding under S. 19-H is *ultra vires*. 1928 L. 947. [33 M. 93 (F.B.), Foll.] The date of the payment for the valuation of the estate for the purpose of assessment of probate duty is the date on which the application for grant of probate is made. The Court-fee ought to be levied as a preliminary on the valuation put forward by the applicant for probate but the duty chargeable may subsequently be revised as a result of a reference made by the Collector under S. 19-H of the Act. 12 L.L.T. 37. O. VIII, r. 14 of the Madras High Court (Original Side) Rules, which relates to paupers, refers not only to suits but also to proceedings. An application for probate is clearly a proceeding within the meaning of this rule, and it is open to the Court not only to entertain the application in *forma pauperis* but also to make a further order granting probate to the applicant without payment by him of the

¹[19-J. (1) Any excess fee found to be payable on an inquiry held under Recovery of penalties, etc. section 19-H, sub-section (6), and any penalty or forfeiture under section 19-G, may, on the certificate of the Chief Controlling Revenue Authority, be recovered from the executor or administrator as if it were an arrear of land-revenue by any Collector in any part of British India.

(2) The Chief Controlling Revenue Authority may remit the whole or any part of any such penalty or forfeiture as aforesaid, or any part of any penalty under section 19-E or of any court-fee under section 19-E in excess of the full court-fee which ought to have been paid.]

Sections 6 and 28 not to apply to probate or letters of administration.

¹[19-K. Nothing in section 6 or section 28 shall apply to probates or letters of administration.]

CHAPTER IV.

PROCESS-FEES.

Rules as to cost of processes.

20. The High Court shall, as soon as may be, make rules as to the following matters :—

(i) The fees chargeable for serving and executing processes issued by such Court in its appellate jurisdiction, and by the other Civil and Revenue Courts established within the local limits of such jurisdiction ;

(ii) the fees chargeable for serving and executing processes issued by the Criminal Courts established within such limits in the case of offences other than offences for which police officers may arrest without a warrant ; and

(iii) the remuneration of the peons and all other persons employed by leave of a Court in the service or execution of processes.

LEG. REF.

¹ Inserted by S. 2 of the Court-Fees Amendment Act (XI of 1899).

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requisite Court-fee (succession duty) under Art. 11, Sch. I of the Court-Fees Act. In this respect, S. 19-I of the Court-Fees Act should be reasonably interpreted ; the section cannot be read as altering the policy of the pre-existing law. In such cases, on the analogy of O. 33, r. 10, C. P. Code, the Government has a first charge on the subject-matter of the pauper application, i.e., the estate of the deceased. (1937) 2 M.L.J. 899. Application for probate—Duty called for and paid and application refiled—Receipt of dividends in the meantime—Date for valuation of estate. See 14 L. 526 = 1933 L. 936. S. 19-I is subject to O. 33, C. P. Code—Probate or letters of administration in *forma pauperis*—Court has power to issue. See 47 L.W. 731 = 1938 Mad. 486 = 1938 M.W.N. 640.

NON-COMPLIANCE WITH—EFFECT—IF RENDERS PROCEEDINGS NULL.—It does not follow that because an application for letters of administration with the will annexed, is not in proper form, because of non-compliance with the provisions of S. 19-I of the Court-Fees Act the proceedings are a nullity. The Court may not pass an order granting letters until the application is made in proper form and fulfils the requirements of the law. The Court can give the applicant an opportunity to amend the application and make good the debts, and then proceed, to make a grant. It is not necessary that the application

should be dismissed and that the applicant asked to start the proceedings *de novo*. 30 S.L.R. 201 = 1936 Sind 150.

Sec. 19-J.—Where S. 19-J is properly applicable, the petitioner is entirely in the hands of the Chief Controlling Revenue Authority who is at liberty to refuse to stamp probate till the penalty has been paid. 43 C. 230 = 20 C.W.N. 504 = 31 I.C. 460.

Sec. 20.—A commission issued to an Ameen to make local investigation, is not a process within S. 20. 17 C. 281. The provisions of S. 93, C. P. Code (now O. 48, R. 1), do not appear to give a Court any power to depart from the rules of the High Court on the subject of the levy of process-fees or to remit these fees. 26 C. 124. The Court of a Special Judge is a Civil Court within the meaning of S. 20. In appeals before the special Judge, process fees should be paid according to the scale laid down in the High Court Rules framed under the section. R. 65 of the rules framed by the Government under S. 189 of the B. T. Act is not applicable to such a case. 58 C. 995 = 35 C.W.N. 253 = 1931 C. 572. Scope—Custody fees in respect of attachment of movables—Decree-holder has a right to refund of unspent fees. See 1937 C. 86 = I.L.R. (1937) 1 Cal. 624 = 41 C.W.N. 155. Court has no inherent jurisdiction to consolidate Civil Revision Petition in cases disposed of by a single judgment of the lower Court so as to enable the party to file one vakalat in the petitions and pay one process-fee for the common respondents. 53 M. 262 = 1930 M. 381 = 58 M.L.J. 521 (F.B.). See also 53 M. 248 = 58 M.L.J. 510 = 1930 M. 376 (F.B.).

The High Court may from time to time alter and add to the rules so made.

All such rules, alterations and additions shall, after being confirmed by the Provincial Government ¹[* * * *] be published in the Official Gazette, and shall thereupon have the force of law.

Confirmation and publication of rules.

Until such rules shall be so made and published, the fees now leviable for serving and executing processes shall continue to be levied, and shall be deemed to be fees leviable under this Act.

21. A table in the English and Vernacular languages, showing the fees chargeable for such service and execution, shall be exposed to view in a conspicuous part of each Court.

Tables of process fees.

Number of peons in District and Subordinate Courts.

22. Subject to rules to be made by the High Court and approved by the Provincial Government ²[* * * *],

every District Judge and every Magistrate of a District shall fix, and may from time to time alter, the number of peons necessary to be employed for the service and execution of processes issued out of his Court and each of the Courts subordinate thereto,

and for the purposes of this section, every Court of Small Causes established under Act No. XI of 1865 (*to consolidate and amend the law relating to Courts of Small Causes beyond the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature*) ³ shall be deemed to be subordinate to the Court of the District Judge.

⁴23. Subject to rules ⁵ to be framed by the Chief Controlling Revenue-Authority and approved by the Provincial Government ²[* * * *] every officer performing the functions of a Collector of a District shall fix, and may from time to time alter, the number of peons necessary to be employed for the service and execution of processes issued out of his Court or the Courts subordinate to him.

24. [*Process served under this Chapter to be held to be process within meaning of Code of Civil Procedure.*] *Rep. by the Repealing and Amending Act (XII of 1891).*

CHAPTER V.

OF THE MODE OF LEVYING FEES.

Collection of fees by stamps. 25. All fees referred to in section 3 or chargeable under this Act shall be collected by stamps.

LEG. REF.

¹ The words "and sanctioned by the Governor-General of India in Council" were omitted by Act XXXVIII of 1920, S. 2, Sch. I.

² The words "and the Governor-General of India in Council" were omitted by Act XXXVIII of 1920, S. 2, Sch. I.

³ The reference to Act XI of 1865 should now be read as referring to the Provincial Small Cause Courts Act (IX of 1887), see S. 2 (3) of that Act.

⁴ In the Punjab, S. 23 is repealed—see the Punjab Land Revenue Act (XVII of 1887), P. and N.W.-F. Code.

⁵ For rules framed under the powers conferred

by this section in—

Madras see Mad. R and O.
Central Provinces see C. P. Gazette, 1905, Pt. III, p. 507.
Assam see Assam Rules Manual.

As to Burma, see S. 41 of the Lower Burma Courts Act (VI of 1900).

NOTES.

Sec. 25.—Whether several stamps may be used to make up the full amount chargeable. See 16 W.R. 152; 12 W.R.C.R. 449; 17 W.R. C.R. 220.

26. The stamps used to denote any fees chargeable under this Act shall be impressed or adhesive, or partly impressed and partly adhesive, as the ¹[Appropriate Government] may, by notification in the Official Gazette from time to time direct.²

Rules for supply, number, renewal and keeping accounts of stamps.

27. The ³[Appropriate] Government] may, from time to time, make rules for regulating—

- (a) the supply of stamps to be used under this Act ;
- (b) the number of stamps to be used for denoting any fee chargeable under this Act ;
- (c) the renewal of damaged or soiled stamps ; and
- (d) the keeping accounts of all stamps used under this Act :

Provided that, in the case of stamps used under section 3 in a High Court, such rules shall be made with the concurrence of the Chief Justice of such Court.

All such rules shall be published in the Official Gazette and shall thereupon have the force of law.

Stamping documents inadvertently received.

28. No document which ought to bear a stamp under this Act shall be of any validity, unless and until it is properly stamped.

But, if any such document is through mistake or inadvertence received, filed or used in any Court or office without being properly stamped, the presiding

LEG. REF.

¹ Substituted by the A.O. for the words "Local Government" which had been substituted by the Devolution Act (XXXVIII of 1920), S. 2 and Sch. I, for "Governor-General of India in Council."

² For rules as to levy of Court-fees by adhesive and impressed stamps, see Gazette of India, 1883, Pt. I, p. 189.

³ Substituted by the A.O. for the words "Local Government."

NOTES.

Sec. 27.—Stamps impressed with "for use in the High Court only" are not invalidated for use in subordinate Courts. 8 P.L.T. 33 = 1926 P. 408. Where a plaint not properly stamped is presented to a wrong Court and is returned to be presented to a proper Court, the latter Court can require the plaintiffs to file Court-fees in accordance with the rules though no objection to it was first taken. 11 P.L.T. 711. Where the fees were not devoted in the manner prescribed in the rules the application can be treated as unstamped. 26 N.L.R. 263. The rules made by the Local Government and the High Court are that stamps of the highest denomination should be used. But the plaintiffs presented a plaint with two stamps one for Rs. 20 and another for Rs. 10. The Court returned the plaint to file fresh Court-fees—a single impressed stamp as per rules. The plaintiff represented it with proper stamp and applied for refund. The Court should grant him a certificate for refund of the stamps originally filed. 11 P.L.T. 708. There is nothing illegal in the Court permitting a plaintiff to file a plaint with Court-fee stamps of a denomination smaller than the one required by the rules under the Court-Fees Act, if the requisite stamps are not available. Nor is there anything in the rules which prohibits the receipt by the Court of a plaint with Court-

fee stamps of a denomination lower than the one required by the rules. On the other hand, the rules provide that Court-fee stamps of a lesser denomination may be affixed if the stamp of the required value is not available. Where the Court-fee stamps of the requisite denomination are not available, and the plaintiff files his plaint with insufficient Court-fee, the Court is bound to receive the plaint, for a time within which the deficiency should be made up, and if it is not complied with within the time fixed, then to reject it. It is illegal and unjust to refuse to receive the plaint, especially when the plaint is presented on the last day of limitation. The order refusing to receive the plaint is liable to be set aside in revision. 44 L.W. 830 = 71 M.L.J. 804.

Sec. 28: SCOPE OF THE SECTION.—The specific provisions of the section are not cut down either by Ss. 9 to 11 of this Act or by O. VII, r. 11 (Old S. 54) of C. P. Code. 12 A. 129 (F.B.). The effect of the section is that if the necessary Court-fees on a document are paid within the time allowed by the Court, the document may be treated as valid from the date on which it was filed. 8 R. 538 = 129 I.C. 500 = 1931 R. 38. The mistake or inadvertence referred to in this section is that of the Court and its officers and not of the party. 1901 A.W.N. 21 ; 12 A. 129 ; 20 M. 319. On this point, see also 4 A.L.J. 636 = 29 A. 749. Where an appeal is not properly stamped, whole appeal will not be dismissed but amount covered by Court-fee will be decreed. 96 I.C. 135 = 1926 L. 558. See also 131 I.C. 297 = 1931 L. 237. It is always open to plaintiff or an appellant to reduce his claim and effect a saving of Court-fee if otherwise permissible. In so far as he submits to the decree appealed against, it becomes final, and the appeal is limited to the amount in contest on which alone Court-fee need be paid. 27 A.L.J. 547 = 116 I.C. 82 = 1929 A.

Judge or the head of the office, as the case may be, or, in the case of a High Court, any Judge of such Court, may, if he thinks fit, order that such document be stamped as he may direct; and, on such document being stamped accordingly the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance.

29. Where any such document is amended in order merely to correct a mistake and to make it conform to the original intention of the parties, it shall not be necessary to impose a fresh stamp.

30. No document requiring a stamp under this Act shall be filed or acted upon in any proceeding in any Court or office until the stamp has been cancelled.

Such officer as the Court or the head of the office may from time to time appoint shall, on receiving any such document, forthwith effect such cancellation by punching out the figure-head so as to leave the amount designated on the stamp untouched, and the part removed by punching shall be burnt or otherwise destroyed.

CHAPTER VI.

MISCELLANEOUS.

31. [*Repayment of fees paid on applications to Criminal Courts.*] Rep. by the Code of Criminal Procedure (Amendment) Act (XVIII of 1923), S. 163.

NOTES.

308. See also 27 A. 151. Even Revenue Officer has the powers under S. 28 to direct the payment of Court-fees in revision. 30 I.C. 862 (2)=22 C.L.J. 57. But this power must be exercised before making the final decision in the case. 7 A. 528=5 A.W.N. 140 (But see the judgment of Mahmood, J., *contra*, in the same case). S. 28 of the Court-Fees Act does not empower the Court to call upon the parties to pay the deficit Court-fee after judgment has been pronounced. The Court is then *functus officio*. 11 P. 532=1932 P. 228. See also 140 I.C. 191=1932 A.L.J. 165=1932 A. 316; 46 C. 520. Where a plaint is returned by one Court, for presentation to another Court, the latter Court should give credit to the stamp on the plaint. 35 M. 567=21 M.L.J. 533; 29 Bom.L.R. 280. See also 8 B. 313; 8 B. 380; 51 B. 236=1927 B. 257. Where a plaint with insufficient Court-fee stamp is presented, opportunity must be given to the party to pay the proper stamp. 106 I.C. 817=1928 L. 221. Written statement claiming set off not stamped—Effect—Subsequent order for payment of Court-fee—If validates proceedings. See 1936 C. 277.

LIMITATION.—Doubts as to whether payment of deficit Court-fee after limitation time would save limitation, have been set at rest by the enactment of S. 149 of G. P. Code. Under that section it is in the discretion of the Court to exercise the powers. The Court will not exercise the discretion unless it is satisfied that some ground exists. 1 L. 234. Where a deficiency in Court-fee is made good within the time allowed by the Court but beyond the period of limitation prescribed for the suit, the suit is not barred by time. 23 I.C. 408. See also 133 I.C. 122 (R.). Plaint and memorandum of appeal insufficiently stamped—Second appeal to High Court properly stamped—High Court has

power, on levying the additional stamp duty on the plaint and memorandum of appeal, to hear the second appeal as there was an existing suit at the time the period of limitation expired and the provisions of S. 28 were applicable. 24 M. 331; 25 M. 380=11 M.L.J. 119. See also 18 M. 29; 1 M.L.J. 598; 2 A. 682 (F.B.); 29 A. 749; 2 C.L.J. 68. Payment of Court-fee after the period of limitation but during the enquiry into pauperism of the plaintiff, saves limitation. 2 A. 241; 24 M. 493. See also 22 B. 849; 26 C. 592 (Court-fee paid after rejection of pauper application). Where there was an entry in the proceedings by the Judge to the effect that the memorandum of appeal was properly stamped, it was held that the counsel for the appellant having thus been deceived into believing that the stamp which he had affixed was quite correct, it would seem to be unfair to dismiss the appeal on the ground that the appeal was incorrectly stamped. It was further held that S. 28 of the Court-Fees Act gave power to the High Court to make such orders as seem to it suitable in the circumstances of each case and that the order of the lower Court in the particular case dismissing the appeal should be set aside. In the result the appellant was directed to make good the deficiency and thereafter the appeal was directed to be heard and disposed of according to law. 1940 A.M.L.J. 19.

Sec. 29.—A party who filed a suit in a Revenue Court which referred him to the Civil Court regarding a portion of the claim is not exempted under S. 29 from paying the usual Court-fees in his suit in the Civil Court. 132 P.R. 1892.

Sec. 30.—See 35 M. 567=21 M.L.J. 533=10 I.C. 201; 29 Bom.L.R. 280 and 51 B. 236 cited under S. 28 (stamp on plaint returned for presentation to proper Court).

[Old] Sec. 31.—Expenses incurred in the prosecution other than Court and process-fees

32. [Amendment of Act VIII of 1859 and Act IX of 1869.] *Rep. by the Repealing and Amending Act (XII of 1891).*

33. Whenever the filing or exhibition in a Criminal Court of a document in respect of which the proper fee has not been paid is, in the opinion of the presiding Judge, necessary to prevent a failure of Justice, nothing contained in section 4 or section 6 shall be deemed to prohibit such filing or exhibition.

¹[34. (1) The ²[Appropriate Government] may from time to time make rules for regulating the sale of stamps to be used under this Act, the persons by whom alone such sale is to be conducted, and the duties and remuneration of such persons.

(2) All such rules shall be published in the Official Gazette, and shall thereupon have the force of law.

(3) Any person appointed to sell stamps who disobeys any rule made under this section, and any person not so appointed who sells or offers for sale any stamp, shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.]

35. The ³[Appropriate Government] may, from time to time by notification in the Official Gazette reduce or remit⁴ in the whole or in any part of ⁵[the territories under its administration] all or any of the fees mentioned in the first and second schedules to this Act annexed and may in like manner cancel or vary such order.

LEG. REF.

¹ Substituted for original section by the Amending Act XII of 1891.

² Substituted by the A.O. for the words "Local Government."

³ Substituted by the A.O. for the words "Local Government" which had been substituted by the Devolution Act (XXXVIII of 1920), S. 2 and Sch. I, for the words "Governor-General of India in Council."

⁴ For remission of duty payable under the Act, in respect of Indian probates, letters of administration or succession certificates of the share or other interest of a deceased member of a company formed under Act VI of 1882, provided that the said share or interest was registered in a branch register of the United Kingdom under Act IV of 1900, and that such member was at the date of his decease domiciled elsewhere than in India, see Notification No. 881 L.R. Gazette of India, 1900, Pt. I, p. 100. For remission of duty on applications for suspension or remission of land revenue, see Notification No. 4385 L.R. dated 19th August, 1901, Gazette of India, 1901, Pt. I, p. 608. For remission of fees on applications for issue of permits for transport of country spirits, see Notification No. 6260 L.R. dated 12th December, 1901, Gazette of India, 1901, Pt. I, p. 1030.

⁵ Substituted by S. 2 and Sch. I of the Devolution Act (XXXVIII of 1920), for "British India."

NOTES.

can be awarded only out of the fine levied from the accused under S. 545 of the Cr. P. Code. (1872-1892) L.B.R. 595; 24 M. 305=2 Weir 722; 1 Weir 723. See also 1 L.B.R. 209. The fee ordered to be paid is an integral part of the sentence and must be treated as a fine imposed

by the Court. 5 M.H.C.R. App. 28; 2 Weir 724. But see *contra* 1 Weir 724 (No imprisonment in default of payment). See also 26 M. 421=2 Weir 488; 20 C. 687. The making of an order under S. 31 does not amount to an enhancement of sentence and an appellate Court can order the accused to pay the complainant's Court-fees. 47 M. 914=47 M.L.J. 355. (Old rulings to the contrary are not now good law.) See also 1925 Mad. 136=47 M.L.J. 355.

APPEAL AND REVISION.—The appellate Court cannot set aside an order passed by a Criminal Court under S. 31. 11 Cr.L.J. 194=4 I.C. 1130. But see also 1923 A. 86, *infra*. If under S. 31 the order directing payment to complainant is not proper, it can be corrected in appeal or revision. 3 A. 187 (Cr.)=1923 A. 86.

Sec. 34.—The case of mukhtear who purchases a Court-fee stamp for a client and transfers it to another client is not covered by S. 34. Where a pleader's munshi instead of obtaining refund on an unused stamp altered the name on the stamp and used it for another client for the first time, *held*, that the accused was not liable to be convicted under S. 468, I. P. Code, and S. 34 Court-Fees Act, in the absence of proof that he acted dishonestly or fraudulently. 133 I.C. 645=1931 L. 337. See also 30 C. 921. To establish a charge of an offence under S. 34 (3) it is necessary for the prosecution to identify the stamps alleged to have been wrongfully sold. Where the only evidence on the point was that of three entries in a particular exhibit, it was held that it was not enough to sustain the charge. 174 I.C. 513=42 C.W.N. 246=1938 C. 195.

36. Nothing in Chapters II and V of this Act applies to the commission payable to the Accountant-General of the High Court at Fort William, or to the fees which any officer of a High Court is allowed to receive in addition to a fixed salary.

Saving of fees to certain officers of High Courts.

SCHEDULE I.

Ad valorem fees.

Number.		Proper Fee.
1. ¹ Plaint ² [written statement pleading a set-off or counter-claim] or memo-	When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.

LEG. REF.

¹ To ascertain the proper fee leviable on the institution of a suit, see the table annexed to this schedule.

² Inserted by S. 155 and the 4th Schedule of the Code of Civil Procedure (V of 1908).

NOTES.

SCOPE OF SCHEDULE I.—Schedule is supplementary and not alternative to S. 7. 6 N.L.R. 164=8 I.C. 1125. The proviso to Art. 1 is of general application and is not confined to plaints and memoranda of appeals under Art. 1 only. 3 A. 108 (112); 29 C. 140. Multifarious suits under S. 17 are also subject to it. 3 A. 108.

Sch. and Ss. 4, 6 and 7: SCOPE—IMPOSITION OF LIABILITY.—The schedules to the Court-Fees Act, when read with Ss. 4 and 6 of the Act, do impose a liability. S. 7 refers only to suits and, in certain cases specifically mentioned, memoranda of appeal. The fees chargeable in respect of all other documents are those laid down in the Schedules to the Act, liability being imposed by the Schedules read with S. 4 or S. 6 as the case may be. 1939 Rang.L.R. 474=1939 Rang. 375.

Art. 1: APPLICABILITY.—Art. 1 applies only to those cases which are not otherwise specially provided for under the Act. 61 P.R. 1919=47 I.C. 992. Suit for cancellation of instrument under S. 39, Specific Relief Act, falls under the residuary Article, Sch. I, Art. 1. 139 I.C. 32=1932 A.L.J. 684=1932 A. 485 (F.B.). See also cases cited on the point under S. 7, Cl. (iv) (c) (IV-A Mad.). If prayer for this relief is attached to a prayer for a declaration, the question which then arises is whether the cancellation should be regarded as consequential on the declaration or as a substantial relief in itself which requires separate valuation. In the former case, a single Court-fee will have to be paid on the value of the reliefs sought under S. 7 (iv)(c). In the other event, a Court-fee will have to be paid on the value of the subject-matter in dispute under Art. 1 of Sch. I, if the subject-matter is capable of valuation, otherwise a fixed fee of Rs. 10 under Art. 17 (vi) of Sch. II. 43 P.L.R. 252=1941 Lah. 265; I.L.R. 1941 Lah. 451=43 P.L.R. 106=1941 Lah. 97 (F.B.) (Distinction between consequential reliefs and substantial reliefs pointed out). There is no particular section in the Court-Fees Act for assessment of fair rent and so *ad valorem* fee

has to be paid. 100 I.C. 913=8 P.L.T. 366=1927 P. 123. See also 1929 C. 141. An application for restitution under S. 144, C. P. Code, may be stamped as a mere application. *Ad valorem* fee is not necessary. 21 C.W.N. 544. But an appeal against an order passed under S. 144, C.P. Code, is an appeal against a decree and an *ad valorem* stamp duty is payable thereon. 82 I.C. 321=22 A.L.J. 881. See also 41 C.W.N. 157=1937 C. 152; 113 I.C. 270; 42 C.W.N. 152; 1938 Rang.L.R. 635; 1937 Pesh. 3=167 I.C. 879. But see *contra* 1927 L. 635. (See also under Sch. II, Art. 1). So also on an appeal against an order under O. 21, r. 50 (2). 10 Bur.L.T. 42=35 I.C. 429; 1930 L. 825; 37 C.W.N. 227. See I.L.R. (1939) Kar. 589=1939 Sind 161 (F.B.). (Case under Bombay Amending Act and notification). Also on an appeal against an order under O. 21, r. 99. 10 B. 238; 8 C. 720. See also 29 M. 172; 4 M. 221. Regarding Court-fees in appeals in land acquisition cases, see 1927 C. 45=97 I.C. 140; 29 L.W. 237=1929 M. 223; 35 C.W.N. 1103; 138 I.C. 199=1932 O. 224. (See also under S. 8). An application for settlement of fair rent and for declaration under Ss. 105 and 105-A of the Bengal Tenancy Act *ad valorem* Court-fee is payable on the value of the subject-matter. 117 I.C. 701=1929 C. 141. The principle of valuation in appeal is the same as in original plaint. 1930 R. 164. When a dispute is at the stage of an appeal by a defendant who seeks to set aside the whole decree, then the value of the subject-matter in dispute must necessarily be the value of the relief granted by the decree which the appellant wishes to disembarass himself of. In such a case one has to ask oneself the question "what is the value to the appellant of immunity from the decree." Upon the answer depends the value at which the appeal ought to be assessed. It is not open to the appellant defendant to avoid assessing his appeal at its full valuation merely because it may prove, as a result of the appeal itself, that the plaintiff's valuation was excessive. 1941 A.L.J. 381=1941 All. 295. An *ad valorem* Court-fee has to be paid on a memorandum of appeal against a decree or order having the force of a decree. A memorandum of appeal against an order rejecting a plaint must be stamped *ad valorem*. 1929 P. 615. See also 60 C. 530=37 C.W.N. 227=1933

Number.		Proper Fee.
1. Plaint etc.—(Contd.) random of appeal (not otherwise provided for in this Act) ¹ [or of cross-objection] presented to any Civil or Revenue Court except those mentioned in section 3.	When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.	Six annas.
	When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to one thousand rupees.	Twelve annas.

LEG. REF.

¹ Inserted by S. 155 and the Fourth Schedule of the Code of Civil Procedure (Act V of 1908).

NOTES.

C. 546; I.L.R. (1939) Kar. 589=1939 Sind 161 (F.B.). [appeal from order under C. P. Code, O. 21, r. 50 (2)]. Where a plaint is rejected under O. 7, r. 11, C. P. Code, as the deficiency in Court-fee was not made good and an appeal is preferred therefrom, the subject-matter of the appeal is not the amount of the claim in the suit but the sum of money rightly claimable as Court-fees. *Ad valorem* Court-fee on the difference between the amount demanded by the Court and that paid by the plaintiff, ought to be paid on the memorandum of appeal. 1939 N.L.J. 32. Court holding additional Court-fee necessary and returning plaint for necessary amendments instead of demanding additional Court-fee and rejecting plaint on failure to pay—Proper procedure pointed out—Court has no power to direct amendment. See 1938 M. 645=47 L. W. 523. Order rejecting plaint for failure to pay additional Court-fee—Appeal from—Same Court-fee is payable as on the plaint. See 1935 N. 83 (F.B.). See also 1939 N.L.J. 32.

COURT-FEES ON SET-OFF.—The words “set-off” and “counter-claim” are not defined in the Court-Fees Act but they have a definite meaning attached to them. They refer to a cross-claim against the plaintiff which entitles the defendant to refuse to pay the amount demanded by the plaintiff and to assert that the result of setting off the cross-claim of the defendant would be that the defendant would on the contrary be entitled to a decree for the balance. 1933 Sind 247. See also 13 L.L.T. 45; 1935 P. 110; 1940 N.L.J. 176. Where the defendant claims set-off, the amount of which exceeds the amount of claim made against him, he must pay *ad valorem* Court-fees on the entire sum claimed by him and not merely on the difference between the two amounts. 45 A. 218=20 A.L.J. 1005=1923 A. 118. See also 8 A. 396; 13 B. 672; 15 M. 29. The expression “set-off” includes an equitable set-off also and is not confined to legal set-off coming under O. 8, r. 6, C. P. Code. 147 I.C. 719; 1933 M. 203; 142 I.C. 719 following 45 All. 218. See also 58 M. 338=68 M.L.J. 23; 1936 A.M.L.J. 60; 1936 N. 290; 165 I.C. 430=1936 N. 222; 1938 A.L.J. 701=1938 All. 522; 43 C.W.N. 838=1939 Cal. 415. Suit for possession of share by partition—Defendant claiming to be in possession under

wakfnama—Decree by trial Court finding wakf invalid—Appeal seeking to set aside decree—Claim by appellant that declaration of validity of wakf will be enough—Court-fee payable. 159 I.C. 727=1936 A. 216. Where on a suit brought on the basis of a promissory note the defendant claimed in his written statement a specified amount by way of damages, setting out the particulars of the claim made by him as one arising from the transaction of sale which led to the execution of the promissory note in favour of the plaintiff and by reason of the breach of covenant alleged to have been committed by the plaintiff. *Held*, that the claim by way of set-off came under Art. 1, Sch. I. (*Ibid.*) In a suit for accounts and to recover moneys of a dissolved partnership the defendant’s claim for decree on accounts is not a counter-claim. No Court-fee need be paid thereon until the amount has been ascertained. 27 I.C. 316=8 S.L.R. 122; 27 I.C. 320=8 S.L.R. 124. See also 1933 M. 353. Pending a suit, the disputes were referred to arbitration out of the Court and it was found that the money was payable to defendant. The Court could direct the defendant to plead the award as an adjustment and claim the amount awarded, paying Court-fee thereon. 18 S.L.R. 111=88 I.C. 61 (2)=1925 Sind 266.

CROSS-OBJECTIONS.—A memorandum of cross-objections must bear Court-fees *ad valorem* on the value of the subject-matter in dispute. 46 C. 160=45 I.C. 939=27 C.L.J. 443; 15 A.L.J. 886; 1933 O. 528; 155 I.C. 293=1935 O.W.N. 505; 39 P.L.R. 586; 185 I.C. 623; 43 C.W.N. 838=1939 Cal. 415. Petition stating reasons on which the respondents supported the decree, does not amount to cross-objection for which *ad valorem* fee is payable. 44 A. 577=1922 A. 280. Nor mere criticism of judgment. 1 P. 258; 25 O.C. 275=1923 O. 44 (1). Where the suit of the plaintiff-appellant was entirely dismissed by the Court below and therefore there was nothing in that decree against which the defendant-respondent was required to object, objections filed by him supporting the decree on some of the grounds that have been decided against him in the Court below are strictly speaking not cross-objections but are really only a means of giving notice to the appellant of his intentions, and an *ad valorem* Court-fee is therefore not payable on them. 1937 O.L.R. 554=1937 O.W.N. 1057=1937 O. 512. See also I.L.R. (1938) Mad. 981=1938 Mad. 498= (1938) 1 M.L.J. 662. In the case of cross-objections relating to possession of land, *ad*

Number.		Proper Fee.
1. <i>Plaint, etc.—(Contd.)</i>	When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to five thousand rupees.	Five rupees.

NOTES.

valorem fee is payable on its value and not on the basis calculated under S. 7 (v). 22 A.L.J. 911. Cross-objections in a suit for declaration must bear *ad valorem* fee under this Article as Art. 17 of Sch. II does not refer to cross-objections. 3 P.L.J. 197=45 I.C. 568. See also 40 A. 93=43 I.C. 179. On a cross-objection as to the finding of the lower Court on a portion of sale consideration being not for legal necessity, Court-fees should be paid on the amount held to be not for legal necessity. 45 A. 537=1924 A. 175. See also 40 A. 93=43 I.C. 179=15 A.L.J. 886; 1939 Rang. 375. A respondent who files a memorandum of objections cannot claim to have Court-fees reduced simply because the appellant has paid more than what he should have paid. 46 C. 160=45 I.C. 939. A memo. of cross-objections filed in the High Court on the question of costs only does not fall under Art. 1, Sch. I, but may be treated as a petition under Art. 1 (d) of Sch. II and a Court-fee of Rs. 2 is leviable thereon. 64 I.C. 606=25 C.W.N. 934. But see *contra* 2 R. 637=1926 R. 145; 98 I.C. 272=1926 L. 645; 8 P. 543=1929 P. 286; 1930 A. 1097. No Court-fee is chargeable on a memorandum of objections filed under O. 41, r. 26, C. P. Code. 54 A. 465=1932 A. 526. Where the defendant is not putting forward any counter-claim, but is making various claims as to items in the particular account to be taken in the suit, he cannot be asked to pay Court-fees on those sums. 1933 M. 353. See also 1940 Rang. L.R. 529=1940 Rang. 300. The plaintiffs and the defendants were tenants in common in certain property. The plaintiffs sued for partition of that property. In their written statement the defendants said that the plaintiffs had been managing the property and recovering the rents. They did not value their relief for account of the rent or pay Court-fee thereon. Held, that it was incumbent on them to value their relief and to pay necessary Court-fees. 1933 S. 304.

THE AMOUNT OR VALUE OF THE SUBJECT-MATTER IN DISPUTE.—The words "value of the subject-matter in dispute" in Art. 1, Sch. I, in the case of a suit, to the value of the subject-matter of the suit, and in the case of an appeal, to the value of the subject-matter in dispute in appeal. The subject-matter of the suit and the subject-matter of the appeal may not be the same. Where the appellant appeals against the decree in a suit on merits and also challenges the order of costs independently, then the value of the subject-matter in dispute in appeal is the total amount consisting of the value of the subject-matter in the suit and the amount of costs challenged. 15 Luck. 392=1940 O.W.N. 167=1940 Oudh 182. S. 7 prescribes the value that shall remain unchanged in all stages of a case. Once the value of the relief is ascertained

for the purposes of the plaintiff, the 1st schedule rates the relief at the same value for the purposes of the appeal. 6 N.L.R. 164=8 I.C. 1125. See also 25 P.R. 1916=32 I.C. 121. The words "the subject-matter in dispute" in Art. 1, Sch. I, mean, in reference to a cross-objection, the subject-matter in dispute in the cross-objection. If, therefore, in an administration suit the respondents, who have been ordered by the preliminary decree to pay to the appellants a certain sum as special costs in any event (the ordinary costs being ordered to abide the passing of the final decree), file a cross-objection relating to the findings in the suit and also to the special costs, the cross-objection, so far as it relates to the special costs, is chargeable with Court-fees *ad valorem* on the amount of the costs. 1939 Rang.L.R. 474=1939 Rang. 375. An appeal filed by some only of the plaintiffs need only be stamped to the extent required by the interests of those parties. 10 L.L.T. 23. Where the valuation of the original suit is over Rs. 5,000, but the appellant is interested only to the extent of Rs. 200, he can value his appeal at Rs. 200. 37 A. 208=13 A.L.J. 283. In a second appeal from a dismissal of an appeal for non-payment of deficient Court-fee, the dispute in the lower Court having reference only to the Court-fee payable, the subject-matter in dispute in second appeal is the amount of stamp in dispute between the parties, in other words, the difference between the Court-fee paid and the Court-fee demanded is the matter in dispute in second appeal. 1938 Mad. 498=I.L.R. (1938) Mad. 981=(1938) 1 M.L.J. 662. See also 1937 O. 512. The subject-matter of every appeal does not necessarily coincide with the subject-matter of the suit in regard to which the appeal has been filed. I.L.R. (1938) Mad. 981=1938 Mad. 498=(1938) 1 M.L.J. 662. See also 1940 O. 182.

ILLUSTRATIVE CASES.—The value of an appeal is not in all cases the value of the suit as originally filed but the value of the relief granted which is sought to be got rid of. 45 M. 246=41 M.L.J. 587. Where a decree for possession is given to the plaintiff conditional on his paying a certain amount to the defendant an appeal by him against the condition must be valued *ad valorem* on the amount he was asked to pay. (*Ibid.*); 59 I.C. 667=21 P.W.R. 1921; 92 I.C. 624=1926 M. 225; 108 I.C. 379 (2)=10 L.L.J. 55; 45 M. 246=1922 M. 211. Where a plaintiff asks for a declaration that a certain decree against him is void and illegal, it involves the setting aside of the decree and relieving plaintiff of the obligations arising thereunder and, therefore, involves a consequential relief and the plaintiff is liable to pay an *ad valorem* Court-fee under

Number.		Proper Fee.
1. Plaint, etc.—(Contd.)	When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees, or part thereof, in excess of five thousand rupees, up to ten thousand rupees.	Ten rupees.
	When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Fifteen rupees.

NOTES.

Art. 1, Sch. I and not fixed fee as given in Art. 17 (iii) of Sch. II. 1940 O.W.N. 1121=191 I.C. 413=16 Lcuk. 526. Where the plaintiff's suit for possession was decreed on condition of the plaintiff paying off the encumbrances on the property, an appeal against the condition should bear an *ad valorem* Court-fee on the value of the encumbrance. 1 P.L.T. 738=57 I.C. 481. See also 59 I.C. 667. Where a suit for possession in which the defendant admits plaintiff's title but claims a charge of Rs. 700 over that property is decreed but without upholding defendant's claim and the defendant files an appeal, he should pay *ad valorem* Court-fee on Rs. 700, the amount claimed by him. 1936 L. 935. Where in a suit for ejectment, the defendant set up title in himself and also claimed Rs. 500 as compensation for improvements, and a decree was passed for the plaintiff the claim in respect of improvements being disallowed, an appeal by defendant again raising both the questions should bear Court-fee only as on a suit for possession. 23 M. 84. See also 48 M. 652=47 M.L.J. 919=1925 M. 323. Thus in a case where the claim for improvements is incidental to a decree for possession Court-fee payable is as in a suit for possession. See 1926 Mad. 225. See also 1940 O.L.R. 92 (Appeal against order disallowing claim under S. 9, U. P. Encumbered Estates Act). Though the real subject-matter in dispute has reference only to the amount of compensation, still a party can as a mere camouflage raise a question of title in order to escape liability for Court-fees. There is no provision of law authorising him to bring the case under S. 7, Cl. (v). See 1928 M. 929=110 I.C. 752. See also 1931 L. 633. Where the defendant's plea in a suit for possession that the plaintiff cannot get possession without payment of her dower debt, was rejected by the lower Court and the suit decreed, and the defendant appealed, *held*, that she was not bound to pay any Court-fee on the dower amount and the Court could grant a decree to plaintiffs conditional on payment of dower debt to defendant. 36 A. 322=25 I.C. 935=12 A.L.J. 481. Where in the decree of the lower Court a charge is created over the lands purchased by the defendants for payment of certain amounts to the plaintiff and the defendants appeal to remove the charge, they should pay *ad valorem* Court-fee on the value of the properties or on the decretal amount whichever is less. 5 P. 721=8 P.L.T. 284=1927 P. 46; 11 P.R. 1916=33 I.C. 138; 7 L. 215=96 I.C. 473

=1926 L. 408 (appeal from the decree rendering a property liable for the decree amounts). The plaintiff sued to recover dower. The trial Court decreed the suit against the person and personal property of 1st defendant but refused to pass a decree against the assets of deceased in the hands of defendants 2 to 5. The plaintiffs besides claiming a further sum by way of interest also prayed for a further declaration that the assets of the deceased might be made liable for the decree debt. *Held*, that Court-fee was payable on the *ad valorem* scale on the value of the debt in respect of which the liability of the properties was sought to be established. 54 A. 608=1932 A. 406=1932 A.L.J. 387. An appeal against one defendant only to establish his liability on a hypothecation bond must bear Court-fee calculated on the amount of the debt sought to be recovered. 13 M. 508; 24 Bom.L.R. 313. See also 86 P. R. 1912=222 P.L.R. 1912. Where a decree gives the plaintiff a partial relief, the plaintiff appellant is bound to pay Court-fee on the difference between the value of the relief he claims and that granted by the decree appealed from. 19 C. 272. See also 6 P. 17=1927 P. 123. In an appeal from instalment decree Court-fee must be paid on the difference to the appellant between getting his money on the date of the decree and getting it by instalments as ordered. 12 P.R. 1915=24 I.C. 931. See also 19 C.272; 167 I.C. 26=1937 Pesh. 31; 1936 Pesh. 232. A plaintiff appellant who seeks to get rid of an order for payment of a sum of money should value his appeal at the amount of that sum of money. In a suit for possession of property, the plaintiff got a decree for possession but subject to his paying a sum of Rs. 3,000 and odd being his share of the debts binding on the property. Plaintiff appealed against the order requiring him to pay the sum of Rs. 3,000 and odd. *Held*, that he should value his appeal not on the basis of possession being the subject-matter, but should value it on the basis of the value of the order for payment which he was seeking to get rid of in the appeal. 52 L.W. 397=1940 Mad. 955=(1940) 2 M.L.J. 406. The plaintiff sued for the recovery of a certain amount from a company and from certain debenture-holders of that company and for a declaration that the amount was recoverable in priority over the debentures in favour of certain other persons. The debenture-holders appealed to the High Court to modify the decision of the trial Court by refusing the declaration as to priority. *Held*, that Court-fee

Number.		Proper Fee.
1. Complaint, etc.—(Contd.)	When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees.	Twenty rupees.

NOTES.

payable was *ad valorem* on the decretal amount or on the value of the debentures whichever was less. 54 A. 553=1932 A.L.J. 385. If in a suit to contest a notice of ejectment falling under S. 7 (xi) (d), the landlord defendant appeals and the relief which he desires to get rid of is simply the amount of compensation awarded to the plaintiff, he should pay *ad valorem* Court-fee. 11 L.L.J. 116. If in an appeal in a partition suit, the appellant claims sums as due from the other party further than what was allowed by the lower Court, Court-fees should be paid *ad valorem* on the amounts claimed. 33 P.L.R. 12. See also 32 P.L.R. 854. Appeal from order as to restitution under C. P. Code, S. 144, *ad valorem* Court-fees to be paid. See 41 C.W.N. 157=1937 C. 152; 167 I.C. 879=1937 Pesh. 3 (order by trial Court refusing to allow costs directed to be paid by Privy Council). See also 42 C.W.N. 152; 1938 Rang.L.R. 635. Where an appeal is filed against an order of the trial Court awarding interest on the decretal amount to be refunded under S. 144, C. P. Code, claiming additional interest, the Court-fee payable is *ad valorem* Court-fee on the amount claimed. So also where the opposite party making the refund files a cross-objection praying for reduction of the interest awarded by the trial Court, it must pay *ad valorem* Court-fees on the interest sought to be reduced. 167 I.C. 879=1937 Pesh. 3.

FUTURE INTEREST.—Where the amount due could be ascertained from the judgment and decree appealed from that should be the value of the appeal or cross-objection and future interest need not be taken into account. 36 A. 40=21 I.C. 723=11 A.L.J. 1016. See also 3 P.L.J. 443=44 I.C. 50; 171 I.C. 79=1937 N. 95; 3 P.L.T. 813=1923 P. 28; 6 P.L.J. 676=1922 P. 386; 23 S.L.R. 277; 104 I.C. 391=1927 Sind 251. But if any future interest is determined by the trial Court and is entered in the decree, additional Court-fee on such interest has to be paid. 1923 Pat. 28. See also 1 Pat. 19; 104 I.C. 391=1927 S. 251; 167 I.C. 577=1937 N. 6; 165 I.C. 279=1936 O.W.N. 916; 1937 N. 95. Where the appellant claims sums of money a definitely ascertainable sum among others by way of *pendente lite* interest which is disallowed by the trial Court, the sum must be held to be part of "amount or value of the subject-matter in dispute" and *ad valorem* Court-fee is payable under Sch. I, Art. 1, on the sum claimed as *pendente lite* interest. 52 A. 1029=1931 A. 351. Where the mortgagee appealed on the ground that interest ought to have been allowed till the date of realization, Court-fee is payable under Art. 17 (vi) of Sch. II. 27 A. 559. There is no provision of law authorising assessment of additional Court-fee by reason

of accrual of interest *pendente lite* where the plaintiff appeals. 1927 P. 230; 1923 P. 28; 10 M.L.J. 144. See also 150 I.C. 653=1934 A.L.J. 957=1934 A. 805; 18 B. 696; 35 A-94=11 A.L.J. 20. It is otherwise if the defendant appeals. 8 P.L.T. 555=1927 P. 230. In Madras the practice is to include the subsequent amount in the value of an appeal by defendant. Where the plaintiff appealed from a mortgage decree as regards the amount of interest disallowed and did not pay the full *ad valorem* Court-fee, but the Court-fee paid was, however, sufficient to cover the amount of interest disallowed on one of the two mortgages on which the decree was passed, it is the duty of the appellate Court to ask the appellant what portion of his appeal he wished to have decided, having regard to the amount of Court-fee paid. 40 P.L.R. 123.

INTEREST PENDENTE LITE.—There is no provision in the Court-Fees Act under which a plaintiff can be called upon to pay Court-fee on the interest which accrues after the institution of the suit. The holder of a mortgage decree who has already paid Court-fee on the amount due at the date of suit can execute a decree for a higher amount on account of interest *pendente lite* without being liable to pay additional Court-fee thereon. When a wrong order is made for such payment and complied with, the decree-holder cannot execute the decree for such payment made by him, as the amount cannot properly be regarded as costs in the case recoverable from the judgment-debtor. 152 I.C. 244=15 P.L.T. 548=1934 P. 571 (S.B.). See also 154 I.C. 470; 1939 Pat. 83=17 P. 687=1939 P.W.N. 162. As to future interest, see also 157 I.C. 633=1935 O.W.N. 919.

MESNE PROFITS—APPEALS.—The value of an appeal by defendant from a decree awarding future mesne profits must include the future mesne profits decreed from the date of plaint till the date of appeal. See 50 M. 488. An appeal from a final decree under O. 30, r. 12 (2), C. P. Code, in respect of subsequent mesne profits is chargeable with *ad valorem* fee. 45 M. 280=42 M.L.J. 184=1923 M. 19; 11 P. 532=1932 P. 228; 12 P. 188=13 P.L.T. 810=1933 P. 81. No Court-fee is payable on future mesne profits in an appeal from the preliminary decree. 20 M.L.J. 98=5 I.C. 880; 21 M. 371; 13 C.W.N. 815. Where the appellants have paid full Court-fee on the claim for mesne profits, in appeal against the preliminary decree, they need not pay any additional fee on their appeal against the mesne profits ascertained subsequent to their original appeal. 15 I.C. 572=16 C.L.J. 564. See also 3 P. 875=1924 P. 694. Where the suit involves a claim for mesne profits *ad valorem* Court-fee is payable on the amount for which the appellant

Number.		Proper Fee.
1. <i>Plaint etc.—(Contd.)</i>	When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.	Twenty rupees.

NOTES.

seeks to avoid liability or on the amount by which he seeks to enhance the value of the decree. This rule applies to all appeals whether the profits have accrued before suit or after the institution of the suit. 14 P.L.T. 180=12 P. 694=1933 P. 234. See also 1937 P.W.N. 893=18 Pat.L.T. 864. Where the plaintiff's claim to mesne profits was disallowed, an appeal filed by him should bear Court-fee on the amount of mesne profits which had been claimed and disallowed. 1931 A.L.J. 413=1931 A. 538. Where mesne profits are left to be ascertained in execution, an appeal from a decree awarding mesne profits must be valued at the same valuation as the suit. 49 I.C. 962; 1 I.C. 670=13 C.W.N. 815; 1929 P. 731. Tentative valuation of a claim is permissible only in suits for account and mesne profits. Defendant who in a suit for damages sets up a cross-claim for damages suffered by him on account of the acts and conduct of the plaintiff and asks for a set-off against the plaintiff's claim must estimate his claim as accurately as he can and pay *ad valorem* Court-fee thereon and cannot be allowed to put a tentative valuation for the claim. 183 I.C. 373=43 C.W.N. 838=1939 Cal. 415.

RELIEF AS TO COSTS.—When relief is sought with regard to costs independently of the main contest between the parties, Court-fees must be paid on the costs decreed. 3 P.L.J. 443=44 I.C. 50; 19 M. 350; 35 P.L.R. 656=1933 L. 739. See also 157 I.C. 96=1935 L. 379.

ACCOUNT SUITS.—See also under S. 7, Cl. (iv) (f). Ten rupees stamp is sufficient for an appeal in a preliminary decree for dissolution of partnership dealing with certain items disallowed, as such disallowance is only incidental to the main relief. 1 L. 6=57 I.C. 185. In a suit for an account it is open to the defendant to say that on the accounts being gone into, money would be due to him and that a decree should be passed in his favour for such amount as may be found due to him. In such cases the Court should not refuse to pass a decree in favour of the defendant or refer him to a separate suit if, as the result of an inquiry held by it at the instance of the plaintiff, it finds that the plaintiff is indebted to the defendant. In the absence of any express provision in the Court-Fees Act, there is no obligation on a defendant to claim any specific sum as due to him in his written statement or to pay Court-fee thereon on pain of being debarred from obtaining a decree in his favour in the same suit. Nor where a defendant nominally values his relief in his written statement on which he pays Court-fee and offers to pay additional Court-fee on such sum as may be found due to him on a settlement of accounts can he be deemed to have relinquished his claim

for the balance. 1933 S. 247. See also 43 Bom.L.R. 475=1941 B. 242=I.L.R. (1941) Bom. 477.

COMPROMISE.—Suit to declare compromise and decree void—Court-fee payable. See 1934 A.L.J. 955=1934 A. 1071.

APPEALS IN MORTGAGE SUITS.—Where the plaintiff in a mortgage suit for sale appeals against the decree for sale, in order to establish the liability to the debt of certain property exonerated by the lower Court, Court-fee is payable on the decree amount but not exceeding the market value of the property. 16 M.L.J. 458=30 M. 96 (F.B.) See also 37 C. 914; 33 A. 20; 44 C.W.N. 482. So also where the defendant appeals on the ground that certain property was not liable under the mortgage. 10 M. 197. See also 5 O.L.J. 663=43 I.C. 535; 1928 N. 316; 5 P. 721. The method of valuation mentioned in S. 7 (5) cannot be adopted in such a case. 1931 M. 710. See also 54 L.W. 526=(1941) 2 M.L.J. 774 (Suit for money claiming first charge on certain assets—Decree for money without charge—Appeal claiming charge on assets—Court-fee to be paid on value of assets). Where a decretal amount has been ordered to be recovered from a certain property and an appeal is preferred to get that property released from the liability the value for the purposes of Court-fee would be the price of the property or the decretal amount whichever is less. 176 I.C. 319=1938 Pesh. 38. Where mortgage decree for sale declares the separate liabilities of different properties from different sums of money, the Court-fee on appeal by one of the defendants whose property had been held liable for a specific sum of money must be calculated on the sum for which the property had been held liable. 35 A. 92=18 I.C. 577=11 A.L.J. 33. Members of a joint family have no specified shares in the family property and where some of them appeal against a decree in a suit to enforce a mortgage of the family property, Court-fees must be paid on the amount decreed and not on the appellant's share of the amount. 55 I.C. 233 (P.). Art 1, of Sch. I applies to appeals in mortgage suits and Court-fee is payable on the subject-matter in dispute in the appeal and not on the principal money secured by the mortgage. 30 A. 547=5 A.L.J. 531. See also 47 A. 926=23 A.L.J. 853=1925 A. 734; 162 I.C. 729=38 P.L.R. 12=1936 L. 17; 1 L. 234; 29 A. 471=107 I.C. 671 (1). On this point, see also the cases noted under S. 7, Cl. (ix). In an appeal against decree for redemption or foreclosure claiming a higher amount than that fixed by the Court, Court-fee should be paid on the excess amount claimed. 5 P.R. 1911=9 I.C. 676; 74 I.C. 88 (1)=1924 O. 170; 22 I.C. 642=16 O.C. 354; 29 I.C. 609. See also 1939 M.L.R. 81 (Civil).

Number.		Proper Fee.
I. Plaint, etc.—(Contd.)	When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees :	Twenty-five rupees.
	Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be three thousand rupees.	

NOTES.

Quære: whether the Court-fee payable in redemption appeal is *ad valorem* or on the diminution claimed in the appeal. 122 I.C. 736=1930 L. 601; 134 I.C. 124=1931 L. 633; 1937 N. 6. Cross-objections in appeals arising out of redemption suits must be stamped *ad valorem* on the amount by which the decretal amount is sought to be reduced. (11 I.C. 198, Rel. on.) 11 O.W.N. 559=1934 O. 246. An appeal filed by certain defendants in a mortgage suit whose claim to priority of their mortgage was negatived by the lower Court, praying for a declaration that they were the prior mortgagees should bear *ad valorem* Court-fee and Art. 17 (iii) has no application. 54 A. 347=1932 A.L.J. 45=1932 A. 221. But *see contra* 61 C. 320=148 I.C. 1084=58 C.L.J. 542=39 C.W.N. 248=1934 C. 377. In a suit for sale of mortgaged property, the puisne mortgagee and mortgagor were impleaded. The mortgagor denied the puisne mortgage, but the Court found it to be subsisting, and in the decree, ordered that the balance, after paying off the plaintiff mortgagee should be paid to the puisne mortgagee and the surplus, if any, should be given to the mortgagor. In an appeal by the mortgagor challenging the portion of decree in favour of the puisne mortgagee, *held*, that *ad valorem* Court-fee on amount due on the mortgage should be paid and not merely for a declaration. 146 I.C. 1003=1933 L. 954. Appeal against a mortgage decree on the ground that a condition of priority should be removed requires an *ad valorem* fee. 4 P.L.J. 323=51 I.C. 786. *Ad valorem* Court-fees must be paid on an appeal from an order refusing to make a personal decree under O. 34, r. 6, C. P. Code. 40 A. 553=47 I.C. 562=16 A.L.J. 437; 195 I.C. 239=1941 Pesh. 56. So also on an appeal against an order passing such personal decree. 1924 A. 292. *See also* 30 I.C. 497=18 O.C. 121; 6 N.L.R. 164; 195 I.C. 239=1941 Pesh. 56. Where the mortgagor objected to the passing of final decree pleading an uncertified payment which the Court rejected and final decree was passed, it was not an order in execution but a judgment in the mortgage suit and an appeal therefrom must bear stamp *ad valorem*. 1928 R. 194=6 R. 285. [35 A. 476 (F.B.) and 22 Bom.L.R. 811, Foll.] An appeal against a final decree on the ground that the mortgagor should or should not have been allowed further time in which to pay the mortgage-debt is not an exception to the general rule that an appeal against a final decree requires an *ad valorem* Court-fee. 7 N.L.R. 41; 130 I.C. 98=1931 N. 1 (F.B.). The plaintiff

sued for a declaration that the property mortgaged by certain deeds executed by a Mahant is the property of a certain math and that the mortgagees have no right to have the property sold by auction. *Held*, that the plaintiff sought, in effect, to have the mortgage deeds in question adjudged void and the suit must be regarded as falling under S. 39 of the Specific Relief Act and as being not of a purely declaratory nature, and that, therefore, an *ad valorem* Court-fee was payable. [1932 A.L.J. 684 (F.B.), Appl.] 1936 A.L.J. 798=1936 A. 710. As to Court-fee on appeal from personal decree in mortgage suit, *see* 62 C. 568=39 C.W.N. 315.

APPEALS IN PARTITION SUITS.—In partition suits whether the plaintiff is in joint possession or out of possession the plaint or memorandum of appeal must bear *ad valorem* Court-fees on the value of share. Art. 17 (6), Sch. II, will not apply. 73 I.C. 788. *See also* the cases noted under S. 7, Cl. (iv) (b). Where in a partition suit, the appellant claims certain sums from the other party and also pleads that he should not have been made liable for certain other sums, Court-fee is payable on the several sums on the *ad valorem* scale. 32 P.L.R. 854. *See also* 33 P.L.R. 12.

PARTITION SUIT, APPEAL IN—COURT-FEES.—*See* 157 I.C. 787=1935 L. 14.

APPEALS IN PRE-EMPTION SUITS.—Where one of the grounds of appeal in a suit for pre-emption is that the right to pre-empt has or has not been established as the case may be, the subject-matter of the dispute continues to be the right of pre-emption, and its value must be determined with reference to S. 7, Cls. (v) and (vi). 6 A. 488. But when the question in appeal relates solely to the amount to be paid by the pre-emptor, the Court-fee must be calculated on the difference between the amounts allowed as the sale price and that claimed or admitted by the party. (*Ibid.*) *See also* 131 I.C. 751=1931 L. 490; 76 P.R. 1913=19 I.C. 961. In the above classes of cases it may happen that the appeal against the whole decree is chargeable to less Court-fee than an appeal against part of the decree. It has been held that an appellant is entitled notwithstanding his admitted intention to attack only part of a decree to take advantage of anomaly existing in the law of Court-fee and to appeal against the whole decree in order to avoid payment of a higher Court-fee applicable to an appeal if only an appeal against part of the decree is preferred. *See* 32 P.L.R. 591=1931 L. 633. Where in a suit for possession of house by pre-emption is decreed on payment of Rs. 700, the Court-fee on memorandum of appeal should be paid *ad valorem*

Number.		Proper Fee.
2. Plaint ¹ [* * *] in a suit for possession under ² [the Specific Relief Act, 1877, Sec. 9.]	...	A fee of one-half of the amount prescribed in the foregoing scale.

LEG. REF.

¹ The words "or memorandum of appeal" were repealed by Act XX of 1870.

² The words "the Specific Relief Act, 1877, section 9" were substituted for the words "Act No. XIV of 1859 (to provide for the limitation of suits)" by Act XII of 1891.

NOTES.

on that amount. 1934 L. 424. See also 1928 M. 929=110 I.C. 752 (parties can avail of camouflage of law).

PROMISSORY NOTE—SUIT ON.—Where on a suit brought on the basis of a promissory note the defendant claimed in his written statement a specified amount by way of damages, setting out the particulars of the claim made by him as one arising from the transaction of sale which led to the execution of the promissory note in favour of the plaintiff and by reason of the breach of covenant alleged to have been committed by the plaintiff. *Held*, that the claim by way of set-off came under Art. 1, Sch. I. 142 I.C. 719=1933 M. 203. Suit on promissory note—Decree against defendant personally—Appeal alleging that defendant is not personally liable but only as trustee.—Court-fee payable is *ad valorem*. 52 L.W. 903=1941 M. 313=1940 2 M.L.J. 946.

RENT, ENAHNECMENT OF.—A suit for enhancement of rent under S. 7 of the Bengal Tenancy (Amended) Act is not governed by S. 7 (i) of the Court-Fees Act, because it is not a suit for recovery of money; or by S. 7 (ii) because a claim to enhancement of rent is not similar to a right to maintenance or annuity and the words "other sums payable periodically" must be construed as implying sums payable in the nature of maintenance and annuities upon the rule of *ejusdem generis* (4 P.L.J. 561, Foll.); or by S. 7 (iv) (c), because there was no consequential relief; or by S. 7 (xi) because the words "rights of occupancy" in cl. (b) denote such rights under which a tenant could be in actual physical possession and not to others who hold superior interests, as a tenure holder. The Court-fee in such a suit is therefore payable under Sch. I, Art. 1 of the Court-Fees Act on the difference between the rent actually paid and the rent claimed on appeal on the difference between the rent awarded by the first Court and that claimed. 61 C. 513=38 C.W.N. 527=1934 C. 674. As to Court-fee on suit by tenant under S. 112, Madras Estates Land Act and appeal from the decree by landlord, see I.L.R. (1937) Mad. 980=46 L.W. 263=1937 M. 786=(1937) 2 M.L.J. 347. An appeal from a decree passed by the Special Judge under S. 14 of the U. P. Encumbered Estates Act falls under Art. 1, Sch. I and *ad valorem* Court-fee has to be paid. Neither Art. 11 nor Art. 17 of the Second Schedule applies to the case. I.L.R. (1938)

All. 230=1938 O.W.N. 88=1937 A.L.J. 1373=1938 All. 97 (F.B.). See also 1941 O.W.N. 219=1941 O. 269. Appeal under S. 25, U. P. Agriculturists' Relief Act—Court-fee payable. 1937 A.W.R. 932=1938 All. 14.

APPEALS ARISING FROM A SINGLE SUIT.—Where several defendants who could have preferred a single appeal prefer separate appeals against a decree, each must pay full Court-fee on his appeal. 48 I.C. 424=91 P.R. 1918. See also 13 P.L.T. 810. Two second appeals by the same party against two decrees passed in the appeals filed by both the parties against a mortgage decree, must be stamped separately and cannot be consolidated. 43 A. 56=58 I.C. 230=18 A.L.J. 894.

MAXIMUM FEES—PROVISO.—Although the proviso to Art. 1, Sch. I, refers only to the maximum fee leviable on a plaint or memorandum of appeal and leaves out any reference to written statement pleading a set-off or counter-claim, there is no authority for charging a larger sum on a written statement than that specified as maximum in the schedule. 1930 O. 140. The proviso is of general application and is not confined to plaints or memoranda of appeal under Art. 1 only. 3 A. 108 (112); 29 C. 140. Multifarious suits under S. 17 are also subject to it. 3 A. 108.

SUITS OF SMALL CAUSE NATURE—ART. 2 (MAD.).—In Madras a lower scale of fee is prescribed for suits of a small cause value by Art. 2. In a suit for two sums, viz., Rs. 600 and Rs. 400 due respectively on two pronotes, it has been held that S. 17 applies and Court-fee is payable at the lower scale for the second item. 141 I.C. 533=1933 M. 178. Order rejecting plaint for failure to pay additional Court-fee, appeal from—Court-fee. See 1935 N. 83. See also 1939 N.L.J. 32.

Arts. 1 and 2 (As Amended by Madras Act V of 1922)—SUIT IN MOFUSSIL FOR TWO SUMS OF RS. 600 AND 400—COURT-FEE PAYABLE.—If two sums of Rs. 600 and 400 respectively are claimed in a suit on the basis of two promissory notes, the Court-fee is payable on the two sums separately. The first item is governed by Art. 1 of Sch. I but the other by Art. 2 and so they are distinct. And S. 6 is controlled by S. 17. 1933 M. 178=65 M.L.J. 252.

Art. 1 and United Provinces Encumbered Act 1934, S. 14 (5), Explanation.—Where the amount decreed was subsequently increased by an amendment in virtue of S. 14 (5), Expln. of the U. P. Encumbered Estates Act and an appeal is preferred against the order of amendment, it is in substance on appeal really directed against the amended decree passed by the learned special Judge, though the memorandum of appeal merely purported to appeal against the order amending the decree and the case therefore falls under Art. 1, Sch. I, and *ad valorem* Court-fee is payable. 1941 O.W.N.

Number.		Proper Fee.
3. [Repealed by Act VIII of 1871].		
4. Application for review of judgment, ¹ if presented on or after the ninetieth day from the date of the decree.	...	The fee leviable on the plaint or memorandum of appeal.
5. Application for review of judgment, ¹ if presented before the ninetieth day from the date of the decree.	...	One-half of the fee leviable on the plaint or memorandum of appeal.

LEG. REF.

¹ As to application for review of judgment, see the Code of Civil Procedure, 1908.

NOTES.

355=1941 A.W.R. (Rev.) 217=1941 O. 269. See also 1938 All. 97 (F.B.); 1941 O. 60.

Art. 2—See 1894 Bom.P.J. 346.

Art. 4.—The decision of a Court dismissing an appeal under O. 41, r. 11, C. P. Code, is a judgment and an application for review of the decision comes within the article. 30 C.W.N. 334=93 I.C. 909 (2)=1926 C. 638. Upon an application for review, no matter what may be the actual relief sought the Court-fee payable is the fee actually leviable upon the plaint or memorandum of appeal upon which the judgment of which review is sought was passed. 20 I.C. 3=254 P.L.R. 1913; 31 A. 294=6 A.L.J. 215=1 I.C. 209. See also 57 C. 679=142 I.C. 416 (N.); 74 I.C. 255=1924 O. 108; 129 I.C. 191=1930 C. 631; 82 I.C. 297=1924 C. 881; 86 I.C. 143=1925 P. 368. But see *contra* 50 M. 488=52 M.L.J. 128=1927 M. 360; 4 B. 26; 11 R. 120; 142 I.C. 416=1933 N. 207; 11 R. 120=146 I.C. 560=1933 R. 203. The word "leviable" is used to provide for an application for review in *forma pauperis*. 31 A. 294=6 A.L.J. 215. See also (1941) 2 M.L.J. 500. On the point, see also 20 A. 410; 91 P.R. 1895. An application for review of the judgment in a second appeal passed before the Court-Fees Amendment Act of 1922 was presented after the passing of the Act. *Held*, the Court-fee leviable was that which fell to be levied under the amended Act calculated as if the application for review were a plaint or memorandum of appeal for the relief sought for. 50 M. 488=1927 M. 360=52 M.L.J. 128. But see *contra* 28 C.W.N. 403=1924 C. 881; 1932 A.L.J. 908. The words "the plaint" in column 3 mean nothing else than the plaint which was actually filed and which has resulted in the judgment which is sought to be reviewed. They do not mean an imaginary plaint which might be filed at the time of the application for review, asking for the same relief as in that application. 57 C. 679=1930 C. 631. As to the fee leviable, see 74 I.C. 255=1924 O. 108 cited under Art. 4. In computing the period of 89 days, the applicant cannot deduct the time which may have been spent in obtaining a copy of the judgment. 2 O.C. 302. See also 39 P.R. 1879. Nor the days during which the Court is closed for vaca-

tion. 9 M. 134; 9 C.P.L.R. 479. See also 80 I.C. 794=1924 C. 994. Application presented on 90th day, 89th day being Sunday must be stamped with full fee under Art. 4. 15 C.L.J. 505=15 I.C. 455. Where after the appeal was dismissed and before the application for review was presented, the Court-fee was enhanced, the application is correctly stamped with half the Court-fees paid on the memorandum of appeal. 28 C.W.N. 403=1924 C. 881. See also 1932 A.L.J. 908. But see the cases cited under Art. 4. The proper Court-fee payable on an application for review of a judgment is that payable on the actual relief sought for in the application and not the entire Court-fee paid on the plaint or memorandum of appeal. Thus where the applicant seeks review only so far as it affects the question of the costs awarded to him Court-fee is payable only on the relief asked for. 11 R. 120=1933 R. 203.

Arts. 4 and 5.—APPLICATION FOR REVIEW—COURT-FEE PAYABLE.—Under Arts. 4 and 5, the Court-fee to be paid on an application for review of judgment must be either the fee or one-half of the fee leviable on the plaint or memorandum of appeal (i.e.) which is prescribed for the original plaint or original memorandum of appeal, and the application cannot be valued in proportion to the value of the relief sought in review. 18 L. 238=1937 L. 439. An application for restoration of an appeal dismissed for non-payment of printing costs should be treated as an application for review and not as an application under O. 41, r. 19 and should be required to be stamped under Arts. 4 and 5 of Sch. I, Court-Fees Act. 17 Pat. 252=19 P.L.T. 17=1938 P. 111.

Art. 5 and S. 14.—When considering the obligation of an applicant for a review to pay Court-fee according to Art. 5 of Sch. I of the Act, an obligation that depends to some extent on the time at which the application is made, the calculation of the 90 days' time is not to be according to rules applicable to times laid down in the Limitation Act but the 90 days mentioned in the Court-Fees Act is to be taken as simply 90 days. Holidays and time taken for obtaining copies, could not be excluded. But in cases of hardship where delay is not due to laches on the part of the applicant the Court has a discretion under S. 14, Court-Fees Act, to give a certificate directing the refund of the excess fee in proper cases. I.L.R. (1941) Nag. 392=1941 N.L.J. 205=1941 N. 236.

Number.		Proper Fee.
6. Copy or translation of a judgment or order not being or having the force of, a decree.	When such judgment or order is passed by any Civil Court other than a High Court or by the presiding Officer of any Revenue Court or Office, or by any other Judicial or Executive Authority— (a) If the amount or value of the subject-matter is fifty or less than fifty rupees. (b) If such amount or value exceeds fifty rupees.	Four annas. Eight annas.
7. Copy of a decree or order having the force of a decree.	When such judgment or order is passed by a High Court. When such decree or order is made by any Civil Court other than a High Court, or by any Revenue Court— (a) If the amount or value of the subject-matter of the suit wherein such decree or order is made is fifty or less than fifty rupees. (b) If such amount or value exceeds fifty rupees.	One rupee. Eight annas. One rupee.
8. Copy of any document liable to stamp duty under the Indian Stamp Act, 1879, ¹ when left by any party to a suit or proceeding in place of the original withdrawn.	When such decree or order is made by a High Court. (a) When the stamp duty chargeable on the original does not exceed eight annas. (b) In any other case.	Four rupees. The amount of the duty chargeable on the original. Eight annas.
9. Copy of any revenue or judicial proceeding or order not otherwise provided for by this Act, or copy of any account statement, report or the like, taken out of any Civil or Criminal or Revenue Court or Office, or from the office of any Chief Officer charged with	For every three hundred and sixty words or fraction of three hundred and sixty words.	Do.

LE.G REF.

¹ See now the Indian Stamp Act (II of 1899).

NOTES.

Arts. 6 to 9: COPIES NOT STAMPED—ACCEPTANCE BY DEPUTY REGISTRAR—EFFECT.—Where the Deputy Registrar whose duty is to see that all documents presented in the High Court are duly stamped, accepts copies of judgments and decrees filed with an application under S. 81 (2), Government of Burma Act, which have not been stamped as required by Arts. 6 to 9, Court-Fees Act, it is an implied decision that the copies are in order and when an objection is raised that it is not in order the applicant is entitled to time to furnish the necessary stamps. 196 I.C. 892=1941 R. 294.

Arts. 6 and 7.—Notes of judgment furnished to parties under the Rules of Practice for the guidance of Small Cause Courts are copies of decrees and require a stamp under Art. 7. 6 M.H.C.R. App. xxiii.

This Article is intended to authorise the levy of 8 annas in the case contemplated under O. 13, r. 9 of the Civil Procedure Code, which deals with the return of admitted documents 43 I.C. 383. A copy of a general power-of-attorney produced in Court for verification does

not require a Court-fee stamp of annas 8 under this Article. (*Ibid.*)

Art. 7.—S. 47, C. P. Code, applies to execution of decrees of their lordships of the Privy Council. An order by the trial Court, refusing to allow costs directed to be paid by their lordships of the Privy Council has the force of a decree and its copy filed with the appeal from the order, must bear a stamp of Re. 1 under Art. 7, Court-Fees Act. Where, however, the copy is under-stamped owing to a *bona fide* mistake, the appellate Court, can under S. 149, C. P. Code, allow the appellant to make up the deficiency and can condone under S. 5, Limitation Act, the period from which the appeal was filed with an insufficient stamped copy up to date. 167 I.C. 879=1937 Pesh. 3; 1940 A.M.L.J. 91; 196 I.C. 892=1941 Rang. 294.

Art. 9.—There is no provision of law and there is nothing in the Civil Rules of Practice or in any rule which governs the procedure in a Civil Court authorising the levy of search fees for supplying copies to litigants when an application is made; all that is required by a party is to supply stamps for copies and if the required number of stamps are supplied, it is the Court's duty to furnish the copies asked for. 51 M. 599.

Number.		Proper Fee.
Copy etc—(Contd)* the executive administration of a Division.		
10. [Repealed by Act VIII of 1890.]	[When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees, but does not exceed ten thousand rupees.] ²	[Two per centum on such amount or value.] ²
11. Probate of a will or letters of administration with or without will annexed.	[When such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees.] [When such amount or value exceeds fifty thousand rupees.] [Provided that, when after the grant of a certificate under the Succession Certificate Act, 1889, or under the Regulation of the Bombay Code No. VIII of 1827 in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of fee paid in respect of the former grant.]	[Two and one-half per centum on such amount or value.] [Three per centum on such amount or value.]

LEG. REF.

¹ This article was substituted by Act VII of 1889, S. 13 (1).

² Matters within brackets in columns 2 and 3 of Art. 11 were substituted by Act VII of 1910.

NOTES.

Art. 11: SCOPE.—The fee prescribed by this Article is only in respect of probates or letters of administration, and not in respect of the application for probate (for which see Art. 1 of Sch. II). The Court-fee payable on a memorandum of appeal against an order in probate proceedings is governed by Art. 1, Sch. II. Therefore an *ad valorem* duty on the value of the estate need not be levied. 9 I.C. 538=21 M.L.J. 418. See also 4 C.W.N. 600; 1935 A. 449.

AMOUNT OR VALUE OF THE PROPERTY.—‘Value’ means market value and the market value of mortgaged property is that of the equity of redemption. 6 N.W.P. 214. See also 3 C. 736. A person is bound to pay stamp duty for probate only on the amount of the right, title and interest of the testator in the property bequeathed. 100 I.C. 111. (Mad.). The value of an annuity for determining the amount of probate fee payable thereon is the market value and not ten times the annual payment. 1 Bom. 118. Court-fee is chargeable on the value at the date of the application for probate and subsequent changes do not alter the amount of Court-fee payable. 5 Bur. L.T. 39=14 I.C. 804. The expression, “the amount or value of the property” signifies the net value obtained by deduction of the debt and expenses from the gross value. 30 I.C. 958=20 C.W.N. 591; See also 18 C.W.N. 121=21 I.C. 502; 7 Bur.L.T. 272=24 I.C. 793; 1 B. 118; 40 A. 279; But see contra 13 B.L.R. App. 24; 24 Cal. 567. The un-

certainty of recovering a debt is no ground for reducing the proportionate duty payable thereon for probate. 24 C. 567. See also 13 B.L.R. App. 24. But see contra 55 B. 844=134 I.C. 729=33 Bom.L.R. 864=1931 B. 419. Nor the fact that an item of property is the subject of litigation. 24 M. 241. Where property is not reduced into possession when probate is taken out but the right to recover it is the subject of suit, the valuation of such property by the applicant at less than Rs. 1,000 may be accepted by the Court. 23 C. 577. Where the appeal is against a decision only under S. 14 of the U. P. Encumbered Estates Act, it falls within the scope of Art. 11, Sch. II, Court-Fees Act and *ad valorem* Court-fee need not be paid. 1940 O.W.N. 862=1941 O. 60=16 Luck. 153. Hindu joint family—Death of coparcener—Application by survivors for Letters of Administration in respect of undivided interest of deceased—Court-fee to be paid. 17 Pat. 542. Property—“Membership of Bombay Native Share and Stock-brokers’ Association—Right of—is not property liable to probate duty. 43 Bom.L.R. 943.

PROPERTY OUTSIDE BRITISH INDIA.—Probate duty payable, to be calculated only upon the property which at the date of the death of the testator was in British India. 21 B. 139. But see also 4 C. 725. See also 51 P.R. 1902.

PROPERTY OVER WHICH A PERSON HAS A GENERAL POWER OF APPOINTMENT.—Is not his ‘property’ and is not leviable to Court-fee under Art. 11 of Sch. I. 60 C. 1016=1933 C. 924.

TRUST PROPERTY IS EXEMPT FROM COURT-FEES.—15 W.R. 45=14 Beng.L.R. 184; 11 Beng.L.R. App. 39; 33 M. 93=19 M.L.J. 91. Where married parties held property under the Code Napoleon, and one of them died, it was held that one half of the property was

Number.	In any case	Proper Fee.
¹ 12. Certificate under the Succession Certificate Act, VII of 1889.	In any case	<p data-bbox="1473 378 1902 827">... Two per centum on the amount or value of any debt or security specified in the certificate under section 8 of the Act, and three per centum on the amount or value of any debt or security to which the certificate is extended under S. 10 of the Act.</p> <p data-bbox="1473 833 1902 1162">NOTES.—(1) The amount of a debt is its amount, including interest, on the day on which the inclusion of the debt in the certificate is applied for, so far as such amount can be ascertained.</p> <p data-bbox="1473 1168 1902 2008">(2) Whether or not any power with respect to a security specified in a certificate has been conferred under the Act; and where such a power has been so conferred, whether the power is for the receiving of interest or dividends on, or for the negotiation or transfer of the security, or for both purposes, the value of the security is its market value on the day on which the inclusion of the security in the certificate is applied for, so far as such value can be ascertained.</p>

LEG. REF.

¹ Substituted by Act VII of 1889, S. 13 (1).

NOTES.

chargeable with duty the other half being exempted under S. 19-D. 20 C. 575. *See also* 25 M. 515. So also in the case of Letters of Administration granted to a Buddhist Burmese widow. 50 I.C. 545=11 Bur.L.T. 258. *See also* under S. 19-D. No duty is leviable a second time where full duty was paid on the property on the first application. 6 B.L.R. App. 139. *See also* 43 C. 625.

RAILWAY PROVIDENT FUND.—Money standing to the credit of a deceased person in Railway Provident Fund deposit is personal property, that is, an asset of the deceased and if such sum exceeds rupees two thousand, it is liable to assessment under Sch. I, Art. 11. There is no provision in the Court-Fees Act under which the party can claim an exemption from liability to pay duty. 122 I.C. 322=1933 O.

145 (F.B.). *See also* 6 R. 558=1928 R. 312; 1933 S. 101. But *see* 1930 C. 252 and 92 I.C. 525 and 1926 N. 306 holding that moneys due under a Railway Provident Fund are exempt from succession duty and pass on to the nominee of the holder. If a debt has been partly discharged, duty need be paid only on the amount of the balance of debt still due and not on the whole amount. 19 A. 129. Court-fee should be paid by a Hindu daughter on an application for certificate in succession to mother who succeeded to her husband's properties though duty was paid by the latter on her application. 36 I.C. 125=20 C.W.N. 1125.

Art. 12: "AMOUNT OR VALUE OF ANY DEBT OR SECURITY"—INTERPRETATION.—It is impossible to interpret the words "the amount or value of any debt or security" in Art. 12 of Sch. I of the Court-Fees Act as referring to anything except individual debts and individual securities. Therefore, the amount payable in respect of an application for a succession certi-

Number.		Proper Fee.
¹ 12-A. Certificate under the Regulation of the Bombay Code, No. VIII of 1827.	(1) As regards debts and securities.	The same fee as would be payable in respect of a certificate under the Succession Certificate Act, 1889, or in respect of an extension of such a certificate, as the case may be.
	(2) As regards other property in respect of which the certificate is granted— When the amount or value of such property exceeds one thousand rupees but does not exceed ten thousand rupees ; When such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees ; [When such amount or value exceeds fifty thousand rupees.] ²	Two per centum on such amount or value. Two and one-half per centum on such amount or value. [Three per centum on such amount or value.] ²
³ 13. Application to the [High Court of Judicature at Lahore] ⁴ for the exercise of its jurisdiction under section 44 of the Punjab Courts Act, 1918, [or to the Court of the Financial Commissioner of the Punjab for the exercise of its revisional juris-	When the amount or value of the subject-matter in dispute does not exceed twenty five rupees.	Two rupees.
	When such amount or value exceeds twenty-five rupees.	The fee leviable on a memorandum of appeal.

LEG. REF.

¹ This Article was substituted by Act VII of 1889, S. 13 (1).

² Columns 2 and 3 of this article were substituted by Act VII of 1910.

³ Inserted by the Punjab Courts Act (XVIII of 1884), S. 71, as amended by the Punjab Courts Act (XXV of 1899), S. 6.

⁴ The words "High Court of Judicature at Lahore" were substituted for the words "Chief Court in the Punjab" by Act XVIII of 1919, Sch. I.

NOTES.

ificate is to be calculated according to the amount of the individual items comprised in the application and not according to the total amount of those items. 151 I.C. 262=1934 O. 414. The Court-fee is not to be paid in the application for the issue of a succession certificate, but on the certificate itself. Therefore, the relevant date for calculating the amount of Court-fee is not the date when the application for the issue of the certificate is made. It is either the date when the certificate is drawn up or the date when the Court passes an order that such certificate should be drawn up. 160 I.C. 709=1936 A.L.J. 55=1936 A. 309.

APPLICATION FOR SUCCESSION CERTIFICATE BY MARRIED SISTER OF DECEASED—COURT-FEE.—The married sisters of the deceased are not "dependents" as defined in S. 2 (c) of the Provident Funds Act. Where they are not nominees, they can only get the money by producing probate, letters of administration or a succession certificate, and Court-fee is payable

on the deceased's provident fund as being his property. 26 S.L.R. 429=1933 S. 101. See also 1939 Sind 52.

AS AMENDED IN BENGAL, SCH. I, ART. 12.—CERTIFICATE FOR SUM LESS THAN RS. 1,000—SUBSEQUENT EXTENSIONS.—DUTY PAYABLE.—Where the original application, is in respect of an amount less than Rs. 1,000 but the amount is exceeded by a later application.

Court-fee is payable at 2 per cent. on the original certificate and at the enhanced rate of 3 per cent. under Bengal Act II of 1922 in respect of the extensions. 60 C. 1262=37 C. W.N. 930.

AS AMENDED BY C. P. COURT-FEES (AMENDMENT) ACT, 1935, SCH. I, ART. 12—APPLICABILITY.—Where an application for a succession certificate relates to several items of debt or securities aggregating to more than Rs. 1,000 but no single items of debt or security by itself exceeds Rs. 1,000, no Court-fee is payable in respect of it, under Sch. I, Art. 12 of the Court-Fees Act as amended by C. P. Court-Fees (Amendment) Act, 1935. The word 'Any' occurring in that article indicates one out of a number of persons or things more than two. 1940 N.L.J. 495=1940 Nag. 400.

Art. 13.—An application for revision against an order refusing to set aside an award is really one against the award decree and is chargeable with *ad valorem* fee under Sch. I, Art. 13. 9 I.C. 388=4 P.L.R. 1911. See also 108 I.C. 382. 1931 Rang.L.R. 54=1941 Rang. 126 (Reunion application from suit under S. 9, Specific Relief Act—Court-fee payable is same as on the plaint.)

Number.	Proper Fee.
diction under Sec. 84 of the Punjab Tenancy Act, 1887]. ¹	
14. [Omitted by Government of India. (Adap. of India Laws) Order, 1937.]	
15. [Repealed by Act XI of 1923, Sch. II.]	

Table of rates of ad valorem fees leviable on the institution of suits.

When the amount or value of the subject-matter exceeds.					When the amount or value of the subject-matter exceeds				
But does not exceed					But does not exceed				
Rs.	Rs.	Proper	Fee.		Rs.	Rs.	Proper	Fee.	
		Rs.	A.	P.			Rs.	A.	P.
...	5	0	6	0	400	410	30	12	0
5	10	0	12	0	410	420	31	8	0
10	15	1	2	0	420	430	32	4	0
15	20	1	8	0	430	440	33	0	0
20	25	1	14	0	440	450	33	12	0
25	30	2	4	0	450	460	34	8	0
30	35	2	10	0	460	470	35	4	0
35	40	3	0	0	470	480	36	0	0
40	45	3	6	0	480	490	36	12	0
45	50	3	12	0	490	500	37	8	0
50	55	4	2	0	500	510	38	4	0
55	60	4	8	0	510	520	39	0	0
60	65	4	14	0	520	530	39	12	0
65	70	5	4	0	530	540	40	8	0
70	75	5	10	0	540	550	41	4	0
75	80	6	0	0	550	560	42	0	0
80	85	6	6	0	560	570	42	12	0
85	90	6	12	0	570	580	43	8	0
90	95	7	2	0	580	590	44	4	0
95	100	7	8	0	590	600	45	0	0
100	110	8	4	0	600	610	45	12	0
110	120	9	0	0	610	620	46	8	0
120	130	9	12	0	620	630	47	4	0
130	140	10	8	0	630	640	48	0	0
140	150	11	4	0	640	650	48	12	0
150	160	12	0	0	650	660	49	8	0
160	170	12	12	0	660	670	50	4	0
170	180	13	8	0	670	680	51	0	0
180	190	14	4	0	680	690	51	12	0
190	200	15	0	0	690	700	52	8	0
200	210	15	12	0	700	710	53	4	0
210	220	16	8	0	710	720	54	0	0
220	230	17	4	0	720	730	54	12	0
230	240	18	0	0	730	740	55	8	0
240	250	18	12	0	740	750	56	4	0
250	260	19	8	0	750	760	57	0	0
260	270	20	4	0	760	770	57	12	0
270	280	21	0	0	770	780	58	8	0
280	290	21	12	0	780	790	59	4	0
290	300	22	8	0	790	800	60	0	0
300	310	23	4	0	800	810	60	12	0
310	320	24	0	0	810	820	61	8	0
320	330	24	12	0	820	830	62	4	0
330	340	25	8	0	830	840	63	0	0
340	350	26	4	0	840	850	63	12	0
350	360	27	0	0	850	860	64	8	0
360	370	27	12	0	860	870	65	4	0
370	380	28	8	0	870	880	66	0	0
380	390	29	4	0	880	890	66	12	0
390	400	30	0	0	890	900	67	8	0

LEG. REF.

¹ The words "or to the Court . . . Tenancy

Act, 1887," were added by S. 1 of Act IX of 1901, Sch. I.

When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.		
Rs.	Rs.	Rs.	A.	P.
900	910	68	4	0
910	920	69	0	0
920	930	69	12	0
930	940	70	8	0
940	950	71	4	0
950	960	72	0	0
960	970	72	12	0
970	980	73	8	0
980	990	74	4	0
990	1,000	75	0	0
1,000	1,100	80	0	0
1,100	1,200	85	0	0
1,200	1,300	90	0	0
1,300	1,400	95	0	0
1,400	1,500	100	0	0
1,500	1,600	105	0	0
1,600	1,700	110	0	0
1,700	1,800	115	0	0
1,800	1,900	120	0	0
1,900	2,000	125	0	0
2,000	2,100	130	0	0
2,100	2,200	135	0	0
2,200	2,300	140	0	0
2,300	2,400	145	0	0
2,400	2,500	150	0	0
2,500	2,600	155	0	0
2,600	2,700	160	0	0
2,700	2,800	165	0	0
2,800	2,900	170	0	0
2,900	3,000	175	0	0
3,000	3,100	180	0	0
3,100	3,200	185	0	0
3,200	3,300	190	0	0
3,300	3,400	195	0	0
3,400	3,500	200	0	0
3,500	3,600	205	0	0
3,600	3,700	210	0	0
3,700	3,800	215	0	0
3,800	3,900	220	0	0
3,900	4,000	225	0	0
4,000	4,100	230	0	0
4,100	4,200	235	0	0
4,200	4,300	240	0	0
4,300	4,400	245	0	0
4,400	4,500	250	0	0
4,500	4,600	255	0	0
4,600	4,700	260	0	0
4,700	4,800	265	0	0
4,800	4,900	270	0	0
4,900	5,000	275	0	0
5,000	5,250	285	0	0
5,250	5,500	295	0	0
5,500	5,750	305	0	0
5,750	6,000	315	0	0
6,000	6,250	325	0	0
6,250	6,500	335	0	0
6,500	6,750	345	0	0
6,750	7,000	355	0	0
7,000	7,250	365	0	0
7,250	7,500	375	0	0
7,500	7,750	385	0	0
7,750	8,000	395	0	0
8,000	8,250	405	0	0
8,250	8,500	415	0	0
8,500	8,750	425	0	0
8,750	9,000	435	0	0
9,000	9,250	445	0	0

When the amount or value of the subject-matter exceeds.	But does not exceed	Proper Fee.		
Rs.	Rs.	Rs.	A.	P.
9,250	9,500	455	0	0
9,500	9,750	465	0	0
9,750	10,000	475	0	0
10,000	10,500	490	0	0
10,500	11,000	505	0	0
11,000	11,500	520	0	0
11,500	12,000	535	0	0
12,000	12,500	550	0	0
12,500	13,000	565	0	0
13,000	13,500	580	0	0
13,500	14,000	595	0	0
14,000	14,500	610	0	0
14,500	15,000	625	0	0
15,000	15,500	640	0	0
15,500	16,000	655	0	0
16,000	16,500	670	0	0
16,500	17,000	685	0	0
17,000	17,500	700	0	0
17,500	18,000	715	0	0
18,000	18,500	730	0	0
18,500	19,000	745	0	0
19,000	19,500	760	0	0
19,500	20,000	775	0	0
20,000	21,000	795	0	0
21,000	22,000	815	0	0
22,000	23,000	835	0	0
23,000	24,000	855	0	0
24,000	25,000	875	0	0
25,000	26,000	895	0	0
26,000	27,000	915	0	0
27,000	28,000	935	0	0
28,000	29,000	955	0	0
29,000	30,000	975	0	0
30,000	32,000	995	0	0
32,000	34,000	1,015	0	0
34,000	36,000	1,035	0	0
36,000	38,000	1,055	0	0
38,000	40,000	1,075	0	0
40,000	42,000	1,095	0	0
42,000	44,000	1,115	0	0
44,000	46,000	1,135	0	0
46,000	48,000	1,155	0	0
48,000	50,000	1,175	0	0
50,000	55,000	1,200	0	0
55,000	60,000	1,225	0	0
60,000	65,000	1,250	0	0
65,000	70,000	1,275	0	0
70,000	75,000	1,300	0	0
75,000	80,000	1,325	0	0
80,000	85,000	1,350	0	0
85,000	90,000	1,375	0	0
90,000	95,000	1,400	0	0
95,000	1,00,000	1,425	0	0
1,00,000	1,05,000	1,450	0	0
1,05,000	1,10,000	1,475	0	0
1,10,000	1,15,000	1,500	0	0
1,15,000	1,20,000	1,525	0	0
1,20,000	1,25,000	1,550	0	0
1,25,000	1,30,000	1,575	0	0
1,30,000	1,35,000	1,600	0	0
1,35,000	1,40,000	1,625	0	0
1,40,000	1,45,000	1,650	0	0
1,45,000	1,50,000	1,675	0	0
1,50,000	1,55,000	1,700	0	0
1,55,000	1,60,000	1,725	0	0
1,60,000	1,65,000	1,750	0	0

When the amount or value of the subject-matter exceeds					When the amount or value of the subject-matter exceeds				
But does not exceed					But does not exceed				
Rs.	Rs.	Rs.	A.	P.	Rs.	Rs.	Rs.	A.	P.
1,65,000	1,70,000	1,775	0	0	2,90,000	2,95,000	2,400	0	0
1,70,000	1,75,000	1,800	0	0	2,95,000	3,00,000	2,425	0	0
1,75,000	1,80,000	1,825	0	0	3,00,000	3,05,000	2,450	0	0
1,80,000	1,85,000	1,850	0	0	3,05,000	3,10,000	2,475	0	0
1,85,000	1,90,000	1,875	0	0	3,10,000	3,15,000	2,500	0	0
1,90,000	1,95,000	1,900	0	0	3,15,000	3,20,000	2,525	0	0
1,95,000	2,00,000	1,925	0	0	3,20,000	3,25,000	2,550	0	0
2,00,000	2,05,000	1,950	0	0	3,25,000	3,30,000	2,575	0	0
2,05,000	2,10,000	1,975	0	0	3,30,000	3,35,000	2,600	0	0
2,10,000	2,15,000	2,000	0	0	3,35,000	3,40,000	2,625	0	0
2,15,000	2,20,000	2,025	0	0	3,40,000	3,45,000	2,650	0	0
2,20,000	2,25,000	2,050	0	0	3,45,000	3,50,000	2,675	0	0
2,25,000	2,30,000	2,075	0	0	3,50,000	3,55,000	2,700	0	0
2,30,000	2,35,000	2,100	0	0	3,55,000	3,60,000	2,725	0	0
2,35,000	2,40,000	2,125	0	0	3,60,000	3,65,000	2,750	0	0
2,40,000	2,45,000	2,150	0	0	3,65,000	3,70,000	2,775	0	0
2,45,000	2,50,000	2,175	0	0	3,70,000	3,75,000	2,800	0	0
2,50,000	2,55,000	2,200	0	0	3,75,000	3,80,000	2,825	0	0
2,55,000	2,60,000	2,225	0	0	3,80,000	3,85,000	2,850	0	0
2,60,000	2,65,000	2,250	0	0	3,85,000	3,90,000	2,875	0	0
2,65,000	2,70,000	2,275	0	0	3,90,000	3,95,000	2,900	0	0
2,70,000	2,75,000	2,300	0	0	3,95,000	4,00,000	2,925	0	0
2,75,000	2,80,000	2,325	0	0	4,00,000	4,05,000	2,950	0	0
2,80,000	2,85,000	2,350	0	0	4,05,000	4,10,000	2,975	0	0
2,85,000	2,90,000	2,375	0	0	4,10,000	...	3,000	0	0

SCHEDULE II.

FIXED FEES.

Number.		Proper Fee.
1. Application or petition.	(a) When presented to any officer of the Customs or Excise Department or to any Magistrate by any person having dealings with the Government and when the subject-matter of such application relates exclusively to those dealings ;	One Anna.

NOTES.

Sch. II, Art. 1.—The term “application” must be construed to mean a documentary and not an oral application. 2 N.W.P. (H.C.) 418.

APPLICATIONS FALLING WITHIN THE ARTICLE.—A petition to withdraw suit on the basis of an agreement to compromise. 8 M. 15 (F.B.) ; See also 8 W.R. 214. A petition for a new trial in a Small Cause Court. 7 B.H.C.A.C.J. 109. An application for enforcing an award. 13 C.L.R. 171. Written objections to an award being an application to set aside an award. 107 I.C. 233. An application for probate of a will. 15 W.R.C.R. 40. An appeal against an order in probate proceedings. 21 M.L.J. 481=9 I.C. 538 ; 4 C.W.N. 600. An appeal from order granting letters of administration. 9 A.W.N. 27. See also 1938 Rang.L.R. 72=1938 Rang. 141. Applications for review of interlocutory orders passed in appeal. 31 A. 262=6 A.L.J. 151=1 I.C. 1000. An appeal from an order absolute for foreclosure or sale. 14 C.P.L.R. 100. An application to restore an

appeal dismissed for default of payment of the initial deposit is governed by Art. 1 (d). 59 C. 1334=36 C.W.N. 564=1932 C. 770. So also an application for restoration of an appeal dismissed for default in payment of paper-book costs. 36 C.W.N. 246=1932 C. 641. See also 19 P.L.T. 17=17 P. 252=1938 P. 111 ; Pauper appeal—Order for payment of Court-fee and security for costs—Dismissal of appeal for failure to pay the same in time—Application for review—Court-fee is Rs. 2 payable under Sch. II, r. 1. 54 L.W. 349=1941 M. 836=(1941) 2 M.L.J. 500 (F.B.).

Sch. II, Art. 1 (a)—ASSISTANT COMMISSIONER—IF A REVENUE COURT.—Assistant Commissioner of Income-tax is a Revenue Court for purposes of the Court-Fees Act. The application for certified copy of Assistant Commissioner's order therefore requires a stamp under Art. 1 (a), Sch. II of Court-Fees Act, Punjab. 1937 Lah. 876.

Paragraph 5 of Art. 1 (a) covers an application to an Assistant Commissioner of Income-

Number.		Proper Fee.
Application or petition— (Contd.)	<p>or when presented to any officer of land-revenue by any person holding temporarily settled land under direct engagement with Government, and when the subject-matter of the application or petition relates exclusively to such engagement ;</p> <p>or when presented to any Municipal Commissioner under any Act for the time being in force for the conservancy or improvement of any place, if the application or petition relates solely to such conservancy or improvement ;</p> <p>or when presented to any Civil Court other than principal Civil Court of original jurisdiction¹ [* * *] or to any Court of Small Causes constituted under Act XI of 1865², or under Act XVI of 1868,³ section 20, or to a Collector or other officer of revenue in relation to any suit or case in which the amount or value of the subject-matter is less than fifty rupees ;</p> <p>or when presented to any Civil, Criminal, or Revenue Court, or to any Board or executive Officer for the purpose of obtaining a copy or translation of any judgment, decree or order passed by such Court, Board or Officer, or of any other document on record in such Court or Office.</p> <p>(b) When containing a complaint or charge of any offence other than an offence for which police officers may under the Criminal Procedure Code,⁴ arrest without warrant, and presented to any Criminal Court ;</p> <p>or when presented to a Civil, Criminal or Revenue Court, or to a Collector, or any Revenue-Officer having jurisdiction equal or subordinate to a Collector, or to any Magistrate in his executive capacity and not otherwise provided for by this Act.</p> <p>or to deposit in Court revenue or rent ;</p> <p>or for determination by a Court of the amount of compensation to be paid by landlord to his tenant.</p> <p>(c) When represented to a Chief Commissioner or other Chief Controlling Revenue or Executive Authority, or</p>	<p>One anna.</p> <p>Eight annas.</p> <p>One rupee.</p>

LEG. REF.

¹ The words "or to any Cantonment Magistrate sitting as a Court of Civil Judicature under Act III of 1859" were repealed by the Cantonments Act (XIII of 1889).

² See now the Provincial Small Causes Courts Act (IX of 1887) by which Act XI of 1865 was repealed.

³ See now S. 25 of the Bengal, North Western Provinces and Assam Civil Courts Act (XII of 1887.)

⁴ See now the Code of Criminal Procedure (Act V of 1908).

NOTES.

tax for a copy of an order passed by him and a Court-fee of two annas should be paid for the application. 11 P. 40=1932 P. 103. A memorandum of objections filed under O. 41, r. 26, C. P. Code, is not a petition or application under Art. 1 (d) and no Court-fee is chargeable thereon. 54 A. 465=1932 A.L.J. 149=1932 A. 526 following 1928 P. 85. But see 105 I.C. 108. On petitions under Ss. 34 and 74, Trusts Act, Court-fees under Sch. 2, Art. 1 (d) are sufficient. 11 O.W.N. 323=1934 O. 118 (2)

Number.		Proper Fee.
Application or petition— (Concl'd.)	to a Commissioner of Revenue or Circuit, or to any chief officer charged with the executive administration of a Division and not otherwise provided for by this Act.	
¹ [1-A. Application to any Civil Court that records may be called for from another Court.	(d) When presented to a High Court. When the Court grants the application and is of opinion that the transmission of such records involves the use of the post.	Two rupees. Twelve annas in addition to any fee levied on the application under clause (a), clause (b), or clause (d) of Article 1 of this Schedule.
2. Application for leave to sue as a pauper.	...	Eight annas.
3. Application for leave to appeal as a pauper.	(a) When presented to a District Court.	One rupee.
	(b) When presented to a Commissioner or a High Court.	Two rupees.
4. Complaint or memorandum of appeal in a suit to obtain possession under Act No. XVI of 1838, or [the ² Mamlatdars' Courts Act, 1876.] ³	...	Eight annas.
5. Complaint or memorandum of appeal in a suit to establish or disprove a right of occupancy.	...	Do.
⁴ 6. Bail-bond or other instrument of obligation given in pursuance of an order made by a Court or Magistrate under any section of the Code of Criminal Procedure, 1898, or the Code of Civil Procedure 1908, and not otherwise provided for by this Act.	...	Do.

LEG. REF.

¹ Was added by Act XIV of 1911.

² These words were substituted for the words "Bombay Act V of 1864" (to give Mamlatdar's Courts jurisdiction in certain cases to maintain existing possession, or to restore possession to any party dispossessed otherwise than by course of law), by the Repealing and Amending Act XII of 1891.

³ See now the Bombay Mamlatdars' Courts Act, 1906 (Bom. Act II of 1906).

⁴ This Article was substituted by Act XVII of 1914, Sch. The original Article ran as follows:—"Bail bond or other instrument of obligation not otherwise provided for by this Act, when given by the direction of any Court or executive authority".

NOTES.

Art. 1, Cl. (d).—No Court-fee is payable in respect of a memorandum of objection filed under O. 41, r. 26, C. P. Code. The object of the memorandum of objection is to give notice to the opposite party of the grounds on which the finding is proposed to be contested. It does not seek any relief from the Court and does not contain any request for any order being passed on it. It can, therefore, hardly be regarded as an application or petition within the meaning of Art. 1, Cl. (d) of Sch. II. 160

I.C. 38 (1)=1936 O.W.N. 113=1936 O. 180. Same judgment governing several suits—Appeals filed in some to High Court and in others in District Court—Application for transfer of all appeals to High Court for analogous trial—Separate application and vakalatnama for each appeal not necessary. I.L.R. (1939) 2 Cal. 264 =43 C.W.N. 836=1940 Cal. 84.

Art. 5.—In a suit to establish or disprove a right of occupancy, the plaint or memorandum of appeal shall bear a Court-fee of eight annas under article. 40 A. 358=16 A.L.J. 167=44 I.C. 608. As to case where the plaintiff sued to eject defendant as being a tenant at will with the mere intention of contesting the right of occupancy claimed by the latter, see 11 C.L.R. 91; 16 M. 310. For a suit to declare plaintiff statutory tenant on a certain rental art. applicable is Sch. II, art. 17 (iii) not Art. 5. 1941 R.D. 24=1941 O.A. (Supp.) 18=(1941) A.W.R. (Rev.) 29.

Art. 6.—Security bonds filed by a claimant in a claim case, being an instrument of obligation given in pursuance of an order of Court, is governed by Sch. II, Art. 6. 49 C. 997=1923 C. 269 (2). See also 29 C.W.N. 851=53 C. 101=1925 C. 906 (F.B.); 58 M. 687=1935 M. 380=68 M.L.J. 436. They will also be chargeable under the Stamp Act if they are

Number.		Proper Fee.
7. Undertaking under section 49 of the Indian Divorce Act.	...	Eight annas.
8. [Rep. by the Repealing and Amending Act, 1891 (XII of 1891.)]		
9. [Repealed by Act XII of 1891.]		
10. Mukhtarnama or Wakalatnama.	When presented for the conduct of any one case—	
	(a) to any Civil or Criminal Court other than a High Court, or to any Revenue Court, or to any Collector or Magistrate, or other executive officer, except such as are mentioned in clauses (b) and (c) of this number.	Eight annas.
	(b) to a Commissioner of Revenue, Circuit or Customs or to any officer charged with the executive administration of a Division, not being the Chief Revenue or Executive Authority.	One rupee.
	(c) to a High Court, Chief Commissioner, Board of Revenue, or other Chief Controlling Revenue or Executive Authority.	Two rupees.
	When present for the conduct of any one case—	

NOTES.

of the kind described in Art. 40 or 57 thereof. 2 C.W.N. 851 (F.B.). Security bonds given in pursuance of an order of the Court for stay of execution must be written on paper properly stamped under the Stamp Act and not on plain paper bearing a Court-fee stamp of annas 8. 43 I.C. 376=21 C.W.N. 1150; 7 L.L.J. 343=1925 L. 552. But see 41 L.W. 482=68 M.L.J. 466 (F.B.). 1929 L. 205, holding that the bond must bear Court-fees and no stamp under Stamp Act is necessary. Stamp on security bond by receiver pledging immovable property. 43 M. 363=38 M.L.J. 503. Where a security bond is executed by a surety under O. 41, r. 5, 6, C. P. Code, it is liable to a Court-fee under Art. 6 of Sch. II, Court-Fees Act, and to stamp duty under Art. 57, Sch. I, Stamp Act. This applies only in relation to deeds executed in the mofussil. 1933 L. 1004; 1934 L. 138 and 1931 O. 99 (S.B.) Foll. 1931 A. 189 Not foll. 30 S.L.R. 1; 1936 Sind 41. Security bond for the production of attached livestock is a bond given in pursuance of an order made by a Court within Art. 6 and the stamp leviable on such a bond is under Court-Fees Act and not under Arts. 15 and 57 of the Stamp Act. 37 M. 17=20 I.C. 775=24 M.L.J. 637.

A bond executed by a surety in accordance with S. 55 (4) of the C. P. Code, undertaking that the debtor would file a petition within a month to be declared an insolvent and that he would appear in any proceeding whenever called upon, need only be stamped with a Court-fee of annas eight under Art. 6 of Sch. II, of the Court-Fees Act. As it imposes only a personal obligation and does not hypothecate any movable or immovable property, Art. 57,

of Sch. I of the Stamp Act has no application to it. 14 L. 284=1933 L. 89 (F.B.). See also 143 I.C. 12 (Lah.). A surety bond given in pursuance of an order under S. 55 (4) of the C. P. Code, in which the surety incurs only a personal obligation falls under Art. 6 of the Second schedule; it is not chargeable with duty under the Stamp Act also. (117 I.C. 226; 53 C. 101 and 141 I.C. 301, Foll.; 81 I.C. 772 and 132 I.C. 225, Not Foll.) 143 I.C. 12=34 P.L.R. 480. The Article does not lay down that it is illegal for the Court to accept a person as surety in proceedings under S. 55 (4), C. P. Code on oral statements made before it or that it is obligatory to take a bond in writing. 1937 Lah. 772. *Ex parte* decree in small cause suit—Application to set aside—Stamp duty on the security bond. See 58 M. 687=1935 M. 380=68 M.L.J. 466 (F.B.).

Art. 10.—A power to a vakil authorising him to present an application for copies to Collector, falls under article and does not require to be stamped under Art. 50 of Sch. I of Stamp Act. 9 M. 146 (F.B.); 33 A. 487=9 I.C. 617. See also 15 I.C. 122=202 P.L.R. 1912 (F.B.); 5 P. 255=1926 P. 246. 40 C.W.N. 1340. The High Court has no inherent jurisdiction to consolidate Civil Revision Petitions in cases disposed of by a single judgment of the lower Court, so as to enable the party to file one vakalat in the petitions and pay one process fee for the common respondents. 53 M. 262=58 M.L.J. 521=1930 M. 381 (F.B.). See also 53 M. 243=58 M.L.J. 510=1930 M. 376 (F.B.). [27 L.W. 366 is not good law.] Where a plaintiff sued to avoid a document executed during his minority, all that was necessary for him was to ask that the document he declarer

Number.		Proper Fee.
11. Memorandum of appeal when the appeal is not [* * * * *] * *] from a decree or an order having the force of a decree, and is presented—	(a) to any Civil Court other than a High Court, or to any Revenue Court or Executive Officer other than the High Court or Chief Controlling Revenue or Executive Authority. (b) to a High Court or Chief Commissioner, or other Chief Controlling Executive or Revenue Authority.	Eight annas. Two rupees.

LEG. REF.

¹ The words "from an order rejecting a plaint or" were omitted by S. 155 (Sch. 4) of the Code of Civil Procedure (Act V of 1908.)

NOTES.

to be void against him and the suit need not be treated as involving a prayer for consequential relief, namely, the setting aside of the document. 11 R. 66. As to memo. of appearance, see 35 C.W.N. 1100.

Art. 11: SCOPE OF ARTICLE.—An order in probate proceedings has the force of a decree and so Art. 11 is not applicable to an appeal therefrom. 21 M.L.J. 481=9 I.C. 538. See also 1938 Rang.L.R. 72=1938 Rang. 141. So also an order under O. 21, r. 50 (2), C. P. Code. 10 Bur.L.T. 42=35 I.C. 429; 37 C.W.N. 227; also an order under O. 21, r. 99, C. P. Code. 10 B. 238; 8 C. 720; 29 M. 172. Though decision under S. 47 of the C. P. Code is a decree, an appeal therefrom should be stamped under this article by a Notification of the Governor-General. The Madras Court-Fees Act removes all doubts by specially including orders under S. 47 and S. 144 of the C. P. Code. An application by way of restitution under S. 144, C. P. Code, is one under S. 47 and hence an appeal from an order on such application would be chargeable with Court-fees under this article under the Government Notification. 11 C.L.J. 541=6 I.C. 125; 41 C.W.N. 157=1937 C. 152. See also 20 M. 448; 8 A. 545; 21 C. 340; 18 N.L.R. 15=1922 N. 62; 39 I.C. 640=21 C.W.N. 544; 1938 Rang.L.R. 635; 42 C.W.N. 152; 17 L.W. 623=1923 M. 270; 107 I.C. 491=1928 L. 143. But see *contra* in 8 R. 271=1930 R. 241; 1925 A. 137=47 A. 98 [19 A.L.J. 771, overruled; 1922 A. 223; 1922 A. 238 and 1925 P. 1 (F.B.), Foll.] 40 Bom.L.R. 416=1938 Bom. 320 (Executing Court ascertaining mesne profits and making order for its recovery—Art. 11 applies and Court-fee stamp is Rs. 2.) So also an appeal against an order directing the mortgagee who obtained a decree for sale, to pay out of the sale proceeds a certain amount as interest due to a prior mortgagee decree-holder. 4 P. 294=1925 P. 577=92 I.C. 474. The matter of an issue of a personal decree against the judgment-debtor for balance due to decree-holder after the sale of the mortgage property in execution of a mortgage decree falls under S. 47, C. P. Code and the fee chargeable on an appeal from an order passed on an application for personal decree is limited to amounts chargeable under Art. 11. 164 I.C. 639=1936 R. 352. The

directing of the Lower Court to re-admit a case is an order not having the force of a decree and an appeal therefrom is to be stamped under the article. 21 A. 178=1898 A.W.N. 23. So also an appeal from an order under S. 104 (f), C. P. Code. 9 L. 380=1928 L. 137; 50 A. 128=25 A.L.J. 741. See also 1927 A. 771; 6 Luck. 703=1932 O. 282; 1929 C. 369 (appeal from an order refusing to set aside award); 1929 L. 367 (revision against an appellate order setting aside award). So also an appeal against an order of remand. 1933 O. 191. So also an appeal to the High Court from an order of the District Judge under S. 214 (now S. 235) of the Companies Act. 17 A. 238. An appeal against an order dismissing an application for the ascertainment of mesne profits must be stamped with an *ad valorem* stamp on the amount claimed. 3 P.L.J. 101=43 I.C. 489. But see also 40 Bom.L.R. 416=1938 Bom. 320. So also an appeal from an order granting application for final decree in a mortgage suit. 27 O.C. 225=84 I.C. 742=1925 O. 102; 130 I.C. 98=1931 N. 1 (F.B.). Also an appeal from order rejecting a plaint for non-payment of Court-fee. 67 I.C. 901=3 L.L.J. 237. See also 1929 P. 615. Any appeal from any order connected with the order granting final decree must pay Court-fees as in any other appeal from a final decree. 1928 N. 146 (35 A. 476 and 22 Bom.L.R. 811, Foll.) But see 1928 N. 33. See also the cases cited below. An appeal against an order directing after contest that a final decree shall be passed in a mortgage suit should be treated only as an appeal against an order, and not as an appeal against the final decree in the suit for the purpose of the payment of Court-fee. 53 M. 155=1930 M. 20=57 M.L.J. 718. See also 130 I.C. 98=1931 N. 1 (F.B.). Where a second appeal was decided under the provisions of S. 98 (2), C. P. Code, and an application having been made under the amended cl. 15 of the Letters Patent for a certificate the same was refused and against that refusal an appeal was preferred. Held, that the Court-fee was chargeable in the memorandum of appeal under Art. 11 (b) of the Second Schedule of the Court-Fees Act. 56 C. 482=117 I.C. 595=1929 C. 575. An appeal from an order under O. 21, r. 50 (2), C. P. Code is an appeal from an original decree and not a Civil Miscellaneous Appeal and is leviable to *ad valorem* Court-fee. 60 C. 530=146 I.C. 123=37 C.W.N. 227=1933 C. 546. See also 1939 Sind 161 (F.B.). Art. 11 of Sch. II, of the Court-Fees Act is inapplicable to an appeal from an order under O. 21, r. 50 (2) C. P.

Number.		Proper Fee.
12. Caveat	...	Five rupees.
13. Application under Act No. X of 1859, ¹ section 26, or Bengal Act No. VI of 1862, ² section 9, or Bengal Act No. VIII of 1869, ³ section 37.	...	Do.
14. Petition in a suit under the Native Converts' Marriage Dissolution Act, 1866.	...	Do.
15. [Repealed by Act V of 1908.]	...	Do.
16. [Repealed by Act VI of 1889, S. 18 (1)].		
17. Plaint or memorandum of appeal in each of the following suits :—		

LEG. REF.

¹ Act X of 1859 was repealed by the Bengal Tenancy Act (VIII of 1885) in those portions of the Lower Provinces to which that Act extends and in the Chota Nagpur Division (except Manbhum and the Tributary Mahals) by the Chota Nagpur Landlord and Tenant Procedure Act, 1879 (Bengal Act I of 1879), in the Province of Agra by Act XVIII of 1873; and in the Central Provinces, by the Central Provinces Tenancy Act, IX of 1883.

² Bengal Act VI of 1862 was repealed by the Bengal Tenancy Act (VIII of 1885), so far as it affected those portions of the Lower Provinces to which that Act extends; and in the Chota Nagpur Division (except Manbhum and the Tributary Mahals) by the Chota Nagpur Landlord and Tenant Procedure (Act I of 1879).

³ Bengal Act VIII of 1869 was repealed by the Bengal Tenancy Act (VIII of 1885.)

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Code, for it expressly excludes from its purview appeal "from a decree" or an order having the force of a decree" and it is distinctly laid down in sub-r. (3) of R. 50 of O. 21, that where the liability of any person has been tried and determined under sub-r. (2), the order made thereon shall "have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree." The wording of this rule is very wide and the word "otherwise" here means "in all other respects." An appeal from such an order is governed by Sch. I, Art. 1 under which the Court-fee is payable is *ad valorem* on the subject-matter in dispute. 35 P.L.R. 565=1934 L. 958. See also 1939 Sind 161 (F.B.). Where an appeal is directed against the order of remand it should be filed as a miscellaneous appeal under O. 43, r. 1 (u), C. P. Code, and a Court-fee of Rs. 2 is payable as on a Civil Miscellaneous Appeal. 144 I.C. 967=10 O.W.N. 143=1933 O. 191. This article applies to appeal under Rules of Madras amendment Relief Act. I.L.R. (1941) Mad. 935=53 L.W. 637=1941 M. 639= (1941) 1 M.L.J. 721. See also 1941 A.W.R. (H.C.) 59=1941 A.L.J. 109 (Order of special judge under U. P. Encumbered Estates

Act (Ss. 9 and 13) rejecting written statement by creditors. See 1937 A.L.J. 1373=(1938) A.W.R. (H.C.) 22 (F.B.); 1937 A.W.R. 932=1938 All. 14; 1938 O.W.N. 1221=1939 O. 437. An order under S. 5 (1) of the U.P. Agriculturists' Relief Act, has not by itself the force of a decree and is not capable of execution by itself. It is an order passed in the suit and should be considered to be interlocutory. On an appeal from such an order *ad valorem* Court-fee need not be paid. 1937 A.W.R. 1223=1937 A.L.J. 1212. See also 1936 R.D. 236.

AS AMENDED IN MADRAS, SCH. II, ART. 11.—An order rejecting an application under O. 20, r. 12, C. P. Code, asking for an inquiry into future profits, which has been left open in the decree in the suit, and for an order directing the defendants to pay the amount found due, is not a decree as defined by S. 2 (d), C. P. Code. An appeal from the order rejecting the application, which cannot be regarded even as an order having the force of a decree, has to be valued for purposes of Court-fee under Sch. II, Art. 11 of the Court-Fees Act, as amended in Madras, and a Court-fee of one rupee is sufficient. The appellant cannot be ordered to estimate the amount at which he values his relief and to pay an *ad valorem* Court-fee on the figure stated by him. 49 L.W. 652=1939 Mad. 667=(1939) 2 M.L.J. 356. Art. 11 (as amended in Bihar and Orissa), Sch. II—Applicability—Appeal from decree under O. 20, r. 12 (2), C. P. Code—Proper Court-fee. 18 P.L.T. 864.

Art. 12.—A petition by which a party upon whom citation has been issued, opposes the grant of probate is not a caveat and need not be stamped as such. 36 I.C. 38=20 C.W.N. 787.

Art. 17 : APPLICABILITY—MEMO. OF CROSS-OBJECTIONS.—Court-fee on memo. of cross-objections should be paid *ad valorem* under Art. 1, Sch. I and not as under Sch. II, Art. 17, as the word "cross-objection" is to be found only in Art. 1, Sch. I and not in Sch. II, Art. 17. 1933 O. 528. But see 1934 A.L.J. 743=1934 A. 728 *contra*. An appellant appealing merely against the portion of a decree declaring his personal liability, can do so on a Court-fee of Rs. 10. 36 P.L.R. 104=1934 L. 865.

Number.		Proper Fee,
(i) to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court.	...	Ten rupees.

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Art. 17 (i) : SUIT TO SET ASIDE SUMMARY ORDER.—A plaint in a suit under O. 21, r. 63, C. P. Code, is governed by this article. 26 C.W.N. 126=1922 C. 166; 64 I.C. 49; 3 P. L.T. 832=1923 P. 152; 22 I.C. 676=1913 U.B.R. 181. *See also* 6 A. 341; 6 A. 466; 1938 O.W.N. 1018; 51 P.R. 1897; 35 C. 202=35 I.A. 22; 10 B. 610. A suit to cancel the order on the claim petition, to declare the plaintiff's title to the property, to raise the attachment and to obtain a permanent injunction against the execution being continued to sale is in substance one to avoid the attachment and Court-fee was payable under Art. 17 of Sch. II of the Court-Fees Act. 64 M.L.J. 568=1932 M. 439; 56 M. 716=144 I.C. 243. *See also* the Privy Council decision in 35 I.A. 22=35 C. 202. The value for purposes of jurisdiction in such a case is the value of the land under Cl. (v). 64 M.L.J. 568=1933 M. 439. When a claim or objection to attachment has been made under O. 21, r. 58, C. P. Code, a suit for a bare declaration under O. 21, r. 63, will lie. In such a suit the proper Court-fee payable is Rs. 10 and the valuation of the suit for Court-fee and the valuation thereof for jurisdiction will always be different, the valuation for the latter purpose being the value of the attached properties. 12 R. 670=1934 R. 332; 45 C.W.N. 50=72 C.L.J. 526=1941 Cal. 28; 18 Pat. 323=20 Pat.L.T. 710=1939 P. 571. A suit under O. 21, r. 103, C. P. Code, though the plaintiff claims possession of property of which he had been dispossessed, nevertheless falls under Art. 17 of Sch. II. The restoration of possession is implicit in the setting aside of the executing Court's order. The consequential relief in substance is not one to seek possession but reversal of the executing Court's order. 1938 N.L.J. 107=1938 Nag. 300. A suit for cancellation of a certificate which was signed by the certificate officer under S. 6 of the Public Demands Recovery Act, comes within Art. 17, Cl. 1 of Sch. II, and only a fixed Court-fee is payable. 44 C.W.N. 255=1940 Cal. 215. A suit under Madras Act (XXVII of 1860) to contest the award of a Settlement Officer falls within this clause. 4 M. 204. The proper Court-fee payable on an application under S. 84 of the Madras Hindu Religious Endowments Act (II of 1927) is that fixed by Art. 17-A (1) of the Madras Court-Fees (Amendment) Act, 1922, and not that fixed by Art. 17 (1). The Board of Commissioners for Hindu Religious Endowments is not 'Civil Court' under Art. 17 (1) of the Madras Court-Fees (Amendment) Act of 1922. 113 I.C. 88=1929 M. 52. But *see* 1929 M. 334. The Court-fee payable on such petitions under S. 84 (2) is Rs. 15, the fee prescribed in Art. 17.

52 M. 388=1929 M. 334. Arts. 17-A and 17-B cannot be regarded as parts of Art. 17 but only as new articles. 1929 M. 334=52 M. 388 (1929 M. 52, Diss. from.) *See also* 68 M.L.J. 327; 68 M.L.J. 329; 68 M.L.J. 280.

MADRAS AMENDMENT—SCH. II, ART. 17-A.—Art. 17-A (1) governs only cases where no consequential relief is prayed for. If as incidental to his remedy by way of partition, a plaintiff contents that a mortgage executed on the joint family property is not for family purposes, it cannot be said that the suit is one which no consequential relief is prayed. 1938 M.W.N. 131=1938 M. 474. Where a suit for a declaration without consequential relief is instituted in the first instance in a District Munsiff's Court, but it is later transferred to a Subordinate Judge's Court for trial by that Court, along with another suit in that Court, and disposed of there, an appeal against the decree passed in such suit must be stamped with a Court-fee stamp of Rs. 100 and not Rs. 15. The decree appealed against is a decree of a sub-Court; the fact that the suit was originally filed in the Court of the District Munsiff cannot make it a decree of that Court for purposes of court-fee under Art. 17-A of Sch. II of the Court-Fees Act. I.L.R. (1940) Mad. 646=51 L.W. 228=1940 Mad. 383=(1940) 2 M.L.J. 425. Decree against temple in suit on promissory note by hereditary trustee—Suit by worshippers to declare not binding on temple as being collusive—Temple and trustee made defendants to suit—Court-fee payable. 53 L.W. 311=(1941) 1 M.L.J. 414. Suit for partition by Hindu coparcener—Prayer for account of family property—Court-fee payable. (1940) 1 M.L.J. 32 (F.B.). *See also* 46 L.W. 484=1937 Mad. 876=(1937) 2 M.L.J. 616. Suit by creditors under S. 53, Transfer of Property Act—Court-fee. 1939 M.W.N. 778. Co-operative Societies Act, S. 42 (2) (b)—Order of liquidator under—Suit to declare null and void—Court-fee payable. (1937) 1 M.L.J. 640.

MADRAS AMENDMENT—SCH. II, ART. 17-B.—The word "estimate" in Art. 17-B of Sch. II of the Court-fees Act (as amended in Madras) involves the idea of approximation and cannot be interpreted as meaning accurate valuation. Where in a suit to recover a sum of Rs. 18,897 and odd from the defendant as a first charge from and out of certain properties as trust money, the plaintiff gets only a decree but no charge, and the plaintiff appeals against the decree declining to give a first charge and seeks to get a charge on the properties which are valued in the memorandum of appeal at Rs. 9,500 it cannot be said that the relief is incapable of valuation so as to attract, Art. 17-B of Sch. II of the Court-Fees Act. The Court-fee payable on the memorandum of appeal is the amount

Number.	Proper Fee.
(ii) to alter or cancel any entry in a register of the names of proprietors of revenue paying estates :	Ten rupees.
(iii) to obtain a declaratory decree where no consequential relief is prayed :	Ten rupees.

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which would be payable under Art. 1, Sch. I, on the sum of Rs. 9,500 which is the value placed by the plaintiff on the property over which the charge is claimed. 54 L.W. 526= (1941) 2 M.L.J. 774. The appellants were executants of three promissory notes on which suits were instituted. Two of the notes were executed by them simply in their personal capacity while in the third there was a reference to a trust in the body of the instrument, though the appellants had not signed as trustees. In all the three suits the claim was against the appellants in their personal capacity and decrees were passed rendering them personally liable. The appellants preferred second appeals and contended that as the debts had been contracted for trust purposes they should not be made personally liable, and that the decree should have been against them as trustees and against the trust property in their hands. The appellants claimed that the appeals were incapable of valuation and that they were only liable to Court-fee under Art. 17-B of Sch. II of the Court-Fees Act as amended in Madras and that no *ad valorem* Court-fee was payable. Held, that the appellants were seeking to get rid of their liability to the extent of both their persons and property in respect of the amounts decreed against them, and it could not therefore be said that the subject-matter of the appeals was incapable of valuation so as to permit Court-fee being paid under Art. 17-B of Sch. II of the Court-Fees Act as amended in Madras and that therefore Court-fee must be paid *ad valorem* on the value of the decree in each suit. 52 L.W. 903=(1940) 2 M.L.J. 946=1941 Mad. 313. A suit under S. 112 of the Madras Estates Land Act is not a suit in which it is not possible to estimate at a money value the subject matter in dispute; and therefore Art. 17-B of the Court-Fees Act as amended in Madras cannot apply to such a suit. An appeal by the landlord against a decree in a suit filed by the tenant is not also governed by Art. 17-B. The value of the subject-matter in such a suit or appeal is not more than the annual rent the recovery of which is resisted, and *ad valorem* Court-fee must be paid on such amount under Sch. I, Art. 1. I.L.R. (1937) Mad. 980=1937 Mad. 786=(1937) 2 M.L.J. 347. Decree-holder purchaser obtaining symbolical delivery of part of house—Suit for partition and possession against another purchaser in physical possession—Valuation—Court-fee. 1939 M.W.N. 303=(1939) 1 M.L.J. 531. Suit for possession of office of member and manager of school committee—Valuation—Court fee. 1939 M.W.N. 720=(1939) 2 M.L.J. 226.

BOMBAY AMENDMENT, SCH. II, ART. 17 (vii).—

Applicability—Suit to set aside prior decree in suit for partition and for fresh partition of all properties—Court-fee payable. I.L.R. (1941) Kar. 102.

BIHAR AND ORISSA AMENDMENT, SCH. C, ART. 17 (iii)—Applicability and scope—Hindu widow—Alienations by—Suit by reversioner to declare invalid—Application for and granting of interim injunction to restrain further alienations by widow—Court-fee payable. 20 P.L.T. 855. A suit by a defeated claimant under O. 21, r. 63, C. P. Code, for a declaration of his title to the property in suit, and for a permanent injunction on the defendant so that no delivery of possession of the property in suit may take place, and to prevent the defendant from taking any illegal action whatsoever to the detriment of the plaintiff, is governed for purposes of Court-fee by Sch. II, Art. 17 (i) of the Court-Fees Act as amended in Bihar and Orissa and the Court-fee payable is that prescribed by that article and not *ad valorem* Court-fee. 193 I.C. 782.

U. P. AMENDMENT, SCH. II, ART. 17 (i).—See 1941 Pat. 174=21 P.L.T. 1019; 193 I.C. 782.

Art. 17, Cl. (iii).—See Cl. (i) of Art. 17-A of Madras Act.

CROSS-OBJECTION IN DECLARATORY SUIT—AD VALOREM COURT-FEES, IF PAYABLE.—A cross-objection in a declaratory suit where no other relief is asked for, does not require *ad valorem* Court-fees. The Court-fees Act lays down the principles for Court-fees and the Schedules merely apply those principles in detail. The principle of the Act to be deduced from S. 7 is that *ad valorem* Court-fee are not to be charged in a declaratory suit where consequential relief is not prayed for. On that view, the omission of the words "cross objection" from Schedule II, Art. 17 (iii) is a mere clerical error and it is no doubt intended that by a memorandum of appeal a cross-objection should also be included. A cross-objection and an appeal are very intimately connected and there is no essential difference from the point of view in Court-fee between the one and the other, and there is no reason why a person who files a cross-objection should have to pay *ad valorem* Court-fee, whereas if he filed an appeal instead of a cross-objection he will not have to pay Court-fee. 152 I.C. 196=1934 A.L.J. 743=1934 A. 728. But see 1933 O. 528, *contra*.

SUITS FOR DECLARATION WHERE NO CONSEQUENTIAL RELIEF IS PRAYED.—Where a plaint or a memorandum of appeal asks only for a pure declaration, the Court in calculating Court-fees cannot go into the question whether he should also have asked for consequential relief. The effect of failing to ask consequential relief is for the final decision

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of the Court. A fixed fee under article is sufficient. 27 C.W.N. 972=1924 C. 183. See also 162 I.C. 750=1936 O. 317; 1931 A.L.J. 235=1931 A. 369; 32 P.L.R. 745; 1932 A.L.J. 466; 1932 A. 560; 1932 A.L.J. 165=1932 A. 316; 1933 A. 488 (F.B.); 43 P.L.R. 106 (F.B.). A suit solely to declare that a sale-deed executed by the plaintiff is void and inoperative against him, on the ground that he was made to execute it because of coercion, undue influence and fraud falls under this Article. 9 O.W.N. 440=138 I.C. 147. The plaintiff who was not a party to the deed sued to have it declared null and void. There was no prayer for the document being delivered up after cancellation. *Held*, that the suit was one for a mere declaration and was leviable to Court-fee on that basis. 141 I.C. 798=10 O.W.N. 19=1933 O. 116. See also 163 I.C. 462=1936 Pesh. 140; 1941 Rang.L.R. 387=1941 Rang. 269; 10 O.W.N. 133=142 I.C. 699=1933 O. 127; 140 I.C. 191=1932 A. 316=1932 A.L.J. 165. But see 63 M.L.J. 764=139 I.C. 317=1932 M. 605, holding that a party cannot alter the nature of the suit or its eventual effect by wording the plaint as one for a declaration and that a suit for possession or cancellation of decree cannot be framed as one for declaration and that the decree was not binding on the plaintiff in order to pay a smaller Court-fee. Even where relief is prayed for it may be a mere surplusage in which case, the suit may be stamped as a mere declaratory suit under this article. 3 P. 795=80 I.C. 655=1925 P. 44. A suit to declare that a previous declaratory decree is not binding on the plaintiff on ground of fraud, is governed by article because no consequential relief is needed or sought for. 35 I.C. 797=12 C.W.N. 375. Where the plaintiff merely asks for a declaration that the previous decree is not in any way binding upon him and is altogether void and ineffectual, his suit is one for obtaining a declaratory decree only and falls under Art. 17 (3), Sch. II. (1931 A. 369; 1932 A. 560; 1932 A. 316 and 1933 A. 350, Rel. on; 1932 A. 485 (F.B.), Expl.) 1933 A.L.J. 673=1933 A. 488 (F.B.). See also 1937 O.W.N. 1186=1938 Oudh 1 (F.B.). 1941 O.W.N. 1107=1941 O.A. 803; 1941 L. 139 (Plaintiff not being a party to previous decree); 1940 O.W.N. 1121. A suit by a reversioner for mere declaration that conveyance by a Hindu widow is void in respect of anything beyond her life interest comes under this article. 70 P.R. 1877. See also 24 C. 833; 12 M. 234; 159 I.C. 454=41 L.W. 702=68 M.L.J. 327=1935 M. 318. For a similar suit where a prayer for the appointment of Receiver is added, see 96 I.C. 29=1926 M. 678=51 M.L.J. 67 and other cases cited under S. 7, Cl. (iv) (c). A suit for bare declaration that a decree is ineffectual and not binding on the plaintiff comes under the article. 30 C. 788; 20 B. 736. See also 34 C.W.N. 1129; also a suit for declaration that a certain document was null and void where the plaintiff was not a party to it. 10 O.W.N. 19=1933 O. 116; also a suit by a member of a joint Hindu family for declaration that an alienation made by a managing member is not binding on him. 7 M. 134; 78 I.C. 782; 1925 L. 90. Suit for declaration that plaintiff is the real owner of

a decree obtained by the defendant against another and for transfer of the decree to him. 1 P.R. 1911=17 P.L.R. 1911. Also a suit for declaration that the plaintiff is entitled to certain sum of money held in Court deposit by the receiver appointed under S. 146, Cr. P. Code. 1933 P. 224=12 P. 261=14 P.L.T. 113. Also a suit for a declaration that plaintiffs were occupancy tenants and not tenure-holders and that the survey entry describing them as tenure-holders was wrong. 4 P.L.J. 302=50 I.C. 298. Also a suit for declaration that certain property belongs to the plaintiff and is not liable to be sold in execution of a mortgage decree to which he is not a party. 85 I.C. 349=1925 O. 500. Also a suit for declaration that the entire family property in the hands of the plaintiff as the head of the joint family belonged equally to the plaintiff and the defendant and that certain documents executed by certain deceased members of the family did not affect the jointness of the family. 1932 A.L.J. 466=1932 A. 560. Also a suit for declaration that a deed of gift executed by the judgment-debtor is fictitious and void and that the property caused by it is capable of being attached and sold. 130 I.C. 344=1931 O. 72; 1933 A.L.J. 1537; 10 O.W.N. 133=1933 O. 127. See also 1937 Sind 248; 1941 Rang.L.R. 387=1941 Rang. 269. Where plaintiff sues for a declaration that his share in certain property is not liable to attachment and sale in execution of a decree against his father, the suit is one for a mere declaration without consequential relief and *ad valorem* Court-fee need not be paid on the amount under the decree. 11 O.W.N. 617=1934 O. 212 (2) (F.B.); 1937 Sind 248. A suit to set aside a compromise decree for maintenance falls under the article (Art. 17-A of the Madras Act). 1928 M. 416. See also 145 I.C. 777=1933 Sind 53. (Suits to set aside consent decree in partition suit). See also 1934 A.L.J. 955. A suit under S. 106, B. T. Act, which is transferred to the Civil Court is a suit for declaratory decree within this article. 48 I.C. 552=28 A.L.J. 301. See also 18 I.C. 275=17 C.L.J. 416. In a suit for recovery of possession with mesne profits and in the alternative for assessment of fair rent, the prayer for assessment is not in the nature of a declaratory relief. 6 P. 17=100 I.C. 913=1927 P. 123. A prayer in a suit for partition by a Hindu son that he may be granted a partition free of a mortgage which he alleges is not binding on him need not be stamped as for a declaratory relief in addition to the fee for partition. I.L.R. (1940) Mad. 259=186 I.C. 491=51 L.W. 11=1940 Mad. 113= (1940) 1 M.L.J. 32 (F.B.), overruling the previous decisions to the contrary. The law allows a plaintiff if he is in possession of property or if the defendant is not in possession to get a declaratory decree. If he is out of possession he will not be entitled to take possession under the decree. Where the relief of possession is not implied in the declaratory decree Court-fee for possession need not be paid. 1941 O.W.N. 1107. The plaintiff sued for possession as the transferee of one G. The first Court gave him a decree on condition that his possession should continue only during the lifetime of his transferor. An appeal by the plaintiff against the condition

Number.	Proper Fee.
(iv) to set aside an award	Ten rupees.

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is for a mere declaration and need bear a Court-fee of Rs. 10 only. 33 A. 705=11 I.C. 977=8 A.L.J. 821. Where in a Land Acquisition proceeding, the compensation money awarded is kept in Court deposit on behalf of a widow owning life interest in the property, an appeal filed by the rival claimant claiming that the compensation money must be payable to him alone should bear only a fixed fee as for declaration. 55 M. 641=62 M.L.J. 541=139 I.C. 131=1932 M. 438. An award having been made in favour of an alienee from Hindu widow in respect of lands sold by her and acquired by the Government compulsorily, the reversioners of the widow's husband claimed the proceeds on the ground that the alienation was not legally binding on them and prayed that the amount should not be paid to the alienee but might be invested under S. 32 of the Land Acquisition Act. The claim was disallowed and they appealed. *Held*, that the appeal was not one under S. 8 of the Court-Fees Act but fell under Art. 17 (iii) of Sch. II of the Act and that the Court-fee was Rs. 20. 39 C.W.N. 110=60 C.L.J. 216. The Bombay practice of valuing suits for declaration at Rs. 130 and paying a Court-fee of Rs. 10 thereon is misleading and unwarranted by law. A fixed fee of Rs. 10 is to be paid thereon. 43 B. 507=46 I.A. 24=36 M.L.J. 437 (P.C.). No *ad valorem* fee need be paid when a suit is brought for a declaration that money is jointly due, plaintiff not objecting to its being received by the defendants. 1923 L. 359. A declaratory suit that a registered release deed be considered cancelled, must be valued for Court-fees at the amount at which the relief is valued. 35 P.R. 1914=25 I.C. 435. Suit by a Hindu reversioner for declaration that a release deed executed by the widow in favour of defendants 1 to 4 would not be binding on them and for the appointment of a Receiver—Decree that the release deed would not be binding on the reversioners but that the defendants 1 to 4 should be paid a certain amount spent to the benefit of the estate—Appeal by defendants 1 to 4 impugning the declaratory decree and also claiming that they should be paid a larger amount than that awarded—Appellants bound to pay Court-fee only in respect of the declaration and not also on the amount claimed by them in the alternative. 63 M.L.J. 822. Suit for cancellation of an instrument under S. 39, Specific Relief Act, falls under Sch. I, Art. 1 and not under this Article. 1932 A.L.J. 684=1932 A. 485 (F.B.). *See also* under S. 7, Cl. (iv) (c) (iv-a) Mad. A suit for the reversal of a *patni* sale is not solely for a declaration that the sale is a nullity. 51 C. 216=28 C.W.N. 683=1924 C. 731. *See also* 1937 A.L.J. 1373; 1938 O.W.N. 1018=1938 A.W.R.(C.C.) 122. (Appeal against dismissal of claim under S. 11, U. P. Encumbered Estates Act). A claim to be declared a holder of an *ayo* is covered by Article.

98 I.C. 196=1926 R. 184 (F.B.). An appeal in a mortgage suit claiming priority for the mortgage held by the appellants, must bear *ad valorem* Court-fee. 54 A. 347=1932 A. 221. *See also* under Sch. I, Art. 1. A suit for declaration that a certain wakfnama is valid as against a defendant who is in possession and claims the properties (covered by the deed) as his own private property is not maintainable without a consequential relief by way of joint possession, injunction or the like. Such a suit cannot, therefore be brought upon a fixed Court-fee payable under Sch. II, Art. 17. 34 C.W.N. 1129. A suit by a beneficiary under a trust to set aside certain alienations of trust property by the trustees does not fall under this Article. 61 M.L.J. 39=130 I.C. 449=1931 M. 24. A suit for declaration that a previous decree declaring certain wakfnamas invalid is not binding on the plaintiff falls under Art. 17, Sch. II and not under S. 7, Cl. (4) (c). 34 C.W.N. 1129 (21 C.W.N. 375; 20 B. 742, Ref. to). *See also* 156 I.C. 13=1935 L. 611. Where the declaration sought by a plaintiff amounts to no more than that she has a right to recover her dower debt from a certain property, the subject of the waqf, the plaintiff is only suing for her right as to the property, namely, the right to attach and put to sale that property for recovery of her dower debt. The declaration sought falls within the purview of S. 42 of the Specific Relief Act and hence the relief is for a mere declaratory decree without any consequential relief coming under Art. 17 (iii) of the Second Schedule to the Court-fees Act and does not fall under S. 7 (iv) (c). 1939 O.W.N. 152=1939 O.A. 293. Where an ex-minor sued alleging that he was a minor at the time of the execution of a mortgage deed by him and that it was therefore void against him. *Held*, that all that was necessary for the minor was to ask that the document be declared to be void against him and the suit need not be treated as involving a prayer for a consequential relief, namely, the setting aside of the document. 11 R. 66=1933 R. 109.

Art. 17, Cl. (iv).—*See* Cl. (ii) of Art. 17-A of Madras Act inapplicable to compensation awards under the Land Acquisition Act covered by S. 8. 21 M. 269. *See also* 35 C.W.N. 1103; 138 I.C. 199=1932 O. 224; 1938 A.L.J. 1124 (Appeal against order of tribunal constituted under U. P. Town Improvements Act). But S. 8 applies only to appeals by persons who claim compensation. For an appeal by the Secretary of State against the compensation award of the Court, a Court-fee of Rs. 10 only is required under article. 37 P.R. 1913=17 I.C. 764. Proceedings before the Court on a reference by the Collector under S. 19, Land Acquisition Act, cannot be described as a suit to set aside an award under this Art. 17 (4) Where a suit is for a declaration that an award made by the Registrar of Co-operative Societies which directed the plaintiff to pay the opposite party

Number.	Proper Fee.
(v) to set aside an adoption ;	Ten rupees.
(vi) every other suit where it is not possible to estimate at a money-value the subject-matter in dispute, and which is not otherwise provided for by this Act.	Ten rupees.

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a sum of Rs. 10,244-1-9, is *ultra vires*, the suit is governed by Art. 17 (iv) of Sch. II, and it is only a fixed Court-fee and not *ad valorem* Court-fee that is payable. There is no reason to limit the term 'Award' in the article to an award by arbitrators. Any Judicial decision which is not a decree might be considered to be an award for the purposes of Art. 17 (iv) of Sch. II. 1941 N.L.J. 254=1941 Nag. 243. The provision applicable is Sch. I, Art. 1 if not S. 8 and Court-fees are payable in the appeals *ad valorem* on the difference between the sum awarded by the Court and the sum which the appellant claims should have been awarded. 6 R. 281=1928 R. 197. Where an appeal is preferred to the High Court against an order of the Civil Court on a reference by the Collector under S. 5 of the Bengal Alluvial Lands Act, a fixed Court-fee of Rs. 20 is payable. 58 C. 710=35 C.W.N. 181.

Art. 17 (v).—The plaintiff may value the relief claimed in his suit to set aside an adoption and that valuation determines the Court which is to decide the suit. 37 C. 860=14 C.W.N. 929=6 I.C. 630. See also 15 A. 378. In a suit to declare adoption invalid, market value of property claimed is the basis of Court-fee. 52 M. 340=56 M.L.J. 107=1928 M. 1294. See also 1937 Rang. 400 (Suit for cancellation of a deed of adoption.) A suit for mere declaration that an adoption is valid does not admit of being satisfactorily valued and falls under Art. 17, Cl. (vi). 24 I.C. 286=17 O.C. 90. A suit for declaration that certain adoption deed executed by a widow shall be of no effect on the plaintiff's reversionary rights is not a suit to annul an adoption. 84 I.C. 486=1925 L. 229.

Art. 17, Cl. (v).—Where a suit for declaration that plaintiff is the adopted son of the last male owner and therefore entitled to property in his possession was dismissed, the Court-fee payable on the appeal is an *ad valorem* fee on the value of the property in possession of the appellant as the adopted son of the last owner. 43 I.C. 64=15 N.L.R. 24. In a suit for declaration that an adoption never took place, Court-fee is payable on the value of the property, title to which is affected. 58 I.C. 965 (1). [These decisions were under a C. P. Gazette, Notification No. 1641, dated 28th September, 1911.]

Cl. (vi).—See Art. 17-B of the Madras Act. (1937) 2 M.L.J. 347; (1937) 2 M.L.J. 572.

CONSTRUCTION AND SCOPE.—Art. 17 (vi) of Sch. II of the Court-Fees Act should be very strictly interpreted, the article cannot be invoked

when a suit is otherwise provided for. 60 C.L.J. 201=39 C.W.N. 131. To bring a case within the scope of this clause, it must be established that it is not possible, even to state approximately a money value for the subject-matter in dispute. 1 I.C. 670=13 C.W.N. 815. See also 59 C.L.J. 447=1934 C. 786. Thus a suit for *restitution of conjugal rights* would fall under the clause. 34 C. 352=11 C.W.N. 458=5 C.L.J. 400. See also 60 C.L.J. 201; 8 C.W.N. 705=31 C. 849; 28 A. 545; 9 I.C. 186=8 A.L.J. 889; 33 A. 767=11 I.C. 186. So also a suit under S. 92, C. P. Code. 14 C.W.N. 932=12 C.L.J. 211=7 I.C. 92; 1927 M. 940=53 M.L.J. 457; 8 L. 730=1928 L. 113. See now Cl. (iii) of Art. 17 of Madras Act. Also a suit for *removal of a trustee* of a religious endowment. 23 M. 537; 19 A. 104; 24 C. 418; 31 B. 48; 1934 P. 647. See also 1938 N.L.J. 357=1938 N. 537. A prayer for *temporary mandatory injunction* to compel defendant to deposit in Court an amount due by him to the trust, in a scheme suit under S. 92, C. P. Code, does not alter the character of the suit and the fee fixed in Sch. II, Art. 17 (ii) is sufficient. 47 M.L.J. 656=1924 M. 882. See also 110 I.C. 264=1928 L. 113; 48 M.L.J. 514=1925 M. 722; I.L.R. (1940) Mad. 259=(1940) 1 M.L.J. 32=1940 Mad. 113 (F.B.). (Prayer for appointment of interim receiver in partition suit). A suit under *Registration Act*, S. 77 to compel registration falls under the article. 21 P.R. 1895; 3 C. 515. A temple as such has no market value and a suit for *recovery of possession of temple* falls under Sch. II, Art. 17, Cl. (iv). 46 M. 782=45 M.L.J. 274=1924 M. 19 (F.B.). An appeal against an order refusing grant of *letters of administration* is governed by Art. 17 (vi) as the subject-matter in dispute cannot be estimated at a money value. 22 I.C. 98=35 A. 448. The Court-fee payable on a memorandum of appeal presented to a High Court from an order refusing or granting letters of administration or probate of a will is Rs. 2 under Art. 11, Sch. II. Neither Art. 1 of Sch. I, nor Art. 1 or Art. 17 (vi) of Sch. II, is applicable to such a case. 1938 Rang.L.R. 72=1938 Rang. 141. The memo. of appeal against a *redemption decree* absolute on the ground that the money was deposited at a later date than that allowed and that it should not have been so received falls within the clause. 10 I.C. 736=7 N.L.R. 41. As to appeal against an order rejecting an appeal memo. for non-payment of Court-fee, see 98 I.C. 663 (2)=1927 N. 100. But see 1935 N. 83 (F.B.), *contra*. As *kyaung* cannot be transferred by sale, mortgage or gift, it has no market-value and the plaint in a suit by *Hypongyi* to recover possession of *kyaung*

Number.		Proper Fee.
18. Application under section 326 of the Code of Civil Procedure, 1908.	...	Ten rupees.

NOTES.

should bear a fixed stamp. 57 I.C. 953=13 Bur.L.T. 40. Where the plaintiff alleging that he was the duly elected Mahant sued for possession of the Math properties, held, the case was governed by S. 7 (v) and not this Article but that the temple should be left out of account as having no market value. 1932 A.L.J. 777=1932 A. 593. See also 7 R. 245=1929 R. 134 and 372 (F.B.); 40 P.L.R. 113; 1938 N.L.J. 214 (Suit for possession of temple). A mere intention to dedicate property for religious purposes is not sufficient to convert that property into religious property. Court-fee to be paid for recovery of possession of such property will be *ad valorem*. 178 I.C. 232=1938 R. 303. A suit under S. 92, C. P. Code, that a mahant may be removed and new mahant may be appointed along with a committee and that the trust property may be made over to them falls under Sch. II, Art. 17 (6) and not under S. 7 (iv) (c). 110 I. C. 264=1928 L. 113. Where the subject-matter of the suit is the right to mutwalliship and the office does not carry any salary or any other material enjoyment, it is not capable of monetary valuation and therefore the proper Court-fee is the fixed fee of Rs. 15 provided by Sch. II, Art. 17, para 6. 1934 P. 647. See also 1938 N.L.J. 357=1938 N. 537 (Suit for removal of mutwalli and rendition of accounts). In a suit the plaintiffs prayed that they be appointed mutawallis and the defendant be ordered not to interfere with their management and worship. The suit having been dismissed, the plaintiffs preferred an appeal. On the question of proper Court-fee to be paid by the appellants, Held, that the relief claimed should not be presumed to be one for possession of the trust property, the latter part of the relief may be considered a superfluity, the case comes under Art. 17 (vi) of the second schedule, as it is not possible to estimate at a money value the subject matter in dispute namely, the appointment of the plaintiffs as mutawallis in the place of the defendant. The criterion is to see whether by obtaining the particular relief claimed, the plaintiffs can obtain possession of the property by execution of the decree. 171 I.C. 468=1937 O.W. N. 1149=1937 O.L.R. 555. An appeal preferred against the decree in an *interpleader suit* which declares the title of one of the claimants and directs the delivery of the property to him upon payment of costs to the plaintiff should be stamped under the Art. 2 P.L.T. 280=61 I.C. 820. A suit for partition of property which was alleged to be joint (and not proved otherwise) need only be stamped with a Court-fee of Rs. 10. No *ad valorem* fee is necessary. 34 P.L.R. 84=1933 L. 208. In respect of a suit for partition by the plaintiff who was in joint possession of a part of the property in dispute, a Court-fee of Rs. 10 is sufficient when his title to a share is not denied by the defendants. (1930 L. 839,

Foll.; 1932 L. 421, Dist.) 34 P.L.R. 772=1933 L. 780 (2). See also 1938 Rang. 76; 40 P.L.R. 27; 32 S.L.R. 124. Court-fee is necessary on the claim for interest from date of suit to date of realization made in appeal, either *ad valorem* the sum up to the date of the appeal or at least a Court-fee of Rs. 10 as provided by Art. 17 (6). 1933 L. 941. An objection on appeal as to the manner in which a decree in a suit for dissolution of partnership is to be enforced is covered by this article. 90 I.C. 629=1925 L. 496. Where in an appeal from the final decree in a mortgage suit, the only question is whether the property should be sold or whether the mortgagee should foreclose, it is difficult to place an exact money value on the appeal for the calculation of *ad valorem* Court-fees and under Art. 17 (6) of Sch. II of the Court-fees Act, the memorandum of appeal should bear a Court-fee stamp of Rs. 15. 15 P.L.T. 696=1934 P. 473 (1). But see also 61 C. 320=38 C.W.N. 276=1934 C. 377. Suit for money against joint family consisting of two brothers B and G—Personal decree against G only but decree against both with respect to share in family property—Appeal by plaintiff praying for personal decree against B also.—Court-fees must be under Art. 17 (vi). See 171 I.C. 13=1937 Pesh. 89. Where in an appeal from a final decree for sale in a mortgage suit, the amount of the decree is not challenged, but the only reliefs prayed were extension of time for payment and permission to pay by instalments, the reliefs claimed are incapable of valuation and as such Art. 17 (vi) of Sch. II applies. In respect of each of the two reliefs separate Court-fee has to be paid. I.L.R. (1938) Nag. 423=1938 N.L.J. 269=1938 Nag. 409 (F.B.). Memorandum of objections by ryot only attacking the finding of the lower appellate Court as to the amount of rent legally due is capable of being estimated in money-value within the meaning of Cl. 17 (6) of Sch. II. 57 M.L.J. 260=1930 M. 22. Second appeal by a ryot from a suit by him under S. 112, Madras Estates Land Act, was held to be a case not possible to be estimated at a money value. 52 M. 972=1930 M. 43=57 M.L.J. 510. Relief originally prayed for was a declaration that the plaintiff was the owner of certain property. A Court-fee of Rs. 10 was paid. Subsequently the prayer was sought to be amended thus: "On account of that (a particular) decree is null and void and ineffectual it may be declared, etc." Held, that the effect of the amendment was to add to the original relief a prayer for a further declaration for which a further Court-fee of Rs. 10 should be paid and that the second relief asked for was not consequential relief within the meaning of S. 7 (iv) (c) so as to necessitate the payment of *ad valorem* Fees. 55 A. 274=1933 A.L.J. 311=1933 A. 350. Where in an appeal under

Number.	Proper Fee.
¹ [19. Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908.]	Ten rupees.

LEG. REF.

¹Substituted by S. 155 (4th Sch.) of the Code of Civil Procedure Act V of 1908 for the original entry which was as follows :—"Agreement under S. 328 of the same Code."

NOTES.

S. 45, U. P. Encumbered Estates Act, the appellant does not object to the amount of the decree but only to certain conditions imposed by the special Judge, the appeal comes under Sch. II, Art. 17 (vi) of the Court-Fees Act in that it is not possible to estimate the subject-matter of the appeal at a money value. An appeal which does not relate to the amount of the decree passed but only to the manner in which the decree can be enforced or executed falls only under Art. 17 (vi) of the second schedule to the Court-Fees Act. 15 Luck. 321 = 1940 O.W.N. 26 = 1940 Oudh 183. See also 1940 O.W.N. 207 = 15 Luck. 413. In a suit on mortgage the mortgagee was granted a decree for certain sum payable in annual instalments and was held entitled to possession under O. 34, r. 2, C. P. Code, on mortgagors' failure to pay the instalments regularly. The mortgagee appealed from it claiming a decree under O. 34, r. 4, C. P. Code. Held, that the Court-fee payable in appeal was under Art. 17 (6), Sch. II. 167 I.C. 26 = 1937 Pesh. 31. See also 1936 R. D. 236. The amount of future interest cannot be determined as it depends upon the date of payment of the amount decreed, by the judgment-debtor. Therefore, a Court-fee stamp of Rs. 10 only is payable on cross-objections filed with regard to future interest. 163 I.C. 928 = 38 P.L.R. 276 = 1936 L. 668.

CASES NOT COMING UNDER THE CLAUSE.—Art. 17 could not apply to a case where a person with a definite decree for a particular sum of money against him seeks to set it aside. The question whether or not the decree is at the moment capable of execution without payment of certain amount by plaintiff as additional Court-fees need not be considered. 33 C.W.N. 743 = 1929 C. 815. Where in a suit for the enforcement of a mortgage or charge against certain property the trial Court held the charge to be enforceable only against a portion of the property, an appeal to have the charge declared against the whole property must bear *ad valorem* fee on the value of the property in dispute. 65 I.C. 114 = 24 O.C. 295. So also an appeal in a mortgage suit claiming priority for the mortgage held by the appellants. 54 A. 347 = 1932 A. 221. See also 46 L.W. 524 = 1937 M. 840. Art. 17 (vi) cannot apply to the case of property which clearly has a money value although it may be difficult to estimate such value correctly. Where the plaintiff-appellants sought to render certain property in the hands

of the defendants liable for a certain money claim, held, that *ad valorem* Court-fee was payable. 54 A. 608 = 1932 A.L.J. 387 = 1932 A.406. Where an appeal relates only to the manner in which the decree is directed to be executed, a declaratory Court-fee is sufficient for it. 15 Luck. 413 = 1940 O.W.N. 207 = 1940 A.W.R. (C.C.) 112. See also 15 Luck. 321 = 1940 O.W.N. 26. When a plaintiff who obtained a decree for the full amount sued for against one of the defendants appealed with a view to make the other defendants also liable, held, he was bound to pay *ad valorem* Court-fee on the amount for which the other defendants were sought to be made liable and not a fixed fee under this article. 24 Bom.L.R. 313 = 46 B. 840. See also 86 P.R. 1912 = 16 I.C. 777; 59 C.L.J. 447 = 1934 C. 786 (valuation of appeal by defendants in a suit for accounts). *Tank bed*, suit for recovery of Court-fees. See 67 M.L.J. 688. In a suit for sale of mortgaged property, the puisne mortgagee and mortgagor were impleaded. The mortgagor denied the puisne mortgage, but the Court found it to be subsisting, and in the decree, ordered that the balance, after paying off the plaintiff mortgagee should be paid to the puisne mortgagee and the surplus, if any, should be given to the mortgagor. In an appeal by the mortgagor challenging the portion of decree in favour of the puisne mortgagee, held that *ad valorem* Court-fee on amount due on the mortgage should be paid and not merely for a declaration. 146 I.C. 1003 = 1933 L. 954.

SUITS FOR PARTITION.—[See also under S. 7, Cl. (iv) (b)]. A suit for partition, pure and simple, where the plaintiff is in joint possession of his share and there is no dispute as to his title or share falls within the clause. 2 P. 432 = 4 P.L.T. 257; 49 I.C. 115 (P.). See also 13 C.L.R. 253; 141 I.C. 175 = 1933 L. 208; 123 I.C. 525 = 1930 L. 839; 8 C. 757; 34 A. 184 = 8 A.L.J. 1329; 90 I.C. 843 = 1926 M. 122 (partition claimed after division in status); 58 C. 188; I.L.R. (1940) Mad. 259 = 186 I.C. 494 = 51 L.W. 11 = 1940 Mad. 113 = (1940) 1 M.L.J. 32. (F.B.) [The distinction observed in the previous case-law between partition of joint family property and other joint property abolished. See 64 M.L.J. 24 = 1933 M. 430; 40 P.L.R. 2; 14 Luck. 346 = 1938 O.W.N. 1265 = 1939 O. 90; 43 P.L.R. 147 = 1941 Lah. 123 (F.B.). See also 1939 Lah. 568; I.L.R. (1941) Lah. 308 = 43 P.L.R. 238 = 1941 Lah. 152 (F.B.). It is enough if the person claims to be in joint possession of the property. 16 I.C. 771 = 6 S.L.R. 74 (notes); 1930 L. 839 = 123 I.C. 525 (2); 43 P.L.R. 147 = 1941 Lah. 123 (F.B.); 20 P. 780. Where in suit for partition of joint family property, the plaintiff alleges that he is a coparcener, that is enough to show plaintiff's joint possession, because the possession of one coparcener must be deemed to be possession

Number.		Proper Fee.
20. Every petition under the Indian Divorce Act, except petitions under S. 44 of the same Act, and every memorandum of appeal under S. 55 of the same Act.	...	Twenty rupees.

NOTES.

on behalf of all. Where a plaintiff alleges that the family has continued joint Court-fee has to be calculated on the basis of that allegation and the suit does not fall under S. 7 (v) of the Court-Fees Act merely because the plaintiff does not specifically allege joint possession or enjoyment. 45 L. W. 541=1937 M. 606. Where however some of the family properties had been alienated by the father or manager of the family, the suit in respect of that property should be valued as a suit for possession under S. 7 (v). I.L.R. (1940) Mad. 259=(1940) 1 M.L.J. 32=1940 Mad. 113 (F. B.). Suit to set aside decree effecting partition by metes and bounds and for fresh partition of all properties held by plaintiff and defendants exclusively since date of prior partition. It cannot be said that in such a case the plaintiff is in joint possession with the defendants, so as to take the suit out of S. 7 (iv) (c), and to bring it under Sch. II, Art. 17 (vii), as being liable to a fixed Court-fee instead of *ad valorem* Court-fee. The fact that the plaintiff is already in possession of a portion of the property of which he seeks a re-partition cannot entitle him to credit for Court-fees payable in respect of that part of the property. I.L.R. (1941) Kar. 102=1941 S. 154. The suit for partition is not converted into a case of claim to possession because the defendants set up that the house is not joint property and that the plaintiff has no title to it. 35 C.W.N. 942. See also 12 C.W.N. 37=6 C.L.J. 651; 38 C. 681; 1937 Rang.L.R. 447=1938 R. 76; 32 S.L.R. 124=40 P.L.R. 27. The wording of Art. 17, Sch. II, Court-Fees Act shows clearly and indubitably that when a suit falls under any one of the clauses of that article, the plaintiff as well as the memorandum of appeal arising from such a suit, is chargeable with a fixed Court-fee of Rs. 10 only, irrespective of whether the subject-matter in appeal is or is not capable of being estimated in money value. I.L.R. (1941) Lah. 234=43 P.L.R. 147=1941 Lah. 123 (F.B.). Where in defence to a suit for partition by a Mahomedan heir, the widow pleads that her right to remain in possession in lieu of dower is paramount to that of the plaintiff's and her defence is rejected, the test to be applied to find out the proper Court-fee payable in respect of an appeal against the rejection of such a plea is, to consider what would be the position, if the appellant was endeavouring to establish in a suit in which she was plaintiff the same right as she is trying to maintain in the appeal. Applying the test it was held, that the Court-fee payable was not an *ad valorem* Court-fee but Court-fee under Art. 17 (vi) of the second Schedule of the Court-Fees Act. 1940 A.L.J. 789=1940 All. 521. A decision as to the amount of Court-

fee should be founded solely on a consideration of the cause of action on which the plaintiff is suing and not on pleas of defendant. 16 I.C. 773=6 S.L.R. 72. On the application of one of the co-sharers in a partition suit the Court directed the properties to be sold as they were not capable of partition.

Another sharer appealed against this order. Held, that the Court-fee payable was Rs. 10 under this article. 100 I.C. 17 (2)=1927 L. 189; 1930 R. 164. A suit, however, in which plaintiff prays for declaration of his title and partition as a consequential relief, falls within S. 7, Cl. (iv) (c) and the plaintiff's share becomes also the valuation of the suit for jurisdiction. 2 P. 432=4 P.L.T. 257. See also 81 I.C. 643=1924 N. 105; 84 I.C. 538=1925 P. 703. So also in a suit intended to recover possession, plaintiff must pay *ad valorem* fee upon the value of the share. 8 C. 757; 8 P. 818=1930 P. 1; 1935 Pesh. 30. See also cases noted under S. 7 (iv) (b). A memorandum of appeal against an order of the Court in a partition suit, directing the defendants to put in properly stamped applications if they wished to have their respective shares separated off by the Court, must be stamped with a Court-fee of Rs. 10 under Sch. II, Art. 17, Cl. (vi). 274 P.L.R. 1913=20 I.C. 177=183 P.W.R. 1913. Where in a suit for declaration and partition the defendant appeals from the decree for partition he is not entitled to stamp the appeal memorandum with Rs. 10 Court-fee stamp simply on the ground that he is in possession of the property. 1930 R. 164. A plaintiff sued for partition alleging that he was in joint possession and paid Court-fees under Sch. II, Art. 17 (vi). The Court found that he was not in joint possession and called upon him to pay *ad valorem* Court-fee. The suit was dismissed on plaintiff's failure to pay the deficient Court-fee. The Court-fee for appeal by plaintiff was under this sub-clause until the question of joint possession was finally decided in appeal. 1930 A. 443. So also for the appeal by the defendant if the lower Court finds the plaintiff to be in joint possession. 1930 L. 839. A suit for partition of a joint property is with reference to the matter of Court-fees governed by Sch. II, Art. 17, Cl. (vi). In appeals against decrees in partition suits the Court-fee payable is Rs. 15. It does not matter whether the ground of attack is with reference to the allotment of specific portion of immovable or movable property or the ground of attack is the question of costs. 56 C. 188=116 I.C. 383=1928 C. 878. Where the plaintiff sued for partition, his father and step-brother alleging a previous partition, it was substantially for a declaration that the prior partition was not binding on him and for other reliefs and falls

Number.	Proper Fee.
21. Plaint or memorandum of appeal under the Parsi Marriage and Divorce Act, 1865.	Twenty rupees.

NOTES.

under S. 7, Cl. (4) (c) and not under this article. 129 I.C. 824=1931 M. 94. Where in an appeal in a suit for partition the only proper relief is the claim for partition and the relief regarding the declaration and injunction are unnecessarily put in, the Court may permit the appellant to give up the unnecessary reliefs and limit his claim to partition. 35 C.W.N. 942. Art. 17 (vi) of Sch. II of the Court-Fees Act is inapplicable to an appeal from an order under O. 21, r. 50 (2). C.P. Code. Sub-rr. (2) and (3) of r. 50 of O. 21 show that the subject-matter in dispute in proceedings under them is the liability of the person against whom execution is sought for payment of the decretal amount, on the ground that he was a partner in the judgment-debtor firm. The subject-matter in appeal against an order passed under sub-r.(2), therefore, is the liability of the judgment debtor for the same amount. This amount is clearly ascertainable and it cannot, therefore, be said that the subject-matter of the appeal is one where it is not possible to estimate it at a money value. Such an appeal is governed by Art. 1 of Sch. I, under which the proper Court-fee payable is *ad valorem* on the subject-matter in dispute. 35 P.L.R. 565=1934 L. 958. As to suits for maintenance, see 149 I.C. 982=1934 L. 150. Appeal in suit for partition—Property subject to charge to meet marriage expenses—Court-fee payable. 159 I.C. 802=1936 A. 221.

SPECIFIC PERFORMANCE, SUIT FOR.—The plaintiff sued for specific performance of a contract to execute a deed of trust in favour of certain institutions in respect of certain joint properties belonging to and in possession of both the plaintiff and the defendant. Under the trust deed, both the plaintiff and the defendant were made trustees. *Held*, that the suit did not come under any of the specified classes of suits for specific performance which are contemplated by S. 7 (x) of the Court-Fees Act, that the relief claimed was not the property itself but merely specific performance of the agreement, the money value of which it was not possible to estimate, and that consequently the suit was governed by Sch. II, Art. 17 (vi) of the Court-Fees Act. I.L.R. (1938) 2 Cal. 411=42 C.W.N. 667.

SUIT ON PROMISSORY NOTE—DECREE SILENT AS TO INTEREST AFTER DATE OF SUIT TILL REALISATION—APPEAL AS TO—COURT-FEE.—Where a decree in a suit on a promissory note awards interest at the contract rate up to the date of suit, but is silent as to the claim for interest from the date of suit till realisation for an appeal from such decree on the ground that interest should have been allowed up to the date of realisation of the amount, the proper Court-fee payable is Rs. 10 as provided for by

Art. 17 (vi) of Sch. II to the Court-Fees Act, 154 I.C. 470.

SUIT FOR SCHEME SO THAT PLAINTIFFS AND DEFENDANTS MAY ENJOY EMOLUMENTS SEPARATELY.—A suit to obtain an injunction restraining the defendants from interfering with the service by the plaintiffs of an idol and asking the Court to frame a scheme so that they and the defendant might be entitled to carry on the service of the idol and to enjoy the emoluments of the office separately and without interference from each other cannot, be described as a suit for partition; yet it is, in a sense, a suit which may be regarded as a suit of a similar nature for the purpose of estimation of Court-fees. Such a suit is one to which Art. 17 (vi) of the Second Schedule applies. 1935 A.L.J. 295=1935 A.W.R. 251.

ORDER REJECTING PLAINT FOR FAILURE TO PAY ADDITIONAL COURT-FEE—APPEAL FROM—COURT-FEE.—*Per Full Bench.*—Where an appeal is filed from an order rejecting a plaintiff for failure to pay additional Court-fee demanded, the subject-matter in appeal is capable of valuation. 1935 N. 83 (F.B.)=157 I.C. 186=18 N.L.J. 207. *Per Grille, J.C. and Pollock, A.J.C., (Niyogi, A.J.C. holding contra).*—An order rejecting a plaintiff for failure to pay additional Court-fee demanded is such a complete and final determination of the rights of the parties that there is no room in any appeal from such an order for the proposition that the subject-matter in appeal is not the same as the subject matter in the original suit, and the same Court-fee is payable on the appeal as on the plaintiff. (*Ibid.*).

DISTINCT RELIEFS—TEST.—Where the relief sought consists of two parts which are such that the first is the foundation for the second and the second part is a necessary consequence of the granting of the first part then the two can be taken together as really constituting one relief which is quite enough for the purpose of decreeing the plaintiff's claim. On the other hand, if the two parts are such that the second does not necessarily follow from the first or that the first goes farther than what is necessary for the granting of the second part of the relief, then one sum of Rs. 10 as Court-fees would not be sufficient. Where the relief claimed is that it may be declared that the property in suit is *wakfalalaulad* and is not attachable and saleable, the declaration that the property is *wakfalalaulad* is the foundation for and would necessarily involve the granting of the relief that the property is not attachable and saleable and only one sum of Rs. 10 is payable as Court-fees. But where the relief claimed is that it may be declared that the property in suit is owned and possessed by the plaintiff and is not fit for attachment and sale in satisfaction of a certain decree, the plaintiff in asking for a declaration as to possession is asking for more than is actually necessary for the granting of the second part of the

SCHEDULE III.¹

(See section 191.)

FORM OF VALUATION (TO BE USED WITH SUCH MODIFICATIONS, IF ANY, AS MAY BE NECESSARY).
IN THE COURT OFRe *Probate of the Will of*
and credits of

,) deceased. (or administration of the property

I

solemnly affirm
make oath.

and say that I am executor (or one of the executors or one of the next of kin) of deceased and that I have truly set forth in Annexure A to this affidavit all the property and credits of which the abovenamed deceased died possessed or was entitled to at the time of his death, and which have come, or are likely to come, to my hands.

2. I further say that I have also truly set forth in Annexure B all the items I am by law allowed to deduct.

3. I further say that the said assets, exclusive only of such last-mentioned items, but inclusive of all rents, interest, dividends and increased values since the date of the death of the said deceased are under the value of

ANNEXURE A.

VALUATION OF THE MOVABLE AND IMMOVABLE PROPERTY OF DECEASED.

	Rs.	A.	P.
Cash in the house and at the Banks, household goods, wearing-apparel, books, plate, jewels, etc. :			
(State estimated value according to best of Executor's or administrator's belief.)	...		
Property in Government securities transferable at the Public Debt Office			
(State description and value at the price of the day; also the interest separately, calculating it to the time of making the application.)	...		
Immovable property consisting of			
(State description, giving, in the case of houses, the assessed value, if any and the number of years' assessment, the market-value is estimated at, and, in the case of land, the area, the market-value and all rents that have accrued.)	...		
Leasehold property			
(If the deceased held any leases for years determinable, state the number of years' purchase, the profits rents are estimated to be worth and the value of such, inserting separately arrears due at the date of death and all rents received or due since that date to the time of making the application.)	...		
Property in public companies			
(State the particulars and the value calculated at the price of the day; also the interest separately; calculating it to the time of making the application.)	...		
Policy of insurance upon life, money out on mortgage and other securities, such as bonds, mortgages, bills, notes and other securities for money			

LEG. REF.

¹ This schedule was inserted by the Court-Fees (Amendment) Act (XI of 1899), S. 3. The original Schedule III was repealed by Act XIV of 1870.

NOTES.

relief, as the plaintiff would succeed if he establishes that he is the owner of the property. In such a case, therefore, two distinct reliefs are claimed by the plaintiff and two sums of Rs. 10 are payable as Court-fees. 1936 A.L.J. 1155 = 1936 A. 874.

WRITTEN STATEMENT CLAIMING PARTITION.—A defendant in a partition suit asking for a decree for his share need not pay Court-fee in order to make his claim effective. 55 M. 975 = 1932 M. 722 = 63 M.L.J. 845.

PRAYER FOR EXPUNGING REMARKS FROM JUDGMENT.—The prayer in an appeal was that certain findings in the lower Court judgment should be expunged from the judgment or that they may be declared to be *obiter dicta* and consequently not binding on the parties. The appellants did not pay Court-fee stamps on this part of the appeal and on a preliminary objection being raised, *held*, that the appellants were entitled to invoke the aid of the High Court without paying Court-fee stamps and that as

the relief claimed by them was not capable of being estimated in money value, a Court-fee stamp of Rs. 10 under Art. 17 (vi) should be paid. 144 I.C. 620 = 1933 L. 678 (2).

Art. 20.—A Court-fee of Rs. 20 is sufficient in a suit for divorce, whatever damages are claimed. 12 L. 266 = 1931 L. 1 (S.B.). The Court-fee applicable to the Divorce Act cannot be applied to a petition under the Indian and Colonial Divorce Jurisdiction Act, 1926. Hence Art. 20 does not apply. 158 I.C. 621 = 1935 A.L.J. 988 = 1935 A. 791.

Art. 22: [PUNJAB].—The terms "ancestral land" in Art. 22, Sch. II, means land held by the common ancestor himself and the last male owner. 1928 L. 221. Where in a suit by a reversioner for a declaration that an alienation of a certain land by a widow following customary law would not affect his reversionary rights, the plaintiff alleged a special custom which restrained the widow from alienating ancestral property and stated that the land was ancestral. *Held*, that having regard to the allegations in the plaint, the Court-fee leviable on an appeal by the reversioner was Rs. 20 under Art. 22 of Sch. II to the Court-Fees Act, as amended by the Punjab Court-Fees Act, VII of 1922. I.L.R. (1938) Lah. 450.

(State the amount of the whole ; also the interest separately, calculating it to the time of making the application.) Rs. A. P.

Book debts

(Other than bad.)

Stock in trade

(State the estimated value, if any.)

Other property not comprised under the foregoing heads.

(State the estimated value, if any.)

TOTAL ...

Deduct the amount shown in Annexure B not subject to Duty

NET TOTAL ...

ANNEXURE B. SCHEDULE OF DEBTS, ETC.

	Rs.	A.	P.
Amount of debts due and owing from the deceased, payable by law out of the estate	...		
Amount of funeral expenses	...		
Amount of mortgage incumbrances	...		
Property held in trust not beneficially or with general power to confer a beneficial interest...	...		
Other property not subject to duty	...		
TOTAL ...			

THE COURT-FEES (AMENDMENT) ACT (VII OF 1910). (Repealed by Act I of 1938.)

THE CROWN GRANTS ACT (XV OF 1895).¹

[S. 1 Rep. in pt., Act X of 1914.]

[10th October, 1895.]

An Act to explain the Transfer of Property Act, 1882,² so far as relates to grants from the Crown, and to remove certain doubts as to the powers of the Crown in relation to such grants.

WHEREAS doubts have arisen as to the extent and operation of the Transfer of Property Act, 1882,² and as to the power of the Crown to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, and it is expedient to remove such doubts; It is hereby enacted as follows:—

Title, extent and commencement. 1. (1) This Act may be called THE CROWN GRANTS ACT, 1895.

LEG. REF.

¹ For Statement of Objects and Reasons, see Gazette of India, 1895, Pt. V, p. 169, and for Proceedings in Council, see *Ibid.*, Pt. VI, pp. 328 and 355.

² This Act was declared in force in Upper Burma (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898), Bur. Code.

NOTES.

Sch. III, Annexure B.—Property held in trust within Annexure B in the form set out in Sch. III is property held in trust by the testator and not one as to which the testator has created a trust. 2 Pat.L.T. 683=62 I.C. 513=6 P.L.J. 411; 45 I.C. 578=2 P.L.J. 611.

Sec. 1: CONSTRUCTION OF CROWN GRANTS.—A Crown grant is to be construed by its own terms and not by reference to the previous or subsequent act of the parties. 36 Bom.L.R. 761=1934 B. 434. The Crown

Grants Act applies to grants by Government of Sunderbans lands. The Crown has unfettered discretion to impose any condition, limitation, or restriction in its grants. I.L.R. (1938) 2 Cal. 1=42 C.W.N. 239. The grants or leases of Sunderbans lands, which are lands vested in the Crown by S. 39 of 21 & 22 Vic., c. 106, executed by the Sunderbans commissioner on behalf of the Secretary of State for India in Council are Crown grants and to these grants the Crown Grants Act applies. I.L.R. (1938) 1 Cal. 626=42 C.W.N. 81=1938 Cal. 211. Where certain waste lands were granted by the Governor of a province of His Majesty under S. 1 of the Government of India Act, held, that Crown Grants Act applied to the grant. 7 O.W.N. 683=1930 O. 441. In Bengal, Crown has conferred no market franchise or right of holding markets. Therefore, a proprietor cannot acquire such a right by prescription, as the right is treated as an incident to the

(2) It extends to the whole of British India; [*]¹

(3) [* * * * *]¹

2. Nothing in the Transfer of Property Act, 1882,² contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of ³[the Crown] to, or in favour of, any person whomsoever; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed.

LEG. REF.

¹ The words "and" at the end of Cl. (2) and "it shall come into force at once" in Cl. (3) were repealed by Act X of 1914, Sch. II.

² This Act was declared in force in Upper Burma (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898), Bur. Code.

³ Substituted for "Her Majesty the Queen-Empress, her heirs or successors, or by or on behalf of the Secretary of State for India in Council," by Government of India (Adaptation of Indian Laws) Order, 1937.

NOTES.

ownership of land; and he has no remedy at law if any competitor holds a market in his proximity. 24 C.W.N. 800=58 I.C. 879=47 C. 1079. A trader usually haunting one market for the sale of his goods, can take the same to another without committing any unlawful act. (*Ibid.*)

ESTOPPEL.—Acts of Government officers, as—A particular construction put upon a Crown grant by the officers will not work as an estoppel against the Government. 36 Bom.L.R. 761=1934 B. 434.

CROWN DEBTS.—The right of the Crown to enforce payment of Crown debts cannot be taken away by statute except by express enactment. There can be no bar by implication. 1934 A.L.J. 221=1934 A. 170. As to priority of Crown debts, see 11 R. 467; 1933 S. 368 (1931 S. 164; (1940) 1 M.L.J. 429; (1938) 1 M.L.J. 351; 5 Bom. H.C.R.O.C. 23, Ref.) It is the duty of the Crown and of every branch of executive to abide by and obey the law. If there is any difficulty in ascertaining it, it is the duty of the executive in cases of doubt to ask for directions from the Court to ascertain the law, in order to obey it, and not to disregard it. 16 P. 159=18 Pat.L.T. 95=1937 P. 65 (S.B.).

Sec. 2.—The Crown in British India has power to grant or transfer lands and limit its descent in any way it pleases; but a subject has no power to impose on lands or other property, any limitation of descent at variance with the ordinary law applicable. 40 A. 470=23 C.W.N. 101=45 I.A. 134 (P.C.).

Secs. 2 and 3.—Transfer of Property Act has no application to grants of Crown lands. 10 P. 203=1931 P. 268=131 I.C. 811. It is not only the T.P. Act, that is affected

by the Crown Grants Act. S. 3 of the Act declares the unfettered discretion of the Crown to impose such conditions and limitations as it thinks fit, no matter what the general law of the land be. By reason of this section, a restrictive clause in a Crown lease which compels the lessee to refer any boundary dispute with the adjoining lessee, only to revenue authorities, is not affected by S. 28 of the Contract Act. But such a clause cannot be availed of by a lessee of an adjoining lot, to oust the jurisdiction of the Civil Court, for the reason, that his predecessors in interest were not parties to the contract entered into between the Secretary of State in Council and the other lessees' predecessors in interest. I.L.R. (1938) 1 Cal. 626=42 C.W.N. 81=1938 Cal. 211. See also 1939 All. 263. The provisions of Ss. 2 and 3 do not include all leases executed by or on behalf of Government from the operations either of S. 107, T.P. Act, or of the Registration Act which provides for the cases of documents exempt from registration when executed by or on behalf of Government. 36 A. 176=22 I.C. 933=12 A.L.J. 219. A provision in a lease granted by Government of land situate in Malabar that the lessee will not erect buildings on the ground, is not consistent with S. 19 of the Malabar Compensation for Tenants Improvements Act and is saved by S. 3 of the Crown Grants Act. 43 M. 65=53 I.C. 345=37 M.L.J. 532. The expression "grant" in S. 2 denotes not only the transfer of prerogative rights possessed by the Crown but also transfers of land of every description. (*Ibid.*) Where a Crown grant consists of a lease of land in the Malabar District containing a reservation of the right to terminate the tenancy on six months' notice and the lessee expressly covenanted to surrender, *held*, that under S. 3, the lease must take effect according to its tenor and the Government is entitled to a decree for ejectment without paying for improvements. 41 M.L.J. 494=69 I.C. 475. The exemption of waste lands from payment of land revenue does not *ipso facto* exempt such land from Land Revenue Act and Tenancy Act. 28 N.L.R. 169=1932 N. 75 (F.B.). Where certain property which had been acquired by the Secretary of State under the Land Acquisition Act was sold in Court auction. *Held*, that the sale was immune from a claim for pre-emption in view of the provisions of S. 3 of the

3. All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor any rule of law, statute or enactment of the Legislature to the contrary notwithstanding.
- Crown grants to take effect according to their tenor.

THE CURRENCY ACT (IV OF 1927).

[Repealed by Reserve Bank Act (II of 1934), S. 60.]

THE CUTCHI MEMONS ACT (X OF 1938).

[8th April, 1938.]

An Act to provide that all Cutchi Memons shall be governed in matters of succession and inheritance by the Muhammadan Law.

WHEREAS it is expedient that all Cutchi Memons be governed in matters of succession and inheritance by the Muhammadan Law; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE CUTCHI MEMONS ACT, 1938.

(2) It shall come into force on the 1st day of November, 1938.

Cutchi Memons to be governed in certain matters by Muhammadan Law.

2. Subject to the provisions of section 3, all Cutchi Memons shall, in matters of succession and inheritance, be governed by the Muhammadan Law.

3. Nothing in this Act shall affect any right or liability acquired or incurred before its commencement, or any legal proceeding or remedy in respect of any such right or liability; and

Savings.

any such legal proceeding or remedy may be continued or enforced as if this Act had not been passed.

NOTES.

Crown Grants Act. 8 Luck. 322=10 O. W.N. 113=1933 O. 134 (F.B.).

Sec. 3.—An inam which is a Crown grant will be governed by S. 3 of the C. G. Act which excludes the application of the personal law. If there is any ambiguity in the inam certificate, the question would have to be decided in accordance with the Inam Rules of 1859. I.L.R. (1940) Nag. 244=1940 N.L.J. 78=1940 Nag. 129. The effect of S. 3 is that when a grant has been made by the Crown, the Crown is not with reference to that grant, bound by any of the sections of either the Tenancy Act or the Transfer of Property Act or the Contract Act. 181 I.C. 584=1939 A.L.J. 164=1939 All. 263. See also 1931 Pat. 258; 1938 Cal. 211; (1938) 1 M.L.J. 656. All that S. 3 means is that the Crown is entitled to put such conditions in a grant which a private individual could not but the only advantage to the grantee is that the grant to him is not invalid if given by the Crown when it might be invalid if given by an individual. It cannot be said to confer the right to sue on the grant if he had no such right, had the grant in his favour been made by an individual. 1938 O.A. 353=1938 O.W.N. 462=1938 Oudh 175. It is competent to the Crown to make a heritable grant of a village,

conferring on the grant not an absolute estate, but a limited interest to enjoy the rents and profits of the village for his life and a similar interest on his heirs who will succeed him; it is open to the Crown to create successive life estates or limited interests, and prohibition as to alienation may be imposed by the Crown either by virtue of an enactment or by a grant. S. 3 is clear and expressly mentions that all limitations contained in a Crown grant shall be valid and take effect according to their tenor notwithstanding any statute or enactment of the Legislature, which would take in S. 60 C.P. Code. I.L.R. (1938) Mad. 767=1938 Mad. 623=(1938) 1 M.L.J. 686. See also 1937 A.L.J. 567=1937 All. 533. A tenure was created in 1842, by the proprietor of an estate, and granted in consideration of services to be rendered as barkandaz. The estate was subsequently forfeited to Government, and in 1881, there was a formal dispensation with the services which the jagirdar had to render as barkandaz, and a new grant was created of the tenure freed of those services at an annual rent. The new grant created a jagir for the descendants of an earlier jagirdar to enjoy so long as any of his descendants should survive. There was a stipulation that the jagirdar had no power to transfer by sale or by

Repeal.

4. The Cutchi Memons Act, 1920, is hereby repealed.

NOTES.

creation of mukkarrari tenures any part of the tenure with a liability to resumption if unauthorised transfer should be made. *Held*, (1) that the tenure was a Crown grant, a grant affected by the Crown Grants Act in such a manner that the provisions of the Transfer of Property Act would not apply to it, so that it took effect according to its tenor whatever might be the conditions laid down; (2) that the grant made a clear restriction against alienation and granted a limited interest which was not transferable either by operation of law or by voluntary alienation; and (3) the estate

C.C.M.—269

could not therefore be attached and sold in execution of a decree against the jagirdar. 1939 Pat. 598. *Rowland, J.* When a Crown grant contains a prohibition against alienation of the estate, that prohibition must take effect in accordance with its terms. 18 Pat. 370=1939 Pat. 598.

Cutchi Memons: WILL EXECUTED BY CODICIL — LAW APPLICABLE.—A Cutchi Memon is governed by the Mahomedan Law so far as the execution of his will and a codicil is concerned. (43 Bom. 641, Rel. on.) 47 L.W. 719=1938 M.W.N. 699=1938 Mad. 616=(1938) 1 M.L.J. 444.

APPENDIX A.

I.—THE ASSAM COURT-FEES (AMENDMENT) ACT (II OF 1922).

[Not in force—Expired on 1st May, 1928.]

An Act to amend the Court-Fees Act, 1870, with reference to the scale of Court-fees in Assam.

WHEREAS it is necessary to revise the scale of Court-Fees for Assam by amendment of the Court-Fees Act, 1870, in its application to Assam, in the manner hereinafter appearing;

It is hereby enacted as follows:—

1. (1) This Act may be called THE ASSAM COURT-FEES (AMENDMENT) ACT, 1922.

(2) It extends to the whole of Assam.

(3) It shall come into force on the first day of May, 1922 and shall remain in force for a period of [six]* years.

2. The Court-Fees Act, 1870, as amended by subsequent legislation, shall be amended, in its application to Assam, in the manner hereinafter provided.

3. In S. 18 of the Court-Fees Act, 1870, hereinafter referred to as "the said Act," for the words "a fee of eight annas" the word "a fee of one rupee" shall be substituted.

4. In item VIII, in S. 19 of the said Act, for the words "one thousand rupees" the words "two thousand rupees" shall be substituted.

5. For Art. 1 in the First Schedule to the said Act the following shall be substituted namely:—

Number.	Proper Fee.
"1. <i>Plaint, written statement, pleading, a set-off or counter-claim or memorandum of appeal (not otherwise provided for in this Act) or of cross-objection presented to any Civil or Revenue Court except those mentioned in S. 3.</i> "	
When the amount or value of the subject-matter in dispute does not exceed one hundred rupees, for every five rupees or part thereof, of such amount or value,	Six annas.
and	
when such amount or value exceeds one hundred rupees, for every ten rupees or part thereof, up to one thousand rupees,	One rupee two annas.
and	
when such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof in excess of one thousand rupees, up to seven thousand five hundred rupees,	Seven rupees eight annas.
and	
when such amount or value exceeds seven thousand five hundred rupees, for every two hundred and fifty rupees, or part thereof, in excess of seven thousand five hundred rupees, up to ten thousand rupees,	Fifteen rupees.
and	
when such amount or value exceeds ten thousand rupees, for every five hundred rupees or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees,	Twenty-two rupees eight annas.
and	
when such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to fifty thousand rupees,	Thirty-rupees.
and	
when such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees:	Thirty - seven rupees eight annas.

NOTES.

*Sec. 1 (3).—The word "six" was substi-

tuted for the word "three" by Assam Act (III of 1925), S. 2.

Number.	Proper Fee
Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be ten thousand rupees.	

6. In the third column in Art. 6 in the same schedule to the said Act,—
 (a) for the words "Four annas," opposite clause (a) in the second column, the words "Six annas" shall be substituted; and

(b) for the words "Eight annas" opposite the first item in clause (c) in the second column, the words "Twelve annas" shall be substituted, and for the words "One rupee" opposite the second item in that clause, the words "One rupee eight annas" shall be substituted.

7. For the entries above the proviso in the second column and for the entries in the third column, in Art. 11 in the same schedule to the said Act, the following shall be substituted namely:—

Number.	Proper Fee.
"When the amount or value of the property in respect of which the grant of probate or letters is made exceeds two thousand rupees, [on such amount or value up to ten thousand rupees.]	Two per centum on such amount or value.

and	
when such amount or value exceeds ten thousand rupees [* * * * *] [on the portion of such amount or value which is in excess of ten thousand rupees, [up to fifty thousand rupees.]	Three per centum [* * * * *]

and	
when such amount or value exceeds fifty thousand rupees, [* * * * *] [on the portion] of such amount or value which is in excess of fifty thousand rupees, [up to a lakh of rupees,]	Four per centum [* * * * *]

and	
when such amount or value exceeds a lakh of rupees, [on the portion] of such amount or value which is in excess of a lakh of rupees.	Five per centum [* * * * *]"

8. For the entry in the second column in Art. 12 in the same schedule to the said Act, and for the first paragraph in the third column in the said Article, the following shall be substituted, namely:—

["When the original amount or value of any debt or security specified in the certificate under S. 8 of the Act, or such amount or value combined with the amount or value of any debt or security to which the certificate is extended under S. 10 of the Act, exceeds one thousand rupees,	Two per centum on such original amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under S. 10 of the Act.
---	--

and	
"when such original or combined amount or value exceeds ten thousand rupees on the portion of such amount or value which is in excess of ten thousand rupees.	Three per centum on such original amount or value and four and a half per centum on the amount or value of any debt or security to which the certificate is extended under S. 10 of the Act.

and	
"when such original or combined amount or value exceeds fifty thousand rupees, on the portion of such amount or value which is in excess of fifty thousand rupees up to one lakh of rupees,	Four per centum on such original amount or value and six per centum on the amount or value of any debt or security to which the certificate is extended under S. 10 of the Act.

and	
"when such original or combined amount or value exceeds a lakh of rupees, on the portion of such amount or value which is in excess of a lakh of rupees."	Five per centum on such original amount or value and seven and a half per centum on the amount or value of any debt or security to which the certificate is extended under S. 10 of the Act.]"

9. For the table of rates of *ad valorem* fees leviable on the institution of suits, at the end of the same schedule to the said Act, the table set forth in the Schedule to this Act shall be substituted.

10. In Article 1 in the second schedule to the said Act,—

(a) in clause (a) after the words "Municipal Commissioner" in the third entry in the second column the words "or member of a Local Board" shall be inserted;

(b) (i) for the words "One anna", opposite clause (a) in the second column, the words "Two annas" shall be substituted,

(ii) for the words "Eight annas," opposite clause (b) in the second column, the following shall be substituted, namely:

"In the case of a complaint or charge of an offence presented to a Criminal Court one rupee, and in other cases ten annas; and

(iii) for the words "One rupee" opposite clause (c) in the second column, the words "One rupee and eight annas" shall be substituted.

11. In the third column in Article 10 in the same schedule to the said Act,—

(1) for the words "Eight annas," opposite clause (a) in the second column, the words "One rupee" shall be substituted; and

(2) for the words "One rupee," opposite clause (b) in the second column, the words "One rupee and eight annas" shall be substituted.

12. For Article 11 of the same schedule to the said Act the following shall be substituted, namely:—

	Number.	Proper Fee.
"11. Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree, and is presented—		
(a) (i) to any Revenue Court or Executive Officer other than the High Court or Chief Controlling Revenue or Executive Authority;		Eight annas.
(ii) to any Civil Court other than a High Court		One rupee.
(b) to a Chief Controlling Executive or Revenue Authority.		Two rupees.'

13. Above the words "Five rupees" where they occur in the third column, opposite Articles 12 and 13, in the same schedule to the said Act, the words "Ten rupees" shall be inserted opposite Article 12, and the bracket between Articles 12 and 13 in the second column shall be omitted.

14. (1) The words "Ten rupees" in the third column opposite Article 17 in the same schedule to the said Act and the bracket opposite that article in the second column in the same schedule shall be omitted.

(2) In the third column in the said Article—

(a) opposite entries (i), (ii), (iii), (iv) and (vi), the words "Fifteen rupees" shall be inserted.

SCHEDULE I.

ASSAM AND BENGAL.

Table of rates of ad valorem fees leviable on the institution of suits.

When the amount or value of the subject-matter exceeds.				When the amount or value of the subject-matter exceeds			
But does not exceed		Proper Fees.		But does not exceed		Proper Fee.	
Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.
...	5	0	6	60	65	4	14
5	10	0	12	65	70	5	4
10	15	1	2	70	75	5	10
15	20	1	8	75	80	6	2
20	25	1	14	80	85	6	10
25	30	2	4	85	90	7	2
30	35	2	10	90	95	7	10
35	40	3	0	95	100	8	2
40	45	3	6	100	110	9	12
45	50	3	12	110	120	11	6
50	55	4	2	120	130	13	0
55	60	4	8				

NOTES.

Art. 11.—The words in the second column, "on such amount . . . rupees" were substituted for the words "but does not exceed ten thousand rupees" and "on the portion" were substituted for "for the portion" wherever they occur and the words "but does not exceed fifty thousand rupees" and but does "not exceed a lakh of rupees" were omitted; and after the words "in excess of ten thousand rupees" the words "up to

fifty thousand rupees" and after the words "in excess of fifty thousand rupees" the words "up to a lakh of rupees" were added by Assam Act IV of 1922, S. 2 (1); and the words "on such amount or value" wherever they occur in the 3rd column were omitted by *ibid.*, S. 2 (2).
Art. 12.—The above cols. 2 and 3 were substituted for the old cols. 2 and 3 by Assam Act, IV of 1922, S. 3.

When the amount or value of the subject-matter exceeds—				When the amount or value of the subject-matter exceeds.—			
But does not exceed—		Proper Fee		But does not exceed—		Proper Fee.	
Rs.	Rs.	Rs.	A. P.	Rs.	Rs.	Rs.	A.
130	140	14	10	760	770	86	10
140	150	16	4	770	780	87	12
150	160	18	0	780	790	88	14
160	170	19	2	790	800	90	0
170	180	20	4	800	810	91	2
180	190	21	6	810	820	92	4
190	200	22	8	820	830	93	6
200	210	23	10	830	840	94	8
210	220	24	12	840	850	95	10
220	230	25	14	850	860	96	12
230	240	27	0	860	870	97	14
240	250	28	2	870	880	99	0
250	260	29	4	880	890	100	2
260	270	30	6	890	900	101	4
270	280	31	8	900	910	102	6
280	290	32	10	910	920	103	8
290	300	33	12	920	930	104	10
300	310	34	14	930	940	105	12
310	320	36	0	940	950	106	14
320	330	37	2	950	960	108	0
330	340	38	4	960	970	109	2
340	350	39	6	970	980	110	4
350	360	40	8	980	990	111	6
360	370	41	10	990	1,000	112	8
370	380	42	12	1,000	1,100	120	0
380	390	43	14	1,100	1,200	127	8
390	400	45	0	1,200	1,300	135	0
400	410	46	2	1,300	1,400	142	8
410	420	47	4	1,400	1,500	150	0
420	430	48	6	1,500	1,600	157	8
430	440	49	8	1,600	1,700	165	0
440	450	50	10	1,700	1,800	172	8
450	460	51	12	1,800	1,900	180	0
460	470	52	14	1,900	2,000	187	8
470	480	54	0	2,000	2,100	195	0
480	490	55	2	2,100	2,200	202	8
490	500	56	4	2,200	2,300	210	0
500	510	57	6	2,300	2,400	217	8
510	520	58	8	2,400	2,500	225	0
520	530	59	10	2,500	2,600	232	8
530	540	60	12	2,600	2,700	240	0
540	550	61	14	2,700	2,800	247	8
550	560	63	0	2,800	2,900	255	0
560	570	64	2	2,900	3,000	262	8
570	580	65	4	3,000	3,100	270	0
580	590	66	6	3,100	3,200	277	8
590	600	67	8	3,200	3,300	285	0
600	610	68	10	3,300	3,400	292	8
610	620	69	12	3,400	3,500	300	0
620	630	70	14	3,500	3,600	307	8
630	640	72	0	3,600	3,700	315	0
640	650	73	2	3,700	3,800	322	8
650	660	74	4	3,800	3,900	330	0
660	670	75	6	3,900	4,000	337	8
670	680	76	8	4,000	4,100	345	0
680	690	77	10	4,100	4,200	352	8
690	700	78	12	4,200	4,300	360	0
700	710	79	14	4,300	4,400	367	8
710	720	81	0	4,400	4,500	375	0
720	730	82	2	4,500	4,600	382	8
730	740	83	4	4,600	4,700	390	0
740	750	84	6	4,700	4,800	397	8
750	760	85	8	4,800	4,900	405	0
				4,900	5,000	412	8

When the amount or value of the subject-matter exceeds—				When the amount or value of the subject-matter exceeds—			
		But does not exceed—	Proper Fee.			But does not exceed—	Proper Fee
Rs.		Rs.	Rs. A.	Rs.		Rs.	Rs. A.
5,000		5,100	420 0	23,000		24,000	1,320 0
5,100		5,200	427 8	24,000		25,000	1,350 0
5,200		5,300	435 0	25,000		26,000	1,380 0
5,300		5,400	442 8	26,000		27,000	1,410 0
5,400		5,500	450 0	27,000		28,000	1,440 0
5,500		5,600	457 8	28,000		29,000	1,470 0
5,600		5,700	465 0	29,000		30,000	1,500 0
5,700		5,800	472 8	30,000		31,000	1,530 0
5,800		5,900	480 0	31,000		32,000	1,560 0
5,900		6,000	487 8	32,000		33,000	1,590 0
6,000		6,100	495 0	33,000		34,000	1,620 0
6,100		6,200	502 8	34,000		35,000	1,650 0
6,200		6,300	510 0	35,000		36,000	1,680 0
6,300		6,400	517 8	36,000		37,000	1,710 0
6,400		6,500	525 0	37,000		38,000	1,740 0
6,500		6,600	532 8	38,000		39,000	1,770 0
6,600		6,700	540 0	39,000		40,000	1,800 0
6,700		6,800	547 8	40,000		41,000	1,830 0
6,800		6,900	555 0	41,000		42,000	1,860 0
6,900		7,000	562 8	42,000		43,000	1,890 0
7,000		7,100	570 0	43,000		44,000	1,920 0
7,100		7,200	577 8	44,000		45,000	1,950 0
7,200		7,300	585 0	45,000		46,000	1,980 0
7,300		7,400	592 8	46,000		47,000	2,010 0
7,400		7,500	600 0	47,000		48,000	2,040 0
7,500		7,750	615 0	48,000		49,000	2,070 0
7,750		8,000	630 0	49,000		50,000	2,100 0
8,000		8,250	645 0	50,000		55,000	2,137 8
8,250		8,500	660 0	55,000		60,000	2,175 0
8,500		8,750	675 0	60,000		65,000	2,212 8
8,750		9,000	690 0	65,000		70,000	2,250 0
9,000		9,250	705 0	70,000		75,000	2,287 8
9,250		9,500	720 0	75,000		80,000	2,325 0
9,500		9,750	735 0	80,000		85,000	2,362 0
9,750		10,000	750 0	85,000		90,000	2,400 0
10,000		10,500	772 8	90,000		95,000	2,437 8
10,500		11,000	795 0	95,000		1,00,000	2,475 0
11,000		11,500	817 8	1,00,000		1,05,000	2,512 8
11,500		12,000	840 0	1,05,000		1,10,000	2,550 0
12,000		12,500	862 8	1,10,000		1,15,000	2,587 8
12,500		13,000	885 0	1,15,000		1,20,000	2,625 0
13,000		13,500	907 8	1,20,000		1,25,000	2,700 0
13,500		14,000	930 0	1,25,000		1,30,000	2,662 8
14,000		14,500	952 8	1,30,000		1,35,000	2,737 8
14,500		15,000	975 0	1,35,000		1,40,000	2,775 0
15,000		15,500	997 8	1,40,000		1,45,000	2,812 8
15,500		16,000	1,020 0	1,45,000		1,50,000	2,850 0
16,000		16,500	1,042 8	1,50,000		1,55,000	2,887 8
16,500		17,000	1,065 0	1,55,000		1,60,000	2,925 8
17,000		17,500	1,087 8	1,60,000		1,65,000	2,962 8
17,500		18,000	1,110 0	1,65,000		1,70,000	3,000 8
18,000		18,500	1,132 8	1,70,000		1,75,000	3,037 8
18,500		19,000	1,155 0	1,75,000		1,80,000	3,075 0
19,000		19,500	1,177 8	1,80,000		1,85,000	3,112 8
19,500		20,000	1,200 0	1,85,000		1,90,000	3,150 0
20,000		21,000	1,230 0	1,90,000		1,95,000	3,187 8
21,000		22,000	1,260 0	1,95,000		2,00,000	3,225 0
22,000		23,000	1,290 0	2,00,000		2,05,000	3,262 8

and the fee increases at the rate of thirty-seven rupees eight annas for every five thousand rupees or part thereof, up to a maximum fee of ten thousand rupees, for example—

Rs.	Rs.	A.	Rs.	Rs.	A.
3,00,000	4,012	8	8,00,000	7,762	8
4,00,000	4,762	8	9,00,000	8,612	8
5,00,000	5,512	8	10,00,000	9,262	8
6,00,000	6,262	8	11,00,000	10,000	0
7,00,000	7,012	0			

ASSAM ACT NO. III OF 1932.

THE ASSAM COURT-FEES (AMENDMENT) ACT, 1932.

[Published in the *Assam Gazette* of the 27th April, 1932.]*An Act to amend the Court-Fees Act, 1870.*

WHEREAS it is necessary to amend the Court-Fees Act, 1870, in its application to Assam in the manner hereinafter appearing;

It is hereby enacted as follows:—

1. (1) This Act may be called THE ASSAM COURT-FEES (AMENDMENT) ACT, 1932.
- (2) It extends to the whole of Assam.
- (3) It shall come into force on the 1st May, 1932.
2. In section 7 of the Court-Fees Act, 1870 (hereinafter referred to as the principal Act)—
in sub-clause (a) of clause (v) for the word “ten” the word “twenty” shall be substituted.
3. For clause (ii) of section 10 of the principal Act, the following clause shall be substituted, namely:—
“ii. In such case—
(a) the suit shall be stayed until the additional fee, is paid and if the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed; and whether the additional fee is or is not paid,
(b) the Court may, if it is of opinion that the estimation has been grossly insufficient, further order that the expenses of the commission, or such portion thereof as the Court may think reasonable, be paid by the party in fault to the Government, and the order so made shall have the force and effect of a decree passed by the Court.”

II.—BENGAL ACT NO. IV OF 1922.

THE BENGAL COURT-FEES (AMENDMENT) ACT, 1922.

[Published in the *Calcutta Gazette extraordinary* of the 29th March, 1922.]*An Act to amend the Court-Fees Act, 1870, and the Presidency Small Cause Courts Act, 1882, with reference to the scale of Court-fees in Bengal.*

WHEREAS it is necessary to revise the scale of Court-fees for Bengal, by amendment of the Court-Fees Act, 1870, and the Presidency Small Cause Courts Act, 1882, in their application to Bengal, in the manner hereinafter appearing;

It is hereby enacted as follows:—

1. (1) This Act may be called THE BENGAL COURT-FEES (AMENDMENT) ACT, 1922.
 - (2) It extends to the whole of Bengal.
 - (3) It shall come into force on the first day of April, 1922.
 2. The Court-Fees Act, 1870, as amended by subsequent legislation, and the Presidency Small Cause Courts Act, 1882, as amended by subsequent legislation, shall be amended, in their application to Bengal, in the manner hereinafter provided.
 3. In section 18 of the Court-Fees Act, 1870, for the words “a fee of eight annas” the words “a fee of one rupee” shall be substituted.
 4. In item viii in section 19 of the same Act for the words “one thousand rupees” the words “two thousand rupees” shall be substituted.
 5. For Article 1 in the *first schedule* to the same Act the following shall be substituted, namely:—
- | | | |
|---|---|----------------------|
| “1. Complaint, written statement, pleading, a set-off or counter-claim or memorandum of appeal (not otherwise provided for in this Act) or of cross-objection presented to any Civil or Revenue Court except those mentioned in section 3.” | When the amount or value of the subject-matter in dispute does not exceed seventy-five rupees, for every five rupees or part thereof of such amount or value, | Six annas. |
| | and | |
| | when such amount or value exceeds seventy-five rupees, for every five rupees or part thereof, in excess of seventy-five rupees, up to one hundred rupees, | Eight annas. |
| | and | |
| | when such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to one hundred and fifty rupees, | One rupee two annas. |

1. *Plaint, etc.—*
(Contd.)

and
 when such amount or value exceeds One rupee two annas.
 one hundred and fifty rupees, for
 every ten rupees, or part thereof,
 up to one thousand rupees,

and
 when such amount or value exceeds Seven rupees eight annas.
 one thousand rupees, for every one
 hundred rupees, or part thereof,
 in excess of one thousand rupees
 up to seven thousand five hundred
 rupees,

and
 when such amount or value exceeds Fifteen rupees.
 seven thousand five hundred
 rupees, for every two hundred
 and fifty rupees, or part thereof,
 in excess of seven thousand five
 hundred rupees up to ten thousand
 rupees,

and
 when such amount or value exceeds Twenty-two rupees
 ten thousand rupees, for every eight annas.
 five hundred rupees, or part
 thereof, in excess of ten thousand
 rupees, up to twenty thousand
 rupees,

and
 when such amount or value exceeds Thirty rupees.
 twenty thousand rupees, for every
 one thousand rupees, or part
 thereof, in excess of twenty
 thousand rupees, up to fifty
 thousand rupees,

and
 when such amount or value exceeds Thirty - seven rupees
 fifty thousand rupees, for every eight annas.
 five thousand rupees, or part
 thereof, in excess of fifty thousand
 rupees:

Provided that the maximum fee
 leviable on a plaint or memoran-
 dum of appeal shall be ten thou-
 sand rupees."

6. In the third column in Article 6 in the same schedule to the same Act,—

(a) for the words "Four annas," opposite clause (a) in the second column, the words "Six annas" shall be substituted; and

(b) for the words "Eight annas," opposite the first item in clause (b) in the second column, the words "Twelve annas" shall be substituted, and for the words "One rupee," opposite the second item in that clause, the words "One rupee eight annas" shall be substituted.

7. For the entries above the proviso in the second column, and for the entries in the third column in Article 11 in the same schedule to the same Act, the following shall be substituted, namely:—

"When the amount or value of the property Two per centum on such amount or value.
 in respect of which the grant of probate
 or letters is made exceeds two thousand
 rupees, but does not exceed ten thousand
 rupees,

and
 when such amount or value exceeds ten Three per centum on such amount or value.
 thousand rupees, but does not exceed fifty
 thousand rupees, for the portion of such
 amount or value which is in excess of ten
 thousand rupees,

and
when such amount or value exceeds fifty thousand rupees, but does not exceed a lakh of rupees, for the portion of such amount or value which is in excess of fifty thousand rupees, Four per centum on such amount or value.

and
when such amount or value exceeds a lakh of rupees, for the portion of such amount or value which is in excess of a lakh of rupees." Five per centum on such amount or value.

8. For the entry in the second column in Article 12 in the same schedule to the same Act, and for the first paragraph in the third column in the said Article, the following shall be substituted, namely:—

"When the amount or value of any debt or security specified in the certificate under section 8 of the Act exceeds one thousand rupees, but does not exceed ten thousand rupees, Two per centum on such amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

and
when such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees, for the portion of such amount or value which is in excess of ten thousand rupees, Three per centum on such amount or value and four-and-a-half per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

and
when such amount or value exceeds fifty thousand rupees, but does not exceed a lakh of rupees, for the portion of such amount or value which is in excess of fifty thousand rupees, Four per centum on such amount or value and six per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

and
when such amount or value exceeds a lakh of rupees, for the portion of such amount or value which is in excess of a lakh of rupees." Five per centum on such amount or value and seven-and-a-half per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

9. For the table of rates of *ad valorem* fees leviable on the institution of suits, at the end of the same schedule to the same Act the table set forth in the schedule to this Act shall be substituted.

10. In Article 1 in the *second schedule* to the same Act—

(a) in clause (a) after the words "Municipal Commissioner" in the third entry in the second column the words "or member of a District Board" shall be inserted;

(b) (i) for the words "One anna," opposite clause (a) in the second column, the words "Two annas" shall be substituted;

(ii) for the words "Eight annas," opposite clause (b) in the second column, the following shall be substituted, namely:—

"In the case of a complaint or charge of an offence presented to a Criminal Court one rupee, and in other cases twelve annas"; and

(iii) for the words "One rupee," opposite clause (c) in the second column, the words "One rupee eight annas" shall be substituted.

11. For clause (d) in the second column in Article 1 in the same schedule to the same Act, and for the entries opposite that clause in the third column thereof, the following clause and entries shall be substituted, namely:—

"(d) (i) When presented to the High Court under S. 115 of the Code of Civil Procedure, 1908, for revision of an order—

(a) when the value of the suit to which the order relates does not exceed Rs. 1,000. Five rupees.

(b) when the value of the suit exceeds Rs. 1,000. Ten rupees.

(ii) When presented to the High Court otherwise than under that section. Two rupees."

12. In the third column in Article 10 in the same schedule to the same Act,—

(1) for the words "Eight annas" opposite clause (a) in the second column, the words "One rupee" shall be substituted; and

(2) for the words "One rupee," opposite clause (b) in the second column, the words "One rupee eight annas" shall be substituted.

13. For Article 11 in the same schedule to the same Act the following shall be substituted, namely:—

"11. Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree and is presented—	(a) (i) to any Revenue Court or Executive Officer other than the High Court or Chief Controlling Revenue or Executive Authority,	Eight annas.
	(ii) to any Civil Court other than a High Court,	One rupee.
	(b) to a Chief Controlling Executive or Revenue Authority,	Two rupees.
	(c) to a High Court.	Five rupees."

14. Above the words "Five rupees," where they occur in the third column, opposite Articles 12 and 13 in the same schedule to the same Act, the words "Ten rupees" shall be inserted opposite Article 12 and the bracket between Articles 12 and 13 in the second column shall be omitted.

15. (1) The words "Ten rupees" in the third column, opposite Article 17 in the same schedule to the same Act, and the bracket opposite that article in the second column in the same schedule shall be omitted.

(2) In the third column in the said Article,—

(a) opposite entries i, ii, iv and vi, the words "Fifteen rupees" shall be inserted; and

(b) opposite entries iii and v, the words "Twenty rupees" shall be inserted.

16. In section 71 of the Presidency Small Cause Courts Act, 1882,—

(1) in clause (a) for the words "five hundred rupees" the words "fifty rupees" shall be substituted;

(2) after clause (a) the following shall be inserted, namely:—

"(b) when the amount or value of the subject-matter exceeds fifty rupees, but does not exceed five hundred rupees—the sum of six rupees four annas and three annas in the rupee on the excess of such amount or value over fifty rupees;"

(3) clause (b) shall be re-numbered as clause (c) and in that clause as renumbered for the words "sixty-two rupees eight annas" the words "ninety rupees ten annas" shall be substituted, and after the words "one anna" the words "six pies" shall be inserted.

17. Nothing in this Act shall apply to any probate, letters of administration or certificate in respect of which the fee payable under the law for the time being in force has been paid prior to the commencement of this Act, but which have not issued.

THE SCHEDULE.

TABLE OF RATES OF AD VALOREM FEES LEVIABLE ON THE INSTITUTION OF SUITS.

[SEE S. 9 OF THE BENGAL COURT-FEES (AMENDMENT) ACT, 1922).]

When the amount or value of the subject-matter exceeds—			When the amount or value of the subject-matter exceeds—		
Rs.	But does not exceed— Rs.	Proper fees Rs. A.	Rs.	But does not exceed— Rs.	Proper fees Rs. A.
...	5	0 6	180	190	21 6
5	10	0 12	190	200	22 8
10	15	1 2	200	210	23 10
15	20	1 8	210	220	24 12
20	25	1 14	220	230	25 14
25	30	2 4	230	240	27 0
30	35	2 10	240	250	28 2
35	40	3 0	250	260	29 4
40	45	3 6	260	270	30 6
45	50	3 12	270	280	31 8
50	55	4 2	280	290	32 10
55	60	4 8	290	300	33 12
60	65	4 14	300	310	34 14
65	70	5 4	310	320	36 0
70	75	5 10	320	330	37 2
75	80	6 2	330	340	38 4
80	85	6 10	340	350	39 6
85	90	7 2	350	360	40 8
90	95	7 10	360	370	41 10
95	100	8 2	370	380	42 12
100	110	9 12	380	390	43 14
110	120	11 6	390	400	45 0
120	130	13 0	400	410	46 2
130	140	14 10	410	420	47 4
140	150	16 4	420	430	48 6
150	160	18 0	430	440	49 8
160	170	19 2	440	450	50 10
170	180	20 4	450	460	51 12

When the amount or
value of the subject- But does not
matter exceeds— exceed—

Proper fee.

Rs.	Rs.	Rs.	A.
460	470	52	14
470	480	54	0
480	490	55	2
490	500	56	4
500	510	57	6
510	520	58	8
520	530	59	10
530	540	60	12
540	550	61	14
550	560	63	0
560	570	64	2
570	580	65	4
580	590	66	6
590	600	67	8
600	610	68	10
610	620	69	12
620	630	70	14
630	640	72	0
640	650	73	2
650	660	74	4
660	670	75	6
670	680	76	8
680	690	77	10
690	700	78	12
700	710	79	14
710	720	81	0
720	730	82	2
730	740	83	4
740	750	84	6
750	760	85	8
760	770	86	10
770	780	87	12
780	790	88	14
790	800	90	0
800	810	91	2
810	820	92	4
820	830	93	6
830	840	94	8
840	850	95	10
850	860	96	12
860	870	97	14
870	880	99	0
880	890	100	2
890	900	101	4
900	910	102	6
910	920	103	8
920	930	104	10
930	940	105	12
940	950	106	14
950	960	108	0
960	970	109	2
970	980	110	4
980	990	111	6
990	1,000	112	8
1,000	1,100	120	0
1,100	1,200	127	8
1,200	1,300	135	0
1,300	1,400	142	8
1,400	1,500	150	0
1,500	1,600	157	8
1,600	1,700	165	0
1,700	1,800	172	8
1,800	1,900	180	0
1,900	2,000	187	8
2,000	2,100	195	0
2,100	2,200	202	8
2,200	2,300	210	0
2,300	2,400	217	8

When the amount or
value of the subject- But does not
matter exceeds— exceed—

Proper fee.

Rs.	Rs.	Rs.	A.
2,400	2,500	225	0
2,500	2,600	232	8
2,600	2,700	240	0
2,700	2,800	247	8
2,800	2,900	255	0
2,900	3,000	262	8
3,000	3,100	270	0
3,100	3,200	277	8
3,200	3,300	285	0
3,300	3,400	292	8
3,400	3,500	300	0
3,500	3,600	307	8
3,600	3,700	315	0
3,700	3,800	322	8
3,800	3,900	330	0
3,900	4,000	337	8
4,000	4,100	345	0
4,100	4,200	352	8
4,200	4,300	360	0
4,300	4,400	367	8
4,400	4,500	375	0
4,500	4,600	382	8
4,600	4,700	390	0
4,700	4,800	397	8
4,800	4,900	405	0
4,900	5,000	412	8
5,000	5,500	420	0
5,100	5,200	427	8
5,200	5,300	435	0
5,300	5,400	442	8
5,400	5,500	450	0
5,500	5,600	457	8
5,600	5,700	465	0
5,700	5,800	472	8
5,800	5,900	480	0
5,900	6,000	487	8
6,000	6,100	495	0
6,100	6,200	502	8
6,200	6,300	510	0
6,300	6,400	517	8
6,400	6,500	525	0
6,500	6,600	532	8
6,600	6,700	540	0
6,700	6,800	547	8
6,800	6,900	555	0
6,900	7,000	562	8
7,000	7,100	570	0
7,100	7,200	577	8
7,200	7,300	585	0
7,300	7,400	592	8
7,400	7,500	600	0
7,500	7,750	615	0
7,750	8,000	630	0
8,000	8,250	645	0
8,250	8,500	660	0
8,500	8,750	675	0
8,750	9,000	690	0
9,000	9,250	705	0
9,250	9,500	720	0
9,500	9,750	735	0
9,750	10,000	750	0
10,000	10,500	772	8
10,500	11,000	795	0
11,000	11,500	817	8
11,500	12,000	840	0
12,000	12,500	862	8
12,500	13,000	885	0
13,000	13,500	907	8

When the amount or
value of the subject- But does not
matter exceeds— exceed—

Proper fee.

When the amount
or value of the sub- But does not
ject-matter exceeds-- exceed—

Proper fee.

Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.
13,500	14,000	930	0	44,000	45,000	1,950	0
14,000	14,500	952	8	45,000	46,000	1,980	0
14,500	15,000	975	0	46,000	47,000	2,010	0
15,000	15,500	997	8	47,000	48,000	2,040	0
15,500	16,000	1,020	0	48,000	49,000	2,070	0
16,000	16,500	1,042	8	49,000	50,000	2,100	0
16,500	17,000	1,065	0	50,000	55,000	2,137	8
17,000	17,500	1,087	8	55,000	60,000	2,175	0
17,500	18,000	1,110	0	60,000	65,000	2,212	8
18,000	18,500	1,132	8	65,000	70,000	2,250	0
18,500	19,000	1,155	0	70,000	75,000	2,287	8
19,000	19,500	1,177	8	75,000	80,000	2,325	0
19,500	20,000	1,200	0	80,000	85,000	2,362	8
20,000	21,000	1,230	0	85,000	90,000	2,400	0
21,000	22,000	1,260	0	90,000	95,000	2,437	8
22,000	23,000	1,290	0	95,000	1,00,000	2,475	0
23,000	24,000	1,320	0	1,00,000	1,05,000	2,512	8
24,000	25,000	1,350	0	1,05,000	1,10,000	2,550	0
25,000	26,000	1,380	0	1,10,000	1,15,000	2,587	8
26,000	27,000	1,410	0	1,15,000	1,20,000	2,625	0
27,000	28,000	1,440	0	1,20,000	1,25,000	2,662	8
28,000	29,000	1,470	0	1,25,000	1,30,000	2,700	0
29,000	30,000	1,500	0	1,30,000	1,35,000	2,737	8
30,000	31,000	1,530	0	1,35,000	1,40,000	2,775	0
31,000	32,000	1,560	0	1,40,000	1,45,000	2,812	8
32,000	33,000	1,590	0	1,45,000	1,50,000	2,850	0
33,000	34,000	1,620	0	1,50,000	1,55,000	2,887	8
34,000	35,000	1,650	0	1,55,000	1,60,000	2,925	0
35,000	36,000	1,680	0	1,60,000	1,65,000	2,962	8
36,000	37,000	1,710	0	1,65,000	1,70,000	3,000	0
37,000	38,000	1,740	0	1,70,000	1,75,000	3,037	8
38,000	39,000	1,770	0	1,75,000	1,80,000	3,075	0
39,000	40,000	1,800	0	1,80,000	1,85,000	3,112	8
40,000	41,000	1,830	0	1,85,000	1,90,000	3,150	0
41,000	42,000	1,860	0	1,90,000	1,95,000	3,187	8
42,000	43,000	1,890	0	1,95,000	2,00,000	3,225	0
43,000	44,000	1,920	0	2,00,000	2,05,000	3,262	8

and the fee increases at the rate of thirty-seven rupees, eight annas for every five thousand rupees, or part thereof, up to a maximum fee of ten thousand rupees, for example—

Rs.	Rs.	A.	Rs.	Rs.	A.
3,00,000	4,012	8	8,00,000	7,762	8
4,00,000	4,762	8	9,00,000	8,512	8
5,00,000	5,512	8	10,00,000	9,262	8
6,00,000	6,262	8	11,00,000	10,000	0
7,00,000	7,012	8			

III.—BENGAL ACT NO. VI OF 1922.

THE BENGAL COURT-FEES (AMENDMENT NO. II) ACT, 1922.

[26th July, 1922.]

An Act further to amend the Court-Fees Act, 1870, with reference to the scale of Court-fees in Bengal.

WHEREAS it is necessary further to amend the Court-Fees Act, 1870, in its application to Bengal in the manner hereinafter appearing;

It is hereby enacted as follows:—

1. (1) This Act may be called THE BENGAL COURT-FEES (AMENDMENT NO. II) ACT, 1922.

(2) It extends to the whole of Bengal.

2. In Article 1 in the first schedule to the Court-Fees Act, 1870 [as amended by the Bengal Court-Fees (Amendment) Act, 1922], hereinafter referred to as the said Act,—

(a) the commas before and after the word "pleading" in the first column shall be omitted,

(b) for the words "in value" in the first entry in the second column the words "or value" shall be substituted, and

(c) the word "and" between the third and fourth entries in the second column shall be omitted.

3. (1) In the second column of Articles 11 and 12 in the *first schedule* to the said Act,—

(a) for the words "but does not exceed ten thousand rupees" the words "on such amount or value up to ten thousand rupees" shall be substituted.

(b) for the words "for the portion", wherever they occur, the words "on the portion" shall be substituted,

(c) the words "but does not exceed fifty thousand rupees" and the words "but does not exceed a lakh of rupees" shall be omitted, and

(d) after the words "in excess of ten thousand rupees" the words "up to fifty thousand rupees" and after the words "in excess of fifty thousand rupees" the words "up to a lakh of rupees" shall be added.

(2) In the third column of Article 11 in the *first schedule* to the said Act, the words "on such amount or value", wherever they occur, shall be omitted.

4. The amendments set forth in sections 2 and 3 shall be deemed to have been made with effect from the commencement of the Bengal Court-Fees (Amendment) Act, 1922.

THE COURT-FEES (BENGAL AMENDMENT) ACT (VII OF 1935).

An Act further to amend the Court-Fees Act, 1870.

WHEREAS it is expedient to revise the law relating to Court-fees in Bengal by amendment of the Court-Fees Act, 1870, in its application to Bengal, in the manner hereinafter appearing;

AND WHEREAS the previous sanction of the Governor-General has been obtained under sub-section (3) of section 80-A of the Government of India Act to the passing of this Act;

It is hereby enacted as follows:—

1. (1) This Act may be called THE COURT-FEES (BENGAL AMENDMENT) ACT, 1935.

(2) It extends to the whole of Bengal.

(3) It shall come into force in whole or in part on such date as the Local Government may, by notification in the *Calcutta Gazette*, appoint and for this purpose different dates may be appointed for different provisions of this Act.

2. The Court-Fees Act, 1870, hereinafter referred to as the said Act shall, in its application to Bengal, be amended in the manner hereinafter provided.

3. For section 2 of the said Act the following section shall be substituted, namely:—

"2. In this Act, unless there is anything repugnant in the subject or context,—

(1) 'appeal' includes a cross-objection;

(2) 'Chief Controlling Revenue-authority' means the Board of Revenue;

(3) 'Collector' includes any officer not below the rank of Sub-Deputy Collector appointed by the Collector to perform the functions of a Collector under this Act;

(4) 'suit' includes an appeal from a decree except in section 8-A."

4. In Chapter II of the said Act, for the heading "Fees in the High Courts and in the Courts of Small Causes at the Presidency Towns" the heading "Fee payable in Courts and in Public Offices" shall be substituted.

5. In Chapter III of the said Act, for the heading "Fees in other Courts and in Public Offices" the heading "Computation of fees" shall be substituted.

6. (1) Section 6 of the said Act shall be transferred from Chapter III and inserted after section 5 in Chapter II and section 6 as thus transferred shall be re-numbered as sub-section (1) of section 6 and in that section as so re-numbered for the words "be paid" the words "has been paid" shall be substituted.

(2) To the said section as so re-numbered and amended the following sub-section shall be added, namely:—

"(2) Notwithstanding anything contained in sub-section (1) or in any other Act, a Court may receive a plaint or memorandum of appeal in respect of which an insufficient fee has been paid, subject to the following conditions, namely:—

(a) no such plaint or memorandum of appeal shall be registered unless the plaintiff or appellant has, before such date as the Court may have fixed in this behalf, paid to the Court such reasonable sum on account of Court-fee as the Court may direct;

(b) the Court shall reject the plaint or memorandum of appeal if the sum referred to in clause (a) is not paid before the date fixed by the Court."

7. In section 7 of the said Act,—

(1) clause (b) of paragraph iv shall be omitted.

(2) in paragraph iv, after the words "memorandum of appeal" the following words, figure and letter shall be inserted, namely:—

"subject to the provisions of section 8-C";

(3) for paragraph v the following paragraph shall be substituted, namely:—

"v. In suits for the possession of land, buildings or gardens—

(a) according to the value of the subject-matter, and such value shall be deemed to be fifteen times the nett profits which have arisen from the land, building or garden during the year next before the date of presenting the plaint, or if the Court sees reason to think that such profits have been wrongly estimated, fifteen times such amount as the Court may assess as such profits or according to the market-value of the land, building or garden,

whichever is lower;

(b) if, in the opinion of the Court such profits are not readily ascertainable or assessable, or where there are no such profits, according to the market-value of the land, building or garden:

Explanation.—In this paragraph “building” includes a house, out-house, stable, privy, urinal, shed, hut, wall and any other such structure, whether of masonry, bricks, wood, mud, metal or any other material whatsoever:—

(4) for paragraph vi the following paragraph shall be substituted, namely:—

“vi. In suits to enforce a right of pre-emption—according to the market-value of the land, building or garden in respect of which the right is claimed:

Explanation.—In this paragraph ‘building’ has the same meaning as in paragraph v:—

(5) after paragraph vi the following paragraph shall be inserted, namely:—

“vi-A. In suits for partition and separate possession of the share of joint family property or of joint property; or to enforce a right to a share in any property on the ground that it is joint family property or joint property—

if the plaintiff has been excluded from possession of the property of which he claims to be a coparcener or co-owner, according to the market-value of the share in respect of which the suit is instituted:—”.

8. After section 8 of the said Act the following sections shall be inserted, namely:—

“8-A. In every suit in which an *ad valorem* Court-fee is payable under this Act on the plaint, the plaintiff shall file with the plaint a statement of particulars of the subject-matter of the suit and his own valuation thereof unless such particulars and the valuation are contained in the plaint. The statement shall be in such form and shall contain such particulars as may be prescribed by the Local Government by notification in the *Calcutta Gazette*. In every such suit the plaintiff shall also, if the Court so directs, file a duplicate copy of the plaint and of the said statement.

8-B. (1) In every suit in which a Court-fee is payable under this Act on the plaint or memorandum of appeal the Court shall, as soon as may be after the registration of the plaint or memorandum of appeal, and in every case before proceeding to deliver judgment, record a finding whether a sufficient Court-fee has been paid.

(2) If the Court records a finding that an insufficient Court-fee has been paid on the plaint or memorandum of appeal the Court shall—

(a) stay all further proceedings in the suit until it has determined the proper amount of such Court-fee payable and the plaintiff or the appellant, as the case may be, has paid such amount or until the date referred to in clause (b), as the case may be:

Provided that if the plaintiff or appellant gives, within such time as the Court may allow, security, to the satisfaction of the Court, for the payment of any additional amount for which he may be found liable the Court may proceed with the suit,

(b) fix a date before which the plaintiff or appellant shall pay the amount of Court-fee due from him, as determined by the Court under clause (a).

(3) If the plaintiff or appellant fails to give the security referred to in clause (a) of sub-section (2) or to pay the amount referred to in clause (b) of that sub-section within the time allowed, or before the date fixed, by the Court, as the case may be, the suit shall be dismissed.

8-C. If the Court is of opinion that the subject-matter of any suit has been wrongly valued it may revise the valuation and determine the correct valuation and may hold such inquiry as it thinks fit for such purpose.

NOTES.

Sec. 8-C.—For recent cases under S. 8-C, see notes under S. 7 (iv) (c) of the Court-Fees Act (VII of 1870), *supra*. Sec. 8 (c) of the Bengal Court-Fees Amendment Act is applicable to a case falling within S. 7 (iv) (c) of the main Act. I.L.R. (1940) 2 Cal. 166 = 44 C.W.N. 745 = 1940 Cal. 451. S. 7 (iv) of the Court-Fees Act is subject to the provisions of S. 8 (c) of the Court-Fees (Bengal Amendment) Act, 1935. If, therefore, in a suit to obtain a declaratory decree in which consequential relief is prayed, the plaintiff puts an entirely unreason-

able valuation on the consequential relief, this valuation may be revised by the Court by adopting the procedure laid down under S. 8 (c) of the Court-Fees (Amendment) Act. 68 C.L.J. 144. Where the plaintiff sues for a declaration and prays for, besides other reliefs, a perpetual injunction as a consequential relief flowing from the declaration, the suit, so far as it relates to these two reliefs, is a suit for a declaration with a consequential relief within the meaning of S. 7 (iv) (c) of the Court-Fees Act. Under S. 8-C, the Court has power to revise the valuation put by the plaintiff and determine the correct valuation for the purposes

8-D. (1) For the purpose of an inquiry under section 8-C the Court may depute, or issue a commission to, any suitable person to make such local or other investigation as may be necessary and to report thereon to the Court. Such report and any evidence recorded by such person shall be evidence in the inquiry.

(2) The Court may, from time to time, direct such party to the suit as it thinks fit to deposit such sum as the Court thinks reasonable as the costs of the inquiry, and if the costs are not deposited within such time as the Court shall fix, may, notwithstanding anything contained in any other Act, dismiss the suit if such party is the plaintiff or the appellant and, in any other case, may recover the costs as a public demand.

8-E. (1) The Court, when making an inquiry under section 8-C and any person making an investigation under section 8-D shall have, respectively, for the purposes of such inquiry or investigation, the powers vested in a Court under the Code of Civil Procedure, 1908, in respect of the following matters, namely:—

(a) enforcing the attendance of any person and examining him on oath or affirmation;

(b) compelling the production of documents or material objects; and

(c) issuing commissions for the examination of witnesses.

(2) An inquiry or investigation referred to in sub-section (1) shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code.

8-F. If in the result of inquiry under section 8-C the Court finds that the subject-matter of the suit has been undervalued the Court may order the party responsible for the undervaluation to pay all or any part of the costs of the inquiry.

NOTES.

of Court-fees. The Court for that purpose may hold such enquiry as it thinks fit. 42 C.W.N. 504=I.L.R. (1938) 2 Cal. 64=1938 Cal. 865. See also 1937 Cal. 748. Although a satisfactory valuation may not be possible in the majority of suits falling within S. 7 (iv) of the Court-Fees Act, when once the Court has formed the opinion that the plaintiff's estimate is wrong, it becomes the duty of the Court to estimate a correct and reasonable valuation of the relief claimed and it follows that it will be for the Court to decide on the merits of each particular case whether the provisions of S. 8 (c) should be invoked for the purpose of revising the plaintiff's valuation. I.L.R. (1940) 1 Cal. 409=1940 Cal. 482. Under S. 8-C, it is of course competent for a Court, in fact in many cases, it is the duty of the Court to hold an enquiry regarding the proper valuation of the subject-matter of suits under S. 7 (iv) of the Act in cases in which there is reason to suppose that the relief sought has been under-valued. But where having regard to the nature of the prayers in the plaint, it would be extremely difficult, if not impossible, to estimate the precise value of the relief sought by the plaintiff, such an enquiry by the Court would be unnecessary. 43 C.W.N. 167. See also I.L.R. (1937) 2 Cal. 501=41 C.W.N. 977. An enquiry under S. 8-C might be usefully held in a suit by a Mahomedan against a Hindu for a declaration of his right to perform certain religious ceremonies on the occasion of the Muharram every year in a Courtyard attached to the palace of the Hindu. If the plaintiff succeeds in his suit, the value of a portion of the defendant's palace will seriously depreciate. Obviously in a case of this sort the extent to which the defendant's property will be depreciated should be taken to correspond to the value of the benefit which the plaintiff seeks to obtain if he succeeds in his suit. From this point of view, it is not correct to hold that there is

no objective standard by which the requisite valuation could be made. I.L.R. (1939) 2 Cal. 20=1939 Cal. 743. In a suit brought by the plaintiff on behalf of himself and as representative of the rate payers of a Municipality for a declaration that a certain assessment made by that Municipality is illegal and for injunction restraining it from recovering the rates, it is open to the Court treating the suit as falling under S. 7 (iv) (c) of the Court-Fees Act, to enquire into the plaintiff's valuation, if it is of opinion that the subject-matter has been wrongly valued. Even if the prayer for injunction is redundant and S. 7 (iv) (c) does not at all apply, it is open to the Court to consider the question of valuation in order to determine the proper forum. 42 C.W.N. 315. Where the only question is one of valuation, and not one relating to classification, an appeal being excluded under S. 12 (i), the remedy of revision is open, though the revisional power should be exercised only in a proper case, such as where the valuation is manifestly by wrong standard either because it is contrary to accepted principles of valuation or because of a wrong approach to the question. Consequently in a case falling under S. 7 (iv) (c) the application of a wrong standard by the Court in determining the correct valuation under S. 8-C, namely the standard laid down in S. 7 (ii) of the Act which is applicable to a different class of suit altogether will attract the revisional jurisdiction of the High Court under S. 115. C.P. Code. 1941 Cal. 509. If the plaintiff fails to pay the additional Court-fee found payable on an enquiry made under S. 8 (c) of the Court-Fees Act, the proper order for the Court to make will be an order for dismissal under the provisions of S. 8-B (3) of that Act as amended in Bengal by Act VII of 1935, and not an order rejecting the plaint under the provisions of O. 7, R. 11, C.P. Code. I.L.R. (1940) 2 Cal. 166=44 C.W.N. 745=1940 Cal. 451.

If in the result of such inquiry the Court finds that the subject-matter of the suit has not been undervalued the Court may, in its discretion, order that all or any part of such costs shall be paid by government or by any party to the suit at whose instance the inquiry has been undertaken, and if any amount exceeding the proper amount of fee has been paid shall refund the excess amount so paid."

9. Sections 9 and 10 of the said Act are hereby repealed.

10. For section 11 of the said Act the following section shall be substituted, namely:—

"11. Where, in any suit for mesne profits or for land and mesne profits or for an account, the fee which would have been payable, if the suit had comprised the whole of the relief to which the Court finds the plaintiff to be entitled exceeds the fee actually paid, the Court shall require the plaintiff to pay an additional fee equal to the amount of the excess, and if such additional fee is not paid within such time as the Court may fix, the suit, or if a decree has previously been passed therein, so much of the claim as has not been so decreed, shall be dismissed:

Provided that, where the additional fee is payable in respect of a portion of the claim which can be relinquished, that portion only shall be dismissed."

11. In paragraph ii of section 12 of the said Act, for the words and figures "and the provisions of section 10, paragraph ii, shall apply" the following shall be substituted, namely "and therefore—

(a) if the party required to pay is the appellant or petitioner, the provisions of sub-sections (2) and (3) of section 8-B shall, so far as may be, apply;

(b) if the party required to pay is the respondent or the opposite party, the provisions of sub-section (2) of section 8-B shall, so far as may be, apply, and, if such party fails to pay the fee required before the date fixed by the Court, the Court shall recover the amount of such fee from him as a public demand:

Explanation.—For the purposes of this section a question relating to the classification of any suit for the purpose of section 7 shall not be deemed to be a question relating to valuation."

12. For section 17 of the said Act, the following section shall be substituted, namely:—

"17. (1) In any suit in which two or more separate and distinct causes of action are joined and separate and distinct reliefs are sought in respect of each, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees with which the plaints or memoranda of appeal would be chargeable under this Act in separate suits instituted in respect of each such cause of action:

Provided that nothing in this sub-section shall be deemed to affect any power conferred by or under the Code of Civil Procedure, 1908, to order separate trials.

(2) Where more reliefs than one based on the same cause of action are sought either jointly or in the alternative, the fee shall be paid according to the value of the relief in respect of which the largest fee is payable."

13. In section 19 of the said Act,—

(a) in paragraph i, after the words "Power-of-attorney" the words "or other written authority" shall be inserted; and

(b) after paragraph xxiv the following paragraph shall be added, namely:—

"xxv. Petitions of appeal by Government servants or servants of a Court of Wards against orders of dismissal, reduction or suspension; copies of such orders filed with such appeals and applications for obtaining such copies."

14. After section 34 of the said Act the following section shall be inserted, namely:—

"34-A. Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period even though the period originally fixed or granted may have expired."

15. For section 35 of the said Act the following section shall be substituted, namely:—

"35. (1) The Local Government may, from time to time, subject to such conditions or restrictions as it may think fit to impose, by notification in the *Calcutta Gazette*, suspend the payment of or reduce or remit, in the whole of Bengal or in any part thereof, all or any of the fees mentioned in the first and second schedules to this Act annexed and may in like manner cancel or vary such order.

(2) The Local Government may, from time to time by rules, prescribe the manner in which any fee the payment of which is suspended under sub-section (1) may be realised and for this purpose direct that such fee may be recovered as a public demand."

16. In Schedule II to the said Act—

(1) in Article 17, after entry v the following entry shall be inserted, namely:—

"v-A. for partition and separate possession of a share of joint family property or of joint property, or to enforce a right to a share in any property on the ground that it is joint family property or joint property if the plaintiff is in possession of the property of which he claims to be a coparcener or co-owner;

Fifteen rupees.

(2) after Article 18 the following article shall be inserted, namely:—

"18-A. Application under paragraph 20 of the Second Schedule to the Civil Procedure Code, 1908, to file an arbitration award, and memorandum of appeal from a decree passed under paragraph 21 of the said Schedule, Fifteen rupees."

(3) after Article 21 the following article shall be inserted, namely:—

"22. Petition. (a) questioning the election of any person as a Municipal Commissioner, when presented to a District Judge under section 36 of the Bengal Municipal Act, 1932; (b) questioning the election of any person as a member of a District Board or Local Board, when presented to any authority appointed under clause (a) of section 138 of the Bengal Local Self-Government Act of 1885 to decide disputes relating to such elections. Fifteen rupees."

THE COURT-FEES (BENGAL SECOND AMENDMENT) ACT (XI OF 1935).

An Act further to amend the Court-Fees Act, 1870.

[See also Bengal Expiring Laws Act (IV of 1938) which continues the provisions of this Act to be in force after the expiry of the period mentioned in this Act.]

WHEREAS it is expedient to amend the Court-Fees Act, 1870, in its application to Bengal, in the manner hereinafter appearing;

AND WHEREAS the previous sanction of the Governor-General has been obtained under sub-section (3) of section 80-A of the Government of India Act to the passing of this Act;

It is hereby enacted as follows:—

1. (1) This Act may be called THE COURT-FEES (BENGAL SECOND AMENDMENT) ACT, 1935.

(2) It extends to the whole of Bengal.

(3) It shall come into force on such date as the Local Government may, by notification in the *Calcutta Gazette*, appoint.

(4) Clauses (a) and (b) of section 4 and sub-section (2) of section 5 shall remain in force for three years only and thereafter the Court-Fees Act, 1870, shall have force as if it had not been amended by the said clauses and sub-section.

2. The Court-Fees Act, 1870, hereinafter referred to as the said Act, shall, in its application to Bengal, be amended in the manner hereinafter provided.

3. In Article 8 of the First Schedule to the said Act, for the figures "1879" in the first column the figures "1899" shall be substituted.

4. In Article 11 of the First Schedule to the said Act,—

(a) after the words "in excess of a lakh of rupees" in the second column, the words "up to two lakhs and fifty thousand rupees" shall be inserted;

(b) in the second and third column before the proviso in the second column, the following shall be inserted, namely:—

"and

when such amount or value exceeds two lakhs and fifty thousand rupees, on the portion of such amount or value which is in excess of two lakhs and fifty thousand rupees up to three lakhs of rupees, Five and a half per centum.

and

when such amount or value exceeds three lakhs of rupees, on the portion of such amount or value which is in excess of three lakhs of rupees up to four lakhs of rupees, Six per centum.

and

when such amount or value exceeds four lakhs of rupees, on the portion of such amount or value which is in excess of four lakhs of rupees up to five lakhs of rupees, Six and a half per centum.

when such amount or value exceeds five lakhs of rupees, on the portion of such amount or value which is in excess of five lakhs of rupees; Seven per centum.

and

(c) in the proviso, for the words and figures "the Succession Certificate Act, 1889" the words and figures "the Indian Succession Act, 1925" shall be substituted.

5. (1) For Article 12 of the first schedule to the said Act the following article shall be substituted, namely:—

"12. Certificate under the Indian Succession Act, 1925.

When the amount or value of any debt or security specified in the certificate under section 374 of the Act exceeds one thousand rupees,

When the aggregate amount or value of any debts or securities specified in the certificate and of any debts or securities to which the certificate has been extended under section 376 of the Act exceeds one thousand rupees.

Two per centum on the first ten thousand rupees,
three per centum on the next forty thousand rupees,
four per centum on the next fifty thousand rupees, and
five per centum on the remainder of such amount or value.

In respect of such portion of the aggregate amount or value as consists of the amount or value of debts or securities so specified, the fee hereinbefore provided in that behalf in this article;

and
three per centum on such portion of the first ten thousand rupees,
four and a half per centum on such portion of the next forty thousand rupees,
six per centum on such portion of the next fifty thousand rupees, and
seven and a half per centum on such portion of the remainder of such aggregate amount or value as consists of the amount or value of debts or securities to which the certificate has been extended.

Note. (1) The amount of a debt is its amount, including interest on the day on which the inclusion of the debt in the certificate is applied for, so far as such amount can be ascertained.

(2) Whether or not any power with respect to a security specified in a certificate has been conferred under the Act and where such a power has been so conferred, whether the power is for the receiving of interest or dividends on, or for the negotiation or transfer of the security, or for both purposes, the value of the security is its market-value on the day on which the inclusion of the security in the certificate is applied for, so far as such value can be ascertained."

(2) In the third column of the said article as amended by sub-section (1),—

(a) after the words "five per centum" the following shall be inserted, namely:—
"on the next one lakh and fifty thousand rupees, five and a half per centum on the next fifty thousand rupees,

six per centum on the next one lakh of rupees,
six and a half per centum on the next one lakh of rupees,

and

seven per centum"

(b) after the words "seven and a half per centum" the following shall be inserted namely:—

"On such portion of the next one lakh and fifty thousand rupees,
eight and a quarter per centum on such portion of the next fifty thousand rupees,
nine per centum on such portion of the next one lakh of rupees,
nine and three quarters per centum on such portion of the next one lakh of rupees,

and

ten and a half per centum".

6. In Article 18 of the second schedule to the said Act, for the words and figures "section 326 of the Code of Civil Procedure" the words and figures "paragraph 17 of the second schedule to the Code of Civil Procedure, 1908" shall be substituted.

7. Nothing in this Act shall apply to any probate, letters of administration or certificate under the Indian Succession Act, 1925, in respect of which the fee payable under the law for the time being in force has been paid before the commencement of this Act, but which has not issued.

IV.—BIHAR AND ORISSA ACT NO. II OF 1922.

THE BIHAR AND ORISSA COURT-FEES (AMENDMENT) ACT 1922.

[21st August, 1922.]

An Act to amend the Court-Fees Act, 1870.

WHEREAS it is expedient to amend the Court-Fees Act, 1870, in its application to the Province of Bihar and Orissa in the manner hereinafter appearing;

It is hereby enacted as follows:—

1. (1) This Act may be called THE BIHAR AND ORISSA COURT-FEES (AMENDMENT) ACT, 1922.

(2) It extends to the whole of Bihar and Orissa including the Santal Parganas.

(3) It shall come into force on the 24th day of August, 1922.

2. In paragraph 3 of section 4 of the Court-Fees Act, 1870, as amended by subsequent legislation and hereinafter called the principal Act, for the word "two" shall be substituted the word "one".

3. In clause (a) of section 7 (v) of the principal Act, for the word "ten" shall be substituted the word "twenty" and in clause (b) of the said section for the word "five" shall be substituted the word "ten".

4. In section 17 of the principal Act, after the words "of appeal" in both places where they occur the words "or of cross-objection" shall be inserted.

5. In section 18 of the principal Act, for the words "a fee of eight annas" the words "a fee of twelve annas" shall be substituted.

6. In item viii of section 19 of the principal Act, for the words "one thousand rupees" the words "two thousand rupees" shall be substituted.

7. (1) In Article 1 of Schedule I of the principal Act, for the entry in the first column the following entry shall be substituted, namely:—

"(1) Plaint, written statement, pleading, a set-off, or counter-claim or memorandum of appeal or of cross-objection, not otherwise provided for in this Act, presented to any Civil or Revenue Court except those mentioned in section 3."

(2) For the "proper fees" set out in the third column of the said Schedule I and shown opposite Article 1 in Schedule A of this Act, the "proper fees" shown against them in the second column of the said Schedule A shall be substituted.

(3) The proviso in Article 1 of the said Schedule I shall be omitted.

8. For the "proper fees" set out in Schedule I of the principal Act for Article 6, 7, 8 and 9 and shown in Schedule A of this Act, the "proper fees" shown against them in the second column of the said Schedule A shall be substituted.

9. For the entries above the proviso in the second column and for the entries in the third column, in Article 11 of Schedule I of the principal Act, the following shall be substituted, namely:—

"When the amount or value of the property in respect of which the grant of probate or letters is made exceeds two thousand rupees, on such amount or value up to ten thousand rupees,

Two per centum.

and
when such amount or value exceeds ten thousand rupees, on the portion of such amount or value which is in excess of ten thousand rupees up to fifty thousand rupees,

Three per centum.

and
when such amount or value exceeds fifty thousand rupees, on the portion of such amount or value which is in excess of fifty thousand rupees up to one lakh of rupees,

Four per centum.

and
when such amount or value exceeds a lakh of rupees, for the portion of such amount or value which is in excess of one lakh of rupees."

Five per centum.

10. For the entry in the second column of Article 12 of Schedule I of the principal Act, and for the first paragraph in the third column of the said Article, the following shall be substituted, namely:—

"When the amount or value of any debt or security specified in the certificate under section 8 of the Act exceeds one thousand rupees, on such amount or value up to ten thousand rupees,

Two per centum, and on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act, three per centum.

and
when such amount or value exceeds ten thousand rupees, on the portion of such amount or value which is in excess of ten thousand rupees up to fifty thousand rupees,

and
when such amount or value exceeds fifty thousand rupees, on the portion of such amount or value which is in excess of fifty thousand rupees up to one lakh of rupees,

and
when such amount or value exceeds a lakh of rupees, on the portion of such amount or value which is in excess of one lakh of rupees."

Three per centum, and on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act, four-and-a-half per centum.

Four per centum, and on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act, six per centum.

Five per centum, and on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act, seven-and-a-half per centum."

11. For the table of rates of *ad valorem* fees annexed to Schedule I of the principal Act, the table set forth in Schedule B of this Act shall be substituted.

12. (1) In the first column of the said Schedule II after the words "memorandum of appeal" in Articles 5, 11, 17, 20 and 21 the words "or of cross-objection" shall be inserted.

(2) For the "proper fees" set out in the said Schedule II, and shown in Schedule C of this Act, the "proper fees" shown against them in the second column of the said Schedule C shall be substituted.

13. Nothing in this Act shall apply to any probate, letters of administration or certificate under the Succession Certificate Act, 1889, in respect of which the fee payable under the law for the time being in force has been paid prior to the commencement of this Act, but which have not issued.

SCHEDULE A.

[See Ss. 7 (3) and 8 of the Bihar and Orissa Court-Fees (Amendment) Act, 1922.]
Proper fees set out in Schedule I of the principal Act. Proper fees to be substituted.

Article 1	Twelve annas	.. One rupee,
	Five rupees	.. Seven rupees and eight annas.
	Ten rupees	.. Fifteen rupees.
	Fifteen rupees	.. Twenty-two rupees and eight annas.
	Twenty rupees	.. Thirty rupees.
Article 6	Twenty-five rupees	.. Thirty-seven rupees and eight annas.
	Four annas	.. Six annas.
	Eight annas	.. Twelve annas.
Article 7	One rupee	.. One rupee and eight annas.
	Eight annas	.. Twelve annas.
	One rupee	.. One rupee and eight annas.
Article 8	Four rupees	.. Six rupees.
	The amount of the duty chargeable on the original	One and a half times the amount of the duty chargeable on the original.
	Eight annas	.. Twelve annas.
	Eight annas	.. Twelve annas.

SCHEDULE B.

TABLE OF RATES OF AD VALOREM FEES LEVIABLE ON THE INSTITUTION OF SUITS.

[See S. 11 of the Bihar and Orissa Court-Fees (Amendment) Act, 1922.]

When the amount or value of the subject-matter exceeds—				When the amount or value of the subject-matter exceeds—			
But does not exceed—		Proper fee.		But does not exceed—		Proper fee.	
Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.
...	5	0	6	55	60	4	8
5	10	0	12	60	65	4	14
10	15	1	2	65	70	5	4
15	20	1	8	70	75	5	10
20	25	1	14	75	80	6	0
25	30	2	4	80	85	6	6
30	35	2	10	85	90	6	12
35	40	3	0	90	95	7	2
40	45	3	6	95	100	7	8
45	50	3	12	100	110	8	8
50	55	4	2	110	120	9	8

THE B. & O. COURT-FEES (AMENDMENT) ACT (II OF 1922). 2165

When the amount or value of the subject-matter exceeds—				But does not exceed— Proper fee.				When the amount or value of the subject-matter exceeds—				But does not exceed— Proper fee.			
Rs.		Rs.		Rs.	A.			Rs.		Rs.		Rs.	A.		
120		130		10	8			800		810		78	8		
130		140		11	8			810		820		79	8		
140		150		12	8			820		830		80	8		
150		160		13	8			830		840		81	8		
160		170		14	8			840		850		82	8		
170		180		15	8			850		860		83	8		
180		190		16	8			860		870		84	8		
190		200		17	8			870		880		85	8		
200		210		18	8			880		890		86	8		
210		220		19	8			890		900		87	8		
220		230		20	8			900		910		88	8		
230		240		21	8			910		920		89	8		
240		250		22	8			920		930		90	8		
250		260		23	8			930		940		91	8		
260		270		24	8			940		950		92	8		
270		280		25	8			950		960		93	8		
280		290		26	8			960		970		94	8		
290		300		27	8			970		980		95	8		
300		310		28	8			980		990		96	8		
310		320		29	8			990		1,000		97	8		
320		330		30	8			1,000		1,100		105	0		
330		340		31	8			1,100		1,200		112	8		
340		350		32	8			1,200		1,300		120	0		
350		360		33	8			1,300		1,400		127	8		
360		370		34	8			1,400		1,500		135	0		
370		380		35	8			1,500		1,600		142	8		
380		390		36	8			1,600		1,700		150	0		
390		400		37	8			1,700		1,800		157	8		
400		410		38	8			1,800		1,900		165	0		
410		420		39	8			1,900		2,000		172	8		
420		430		40	8			2,000		2,100		180	0		
430		440		41	8			2,100		2,200		187	8		
440		450		42	8			2,200		2,300		195	0		
450		460		43	8			2,220		2,400		202	8		
460		470		44	8			2,300		2,500		210	0		
470		480		45	8			2,400		2,600		217	8		
480		490		46	8			2,500		2,700		225	0		
490		500		47	8			2,600		2,800		232	8		
500		510		48	8			2,700		2,900		240	0		
510		520		49	8			2,800		3,000		247	8		
520		530		50	8			2,900		3,100		255	0		
530		540		51	8			3,000		3,200		262	8		
540		550		52	8			3,100		3,300		270	0		
550		560		53	8			3,200		3,400		277	8		
560		570		54	8			3,300		3,500		285	0		
570		580		55	8			3,400		3,600		292	8		
580		590		56	8			3,500		3,700		300	0		
590		600		57	8			3,600		3,800		307	8		
600		610		58	8			3,700		3,900		315	0		
610		620		59	8			3,800		4,000		322	8		
620		630		60	8			3,900		4,100		330	0		
630		640		61	8			4,000		4,200		337	8		
640		650		62	8			4,100		4,300		345	0		
650		660		63	8			4,200		4,400		352	8		
660		670		64	8			4,300		4,500		360	0		
670		680		65	8			4,400		4,600		367	8		
680		690		66	8			4,500		4,700		375	0		
690		700		67	8			4,600		4,800		382	8		
700		710		68	8			4,700		4,900		390	0		
710		720		69	8			4,800		5,000		397	8		
720		730		70	8			4,900		5,250		412	8		
730		740		71	8			5,000		5,500		427	8		
740		750		72	8			5,250		5,750		442	8		
750		760		73	8			5,500		6,000		457	8		
760		770		74	8			5,750		6,250		472	8		
770		780		75	8			6,000		6,500		487	8		
780		790		76	8			6,250		6,750		502	8		
790		800		77	8			6,500		7,000		517	8		
								6,750							

When the amount or value of the subject-matter exceeds—				When the amount or value of the subject-matter exceeds—			
		But does not exceed—	Proper fee.			But does not exceed—	Proper fee.
Rs.		Rs.	Rs. A.	Rs.		Rs.	Rs. A.
7,000		7,250	532 8	30,000		32,000	1,477 8
7,250		7,500	547 8	32,000		34,000	1,507 8
7,500		7,750	562 8	34,000		36,000	1,537 8
7,750		8,000	577 8	36,000		38,000	1,567 8
8,000		8,250	592 8	38,000		40,000	1,597 8
8,250		8,500	607 8	40,000		42,000	1,627 8
8,500		8,750	622 8	42,000		44,000	1,657 8
8,750		9,000	637 8	44,000		46,000	1,687 8
9,000		9,250	652 8	46,000		48,000	1,717 8
9,250		9,500	667 8	48,000		50,000	1,747 8
9,500		9,750	682 8	50,000		55,000	1,785 0
9,750		10,000	697 8	55,000		60,000	1,822 8
10,000		10,500	720 0	60,000		65,000	1,860 0
10,500		11,000	742 8	65,000		70,000	1,897 8
11,000		11,500	765 0	70,000		75,000	1,935 0
11,500		12,000	787 8	75,000		80,000	1,972 8
12,000		12,500	810 0	80,000		85,000	2,010 0
12,500		13,000	832 8	85,000		90,000	2,047 8
13,000		13,500	855 8	90,000		95,000	2,085 0
13,500		14,000	877 8	95,000		1,00,000	2,122 8
14,000		14,500	900 0	1,00,000		1,05,000	2,160 0
14,500		15,000	922 8	1,05,000		1,10,000	2,197 8
15,000		15,500	945 0	1,10,000		1,15,000	2,235 0
15,500		16,000	967 8	1,15,000		1,20,000	2,272 8
16,000		16,500	990 0	1,20,000		1,25,000	2,310 0
16,500		17,000	1,012 8	1,25,000		1,30,000	2,347 8
17,000		17,500	1,035 0	1,30,000		1,35,000	2,385 0
17,500		18,000	1,057 8	1,35,000		1,40,000	2,422 8
18,000		18,500	1,080 0	1,40,000		1,45,000	2,460 0
18,500		19,000	1,102 8	1,45,000		1,50,000	2,497 8
19,000		19,500	1,125 0	1,50,000		1,55,000	2,535 0
19,500		20,000	1,147 8	1,55,000		1,60,000	2,572 8
20,000		21,000	1,177 8	1,60,000		1,65,000	2,610 0
21,000		22,000	1,207 8	1,65,000		1,70,000	2,647 0
22,000		23,000	1,237 8	1,70,000		1,75,000	2,685 0
23,000		24,000	1,267 8	1,75,000		1,80,000	2,722 8
24,000		25,000	1,297 8	1,80,000		1,85,000	2,760 0
25,000		26,000	1,327 8	1,85,000		1,90,000	2,797 8
26,000		27,000	1,357 8	1,90,000		1,95,000	2,835 0
27,000		28,000	1,387 8	1,95,000		2,00,000	2,872 8
28,000		29,000	1,417 8	2,00,000		2,05,000	2,910 0
29,000		30,000	1,447 8				

and the fee increases at the rate of thirty-seven rupees eight annas for every five thousand rupees, or part thereof, for example, when the amount or value of the subject-matter exceeds—

Rs.	Rs.	Rs.	Rs.
3,00,000	3,660	8,00,000	7,410
4,00,000	4,410	9,00,000	8,160
5,00,000	5,160	10,00,000	8,910
6,00,000	5,910	11,00,000	9,660
7,00,000	6,660		

SCHEDULE C.

[See S. 12 (4) of the Bihar and Orissa Court-Fees (Amendment) Act, 1922.]

Proper fees set out in Schedule II of the principal Act.			Proper fees to be substituted.
Article 1	..	{ One anna .. { Eight annas .. { One rupee .. { Two rupees ..	Two annas. Twelve annas. One rupee and eight annas. Three rupees.
Article 1-A	..	Twelve annas in addition to any fee levied on the application under	One rupee in addition to any fee levied on the ap-

	clause (a), clause (b) or clause (d) of Article 1 of this Schedule.	application under clause (a), clause (b) or clause (d) of Article 1 of this Schedule.
Article 10 ..	{ Eight annas One rupee Two rupees	.. One rupee. .. Two rupees. .. Three rupees.
Article 11 ..	{ Eight annas Two rupees	.. One rupee. .. Four rupees.
Article 12 ..	Five rupees	.. Ten rupees.
Article 14 ..	Five rupees	.. Ten rupees.
Articles 17, 18 and 19.	Ten rupees	.. Fifteen rupees.
Articles 20 and 21 ..	Twenty rupees	.. Thirty rupees.

BIHAR ACT XVII OF 1939.

THE BIHAR COURT-FEES (AMENDMENT) ACT, 1939.

[2nd November, 1939.]

An Act to amend the Court-Fees Act, 1870, in its application to Bihar.

WHEREAS it is expedient to amend the Court-Fees Act (VII of 1870) in its application to the Province of Bihar in the manner hereinafter appearing;

It is hereby enacted as follows:—

1. *Short title, extent and commencement.*

(1) This Act may be called THE BIHAR COURT-FEES (AMENDMENT) ACT, 1939.

(2) It extends to the whole of the province of Bihar.

(3) It shall come into force on such date as the Provincial Government may by notification in the Official Gazette appoint.

2. *Amendment of Schedule I of Act VII of 1870.*

In Schedule I of the Court-Fees Act, 1870—

(a) after the entries in the second column against Art. 1, the following proviso shall be added namely:—

“Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be ten thousand rupees”; and

(b) in the table of rates of *ad valorem* fees leviable on the institution of suit, for the portion beginning with the words “for example”, and ending with the figures “9,660”, the following shall be substituted, namely:—

“subject to a maximum of ten thousand rupees, for example—

When the amount or value
of the subject-matter
exceeds—

But does not exceed—

Proper fee.

Rs.	Rs.	Rs.	A.	P.
3,00,000	3,05,000	3,660	0	0
4,00,000	4,05,000	4,410	0	0
5,00,000	5,05,000	5,160	0	0
6,00,000	6,05,000	5,910	0	0
7,00,000	7,05,000	6,660	0	0
8,00,000	8,05,000	7,410	0	0
9,00,000	9,05,000	8,160	0	0
10,00,000	10,05,000	8,910	0	0
11,00,000	11,05,000	9,660	0	0
11,45,000	11,50,000	9,997	8	0

and for all amounts and values exceeding Rs. 11,50,000, the Court-fee is Rs. 10,000.”

V.—BOMBAY ACT NO. II OF 1932.

THE BOMBAY FINANCE ACT, 1932.

[See Bombay Finance Acts of Subsequent years.]

[30th March, 1932]

An Act to provide for the levy of a duty on consumption of electrical energy for the purpose of lights and fans in the Presidency of Bombay and to amend the Court-Fees Act, 1870, and the Indian Stamp Act, 1899, in their application to the said Presidency.

WHEREAS it is expedient to provide for the levy of a duty on consumption of electrical energy for the purpose of lights and fans in the Presidency of Bombay and to amend the Court-Fees Act, 1870, and the Indian Stamp Act, 1899, in their application to the said Presidency for the purposes hereinafter appearing; and whereas the previous sanction of the Governor-General required by sub-section (3) of section 80-A of the Government of India Act and the previous sanction of the Governor required by section 80-C of the said Act have been obtained for the passing of this Act;

It is hereby enacted as follows:—

PART I.—*Preliminary.*

1. This Act may be called THE BOMBAY FINANCE ACT, 1932.
2. (1) Except where it is otherwise provided in this Act, this Act extends to the whole of the Presidency of Bombay.
- (2) It shall come into force on the 1st day of April, 1932.
- (3) This section and sections 3 to 15 containing Parts II, III and IV shall remain in operation for one year ¹[*] from the date on which this Act comes into force.

PART III.—*Court-fees.*

12. In section 7 of the Court-Fees Act, 1870, in its application to the Presidency of Bombay, in this Part referred to as the said Act—

(a) to clause (d) of paragraph (iv) the words "or other consequential relief" shall be added;

(b) after the word "appeal" in paragraph (iv) the words "with a minimum fee of rupees five in the case of suits falling under clause (c)" shall be inserted; and

(c) in clauses (1), (2) and (3) of the proviso to paragraph (v) for the words "five," "ten" and "ten" the words "seven and a half," "fifteen" and "fifteen" shall respectively be substituted.

13. For Articles 1, 8, 11, 12 and 12-A of; and the Table of Rates of *ad valorem* fees in Schedule I to the said Act the following shall be substituted, namely:—

SCHEDULE I.

Ad Valorem Fees.

Number.		Proper Fee.
1. Plaint, written statement, pleading, a set-off or counter-claim or memorandum of appeal (not otherwise provided for in this Act) or of cross-objection presented to any Civil or Revenue Court except those mentioned in section 3.	When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
	When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.	Six annas.
	When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to one thousand rupees.	Twelve annas.
	When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to five thousand rupees.	Five rupees.
	When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees, or part thereof, in excess of five thousand rupees, up to ten thousand rupees.	Fifteen rupees.
	When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Twenty-two rupees and eight annas.
	When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees.	Thirty rupees.
	When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.	Thirty rupees.

Number.	Proper Fee.
1. <i>Plaint, etc.—(Contd.)</i>	
When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees:	Thirty rupees.
Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be ten thousand rupees.	
(a)—When the stamp-duty chargeable on the original does not exceed one rupee.	The amount of the duty chargeable on the original.
8. Copy of any document liable to stamp-duty under the Indian Stamp Act, 1899, when left by any party to a suit or proceeding in place of the original withdrawn.	
11. Probate of a will or letters of administration with or without will annexed.	
(b) —In any other case.	One rupee.
When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees, on the part of the amount or value in excess of one thousand rupees, up to ten thousand rupees.	Two per centum.
When the amount or value of the property in respect of which the grant of probate or letters is made exceeds ten thousand rupees, on the part of the amount or value in excess of ten thousand rupees, up to fifty thousand rupees.	Three per centum.
When the amount or value of the property in respect of which the grant of probate or letters is made exceeds fifty thousand rupees, on the part of the amount or value in excess of fifty thousand rupees, up to one lakh of rupees.	Four per centum.
When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one lakh of rupees, on the part of the amount or value in excess of one lakh of rupees, up to two lakhs of rupees.	Four and a half per centum.
When the amount or value of the property in respect of which the grant of probate or letters is made exceeds two lakhs of rupees, on the part of the amount or value in excess of two lakhs of rupees, up to two lakhs and fifty thousand rupees.	Five per centum.
When the amount or value of the property in respect of which the grant of probate or letters is made exceeds two lakhs and fifty thousand rupees, on the part of the amount or value in excess of two lakhs and fifty thousand rupees, up to three lakhs of rupees.	Five and a half per centum.
When the amount or value of the property in respect of which the grant of probate or letters is made exceeds three lakhs of rupees, on the part of the amount or value in excess of three lakhs of rupees, up to four lakhs of rupees.	Six per centum.

Number.

Proper Fee.

11. Probate of a will,
etc.—(Contd.)

When the amount or value of the property in respect of which the grant of probate or letters is made exceeds four lakhs of rupees, on the part of the amount or value in excess of four lakhs of rupees, up to five lakhs of rupees.

Six and a half per centum.

When the amount or value of the property in respect of which the grant of probate or letters is made exceeds five lakhs of rupees, on the part of the amount or value in excess of five lakhs of rupees:

Seven per centum.

Provided that when, after the grant of a certificate under Part X of the Indian Succession Act, 1925 or under Bombay Regulation VIII of 1827, in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of the fee paid in respect of the former grant.

12. Certificate under
Part X of the Indian
Succession Act, 1925.

The fee leviable in the case of a probate (Article 11) on the amount or value of any debt or security specified in the certificate under section 374 of the Act, and one and a half times this fee on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.

NOTE.—(1) The amount of a debt is its amount, including interest on the day on which the inclusion of the debt in the certificate is applied for, so far as such amount can be ascertained.

(2) Whether or not any power with respect to a security specified in a certificate has been conferred under the Act; and where such a power has been so conferred, whether the power is for the receiving of interest or dividends on, or for the negotiation or transfer of the security or for both purposes, the value of the security is its market-value.

12. Certificate, etc.—
(Contd.)

12-A. Certificate under Bombay Regulation VIII of 1827.

on the day on which the inclusion of the security in the certificate is applied for, so far as such value can be ascertained.

The fee leviable in the case of a probate (article 11) on the amount or value of the property in respect of the certificate or an extension of such certificate, as the case may be.

TABLE OF RATES OF *ad valorem* FEES LEVIABLE ON THE INSTITUTION OF SUITS.

When the amount or value of the subject-matter exceeds—			But does not exceed—			Proper fee.			When the amount or value of the subject-matter exceeds—			But does not exceed—			Proper fee.		
Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.	Rs.	A.
...	5	0	6	410	420	31	8	...	5	0	6	410	420	31	8	...	5
5	10	0	12	420	430	32	4	5	10	0	12	420	430	32	4	5	10
10	15	1	2	430	440	33	0	10	15	1	2	430	440	33	0	10	15
15	20	1	8	440	450	33	12	15	20	1	8	440	450	33	12	15	20
20	25	1	14	450	460	34	8	20	25	1	14	450	460	34	8	20	25
25	30	2	4	460	470	35	4	25	30	2	4	460	470	35	4	25	30
30	35	2	10	470	480	36	0	30	35	2	10	470	480	36	0	30	35
35	40	3	0	480	490	36	12	35	40	3	0	480	490	36	12	35	40
40	45	3	6	490	500	37	8	40	45	3	6	490	500	37	8	40	45
45	50	3	12	500	510	38	4	45	50	3	12	500	510	38	4	45	50
50	55	4	2	510	520	39	0	50	55	4	2	510	520	39	0	50	55
55	60	4	8	520	530	39	12	55	60	4	8	520	530	39	12	55	60
60	65	4	14	530	540	40	8	60	65	4	14	530	540	40	8	60	65
65	70	5	4	540	550	41	4	65	70	5	4	540	550	41	4	65	70
70	75	5	10	550	560	42	0	70	75	5	10	550	560	42	0	70	75
75	80	6	0	560	570	42	12	75	80	6	0	560	570	42	12	75	80
80	85	6	6	570	580	43	8	80	85	6	6	570	580	43	8	80	85
85	90	6	12	580	590	44	4	85	90	6	12	580	590	44	4	85	90
90	95	7	2	590	600	45	0	90	95	7	2	590	600	45	0	90	95
95	100	7	8	600	610	45	12	95	100	7	8	600	610	45	12	95	100
100	110	8	4	610	620	46	8	100	110	8	4	610	620	46	8	100	110
110	120	9	0	620	630	47	4	110	120	9	0	620	630	47	4	110	120
120	130	9	12	630	640	48	0	120	130	9	12	630	640	48	0	120	130
130	140	10	8	640	650	48	12	130	140	10	8	640	650	48	12	130	140
140	150	11	4	650	660	49	8	140	150	11	4	650	660	49	8	140	150
150	160	12	0	660	670	50	4	150	160	12	0	660	670	50	4	150	160
160	170	12	12	670	680	51	0	160	170	12	12	670	680	51	0	160	170
170	180	13	8	680	690	51	12	170	180	13	8	680	690	51	12	170	180
180	190	14	4	690	700	52	8	180	190	14	4	690	700	52	8	180	190
190	200	15	0	700	710	53	4	190	200	15	0	700	710	53	4	190	200
200	210	15	12	710	720	54	0	200	210	15	12	710	720	54	0	200	210
210	220	16	8	720	730	54	12	210	220	16	8	720	730	54	12	210	220
220	230	17	4	730	740	55	8	220	230	17	4	730	740	55	8	220	230
230	240	18	0	740	750	56	4	230	240	18	0	740	750	56	4	230	240
240	250	18	12	750	760	57	0	240	250	18	12	750	760	57	0	240	250
250	260	19	8	760	770	57	12	250	260	19	8	760	770	57	12	250	260
260	270	20	4	770	780	58	8	260	270	20	4	770	780	58	8	260	270
270	280	21	0	780	790	59	4	270	280	21	0	780	790	59	4	270	280
280	290	21	12	790	800	60	0	280	290	21	12	790	800	60	0	280	290
290	300	22	8	800	810	60	12	290	300	22	8	800	810	60	12	290	300
300	310	23	4	810	820	61	8	300	310	23	4	810	820	61	8	300	310
310	320	24	0	820	830	62	4	310	320	24	0	820	830	62	4	310	320
320	330	24	12	830	840	63	0	320	330	24	12	830	840	63	0	320	330
330	340	25	8	840	850	63	12	330	340	25	8	840	850	63	12	330	340
340	350	26	4	850	860	64	8	340	350	26	4	850	860	64	8	340	350
350	360	27	0	860	870	65	4	350	360	27	0	860	870	65	4	350	360
360	370	27	12	870	880	66	0	360	370	27	12	870	880	66	0	360	370
370	380	28	8	880	890	66	12	370	380	28	8	880	890	66	12	370	380
380	390	29	4	890	900	67	8	380	390	29	4	890	900	67	8	380	390
390	400	30	0	900	910	68	4	390	400	30	0	900	910	68	4	390	400
400	410	30	12	910	920	69	0	400	410	30	12	910	920	69	0	400	410

When the amount or value of the subject- matter exceeds—	But does not exceed—	Proper fee.	When the amount or value of the subject- matter exceeds—	But does not exceed—	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
920	930	69 12	6,500	6,750	380 0
930	940	70 8	6,750	7,000	395 0
940	950	71 4	7,000	7,250	410 0
950	960	72 0	7,250	7,500	425 0
960	970	72 12	7,500	7,750	440 0
970	980	73 8	7,750	8,000	455 0
980	990	74 4	8,000	8,250	470 0
990	1,000	75 0	8,250	8,500	485 0
1,000	1,100	80 0	8,500	8,750	500 0
1,100	1,200	85 0	8,750	9,000	515 0
1,200	1,300	90 0	9,000	9,250	530 0
1,300	1,400	95 0	9,250	9,500	545 0
1,400	1,500	100 0	9,500	9,750	560 0
1,500	1,600	105 0	9,750	10,000	575 0
1,600	1,700	110 0	10,000	10,500	597 8
1,700	1,800	115 0	10,500	11,000	620 0
1,800	1,900	120 0	11,000	11,500	642 8
1,900	2,000	125 0	11,500	12,000	665 0
2,000	2,100	130 0	12,000	12,500	687 8
2,100	2,200	135 0	12,500	13,000	710 0
2,200	2,300	140 0	13,000	13,500	732 8
2,300	2,400	145 0	13,500	14,000	755 0
2,400	2,500	150 0	14,000	14,500	777 8
2,500	2,600	155 0	14,500	15,000	800 0
2,600	2,700	160 0	15,000	15,500	822 8
2,700	2,800	165 0	15,500	16,000	845 0
2,800	2,900	170 0	16,000	16,500	867 8
2,900	3,000	175 0	16,500	17,000	890 0
3,000	3,100	180 0	17,000	17,500	912 8
3,100	3,200	185 0	17,500	18,000	935 0
3,200	3,300	190 0	18,000	18,500	957 8
3,300	3,400	195 0	18,500	19,000	980 0
3,400	3,500	200 0	19,000	19,500	1,002 8
3,500	3,600	205 0	19,500	20,000	1,025 0
3,600	3,700	210 0	20,000	21,000	1,055 0
3,700	3,800	215 0	21,000	22,000	1,085 0
3,800	3,900	220 0	22,000	23,000	1,115 0
3,900	4,000	225 0	23,000	24,000	1,145 0
4,000	4,100	230 0	24,000	25,000	1,175 0
4,100	4,200	235 0	25,000	26,000	1,205 0
4,200	4,300	240 0	26,000	27,000	1,235 0
4,300	4,400	245 0	27,000	28,000	1,265 0
4,400	4,500	250 0	28,000	29,000	1,295 0
4,500	4,600	255 0	29,000	30,000	1,325 0
4,600	4,700	260 0	30,000	32,000	1,355 0
4,700	4,800	265 0	32,000	34,000	1,385 0
4,800	4,900	270 0	34,000	36,000	1,415 0
4,900	5,000	275 0	36,000	38,000	1,445 0
5,000	5,250	290 0	38,000	40,000	1,475 0
5,250	5,500	305 0	40,000	42,000	1,505 0
5,500	5,750	320 0	42,000	44,000	1,535 0
5,750	6,000	335 0	44,000	46,000	1,565 0
6,000	6,250	350 0	46,000	48,000	1,595 0
6,250	6,500	365 0	48,000	50,000	1,625 0

and the fee increases at the rate of thirty rupees for every five thousand rupees, or part thereof, up to a maximum of ten thousand rupees, for example—

Rs.	Rs.	A.	Rs.	Rs.	A.
1,00,000	1,925	0	9,00,000	6,725	0
2,00,000	2,525	0	10,00,000	7,325	0
3,00,000	3,125	0	11,00,000	7,925	0
4,00,000	3,725	0	12,00,000	8,525	0
5,00,000	4,325	0	13,00,000	9,125	0
6,00,000	4,925	0	14,00,000	9,725	0
7,00,000	5,525	0	15,00,000	10,000	0
8,00,000	6,125	0			

14. For Articles 1, 6, 7, 12, 14, 17, 18, 19, 20 and 21 of Schedule II to the said Act the following shall be substituted, namely:—

SCHEDULE II.
FIXED FEES.

1. petition.	Number. Application	or		Proper Fee. Two annas.
			(a) When presented to any officer of the Customs or Excise Department or to any Magistrate by any person having dealings with the Government, and when the subject-matter of such application relates exclusively to those dealings:	
			or when presented to any officer of land-revenue by any person holding temporarily settled land under direct engagement with Government, and when the subject-matter of the application or petition relates exclusively to such engagement:	
			or when presented to any Municipal Commissioner under any Act for the time being in force for the conservancy or improvement of any place, if the application or petition relates solely to such conservancy or improvement:	
			or when presented to any Civil Court other than a principal Civil Court of original jurisdiction, or to any Court of Small Causes constituted under the Provincial Small Causes Courts Act, 1887, or to a Collector or other officer of revenue in relation to any suit or case in which the amount or value of the subject-matter is less than fifty rupees, not being an application for assistance under section 86 of the Bombay Land Revenue Code, 1879.	
			or when presented to any Civil, Criminal or Revenue Court, or to any Board or executive officer for the purpose of obtaining a copy or translation of any judgment, decree or order passed by such Court, Board or officer, or of any other document on record in such Court or Office.	
			(aa) When presented to a Collector or other officer of revenue for assistance under section 86 of the Bombay Land Revenue Code, 1879.	Four annas.
			(b) When containing a complaint or charge of any offence other than an offence for which police-officers may, under the Criminal Procedure Code, 1898, arrest without warrant, and presented to any Criminal Court:	
			or when presented to a Civil, Criminal or Revenue Court, or to a Collector, or any Revenue-officer having jurisdiction equal or subordinate to a Collector, or to any Magistrate in his executive capacity and not otherwise provided for by this Act:	Eight annas.

Number.

Proper Fee.

1. Application or petition— <i>Contd.</i>	or to deposit in Court revenue or rent: or for determination by a Court of the amount of compensation to be paid by a landlord to his tenant. (c) When presented to a Chief Commissioner or other Chief Controlling Revenue or Executive Authority, or to a Commissioner of Revenue or Circuit, or to any chief officer charged with the executive administration of a Division and not otherwise provided for by this Act. (d) When presented to a High Court.	Two rupees. Four rupees.
6. Bail-bond or other instrument of obligation given in pursuance of an order made by a Court or Magistrate under any section of the Code of Criminal Procedure, 1898, or the Code of Civil Procedure, 1908, and not otherwise provided for by this Act.		One rupee.
7. Undertaking under section 49 of the Indian Divorce Act, 1869.		One rupee.
12. Caveat.	When the amount or value of the property involved does not exceed two thousand rupees. When the amount or value of the property involved exceeds two thousand rupees.	Five rupees. Ten rupees.
14. Petition in a suit under the Native Converts' Marriage Dissolution Act, 1866.		Ten rupees.
17. Complaint or memorandum of appeal in each of the following suits:— (i) to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court; (ii) to alter or cancel any entry in a register of the names of proprietors of revenue paying estates; and (iii) to obtain a declaratory decree or order where no consequential relief is prayed; (iv) to set aside alienation; (v) to set aside a decree or award;	When the amount or value of the property involved does not exceed five hundred rupees. When the amount or value of the property involved exceeds five hundred rupees. When the amount or value of the property involved does not exceed five hundred rupees.	Ten rupees. Fifteen rupees. Fifteen rupees. Ten rupees.

Number.

Proper Fee.

When the amount or value of the property involved exceed five hundred rupees.

Fifteen rupees.

(vi) to set aside an adoption; and

Fifteen rupees.

(vii) any other suit where it is not possible to estimate at a money-value the subject-matter in dispute, and which is not otherwise provided for by this Act.

Fifteen rupees.

18. Application—

(a) under paragraph 17 of the Second Schedule to the Code of Civil Procedure, 1908;

Ten rupees.

(b) for probate or letters of administration or for revocation thereof under the Indian Succession Act, 1925;

When the amount or value of the Estate does not exceed two thousand rupees.

Two rupees.

(c) for a certificate under Part X of the Indian Succession Act, 1925, or Bombay Regulation VIII of 1827;

When it exceeds two thousand rupees, but does not exceed five thousand rupees.

Five rupees.

When it exceeds five thousand rupees.

Ten rupees.

(d) for opinion or advice or for discharge from a Trust, or for appointment of new Trustees, under sections 34, 72, 73 or 74 of the Indian Trusts Act, 1882;

Ten rupees.

(e) for the winding up of a Company, under section 166 of the Indian Companies Act, 1913;

Ten rupees.

(f) under R. 58 of Order XXI of the Code of Civil Procedure, 1908, regarding a claim to attached property.

When the amount or value of the property exceeds five hundred rupees.

Ten rupees.

19. Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908.

Twenty rupees.

20. Every petition under the Indian Divorce Act, 1869, except petitions under section 44 of that Act and every memorandum of appeal under section 55 of that Act.

Thirty rupees.

21. Plaint or memorandum of appeal under the Parsi Marriage and Divorce Act, 1865.

Thirty rupees.

THE COURT-FEES (CENTRAL PROVINCES AMENDMENT) ACT (XVI OF 1935).

(Assented to by the Governor-General in Council on the 21st May, 1935.)
An Act to amend the Court-Fees Act, 1870, with reference to the scale of Court-Fees in the Central Provinces.

WHEREAS it is expedient to revise the scale of Court-Fees for the Central Provinces by amendment of the Court-Fees Act, 1870, in its application to the Central Provinces, in the manner hereinafter appearing;

AND WHEREAS the previous sanction of the Governor required under section 80-C of the Government of India Act has been obtained to the passing of this Act;

It is hereby enacted as follows:—

1. (1) This Act may be called THE COURT-FEES (CENTRAL PROVINCES AMENDMENT) ACT, 1935.

(2) It shall come into force on such date as the Local Government may, by notification, appoint in this behalf and shall remain in force to the end of 31st day of March, 1943.

2. The Court-Fees Act, 1870 (hereinafter referred to as the said Act), shall be amended in its application to the Central Provinces, in the manner hereinafter provided.

3. In section 7 of the said Act—

(a) after the word "appeal" in paragraph iv, the words "with a minimum fee of rupees five in the case of suits falling under clause (c)" shall be inserted;

(b) in clause (a) of paragraph v, between the words "or" and "forms part", the words "where the land" shall be inserted;

(c) in clause (b) of paragraph v—

(i) between the words "or" and "forms part", the words "where the land" shall be inserted; and

(ii) for the word "five" the words "seven and half" shall be substituted; and

(d) for paragraph ix, the following paragraph shall be substituted, namely:—

"ix. (a) In suits against a mortgagee for the recovery of the property mortgaged,—according to the principal money expressed to be secured by the instrument of mortgage; and

(b) in suits by a mortgagee to foreclose the mortgage, or, where the mortgage is made by conditional sale, to have the sale declared absolute,—according to the amount claimed as due at the date of presenting the plaint".

4. In Schedule 1 to the said Act—

(a) before the word "presented" in the first column of Article 1, the words "in any suit between landlord and tenant for an arrear of rent" shall be inserted;

(b) after Article 1, the following article shall be inserted, namely:—

"1-A. Plaint, written statement pleading a set-off or counter-claim or memorandum of appeal (not otherwise provided for in this Act) or of cross-objection presented to any Civil or Revenue Court except those mentioned in S. 3, in suits other than those provided for in article 1.	When the amount or value of the subject-matter in dispute does not exceed five hundred rupees.	Six annas.
	When such amount or value exceeds five rupees, for every five rupees or part thereof, in excess of five rupees, up to one hundred rupees.	Six annas.
	When such amount or value exceeds one hundred rupees, for every ten rupees or part thereof, in excess of one hundred rupees, up to one thousand rupees.	Twelve annas.
	When such amount or value exceeds one thousand rupees, for every one hundred rupees or part thereof, in excess of one thousand rupees, up to five thousand rupees.	Six rupees.
	When such amount or value exceeds five thousand rupees, for every two hundred rupees or part thereof, in excess of five thousand rupees up to ten thousand rupees.	Ten rupees.
	When such amount or value exceeds ten thousand rupees, for every five hundred rupees or part thereof in excess of ten thousand rupees, up to twenty thousand rupees.	Twenty rupees.

When such amount or value exceeds twenty thousand rupees, for every one thousand rupees or part thereof, in excess of twenty thousand rupees up to thirty thousand rupees. Thirty rupees.

When such amount or value exceeds thirty thousand rupees for every two thousand rupees or part thereof, in excess of thirty thousand rupees up to fifty thousand rupees. Thirty rupees.

When such amount or value exceeds fifty thousand rupees, for every five thousand rupees or part thereof, in excess of fifty thousand rupees: Thirty rupees.

Provided that the maximum fee leviable shall not exceed five thousand rupees.

(c) in the third column of Article 6 for the words "Four annas" opposite clause (a), the words "six annas", and for the words "Eight annas" opposite clause (b), the words "Twelve annas" shall be substituted;

(d) in the third column of Article 7 for the words "Eight annas", opposite clause (a), the words "Twelve annas", and for the words "One rupee" opposite clause (b), the words "One rupee and eight annas" shall be substituted;

(e) for Articles 11 and 12 and the entries in the second and third columns thereof, the following articles and entries shall be substituted, namely:—

"II. Probate of a will or letters of administration with or without will annexed.	When the amount or value of the property in respect of which the grant or probate or letters is made exceeds one thousand rupees but does not exceed five thousand rupees.	Two per centum on such amount or value.
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When such amount or value exceeds five thousand rupees but does not exceed ten thousand rupees.	One hundred rupees plus two and a half per centum on the amount or value in excess of five thousand rupees.
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When such amount or value exceeds ten thousand rupees.	Two hundred and fifty rupees plus three per centum on the amount or value in excess of ten thousand rupees;
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Provided that when, after the grant of a certificate under Part X of the Indian Succession Act, 1925, or under Bombay Regulation VIII of 1827, in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of the fee paid in respect of the former grant.

12. Certificate under Part X of the Indian Succession Act, 1925 (XXXIX of 1925).	When the amount or value of any debt or security specified in the certificate under S. 374 of the Act exceeds one thousand rupees but does not exceed five thousand rupees.	Two per centum on such amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.
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When such amount or value exceeds five thousand rupees but does not exceed ten thousand rupees.	One hundred rupees plus two and a half per centum on the amount or value in excess of five thousand rupees and four and a half per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.
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When such amount or value exceeds ten thousand rupees.	Two hundred and fifty rupees plus three per
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centum on the amount or value in excess of ten thousand rupees and seven and a half per centum on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act.”;

(f) for the table of rates of *ad valorem* fees leviable on the institution of suits, the following table shall be substituted, namely:—

N.B.—The old scale for 0 to 1,000 subject-matter not being altered that part of the table is omitted;

“Table of rates of *ad valorem* fees leviable on the institution of suits.

When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee	When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee.
Rs.	Rs.	Rs.	Rs.	Rs.	Rs.
1,000	1,100	81	7,600	7,800	455
1,100	1,200	87	7,800	8,000	465
1,200	1,300	93	8,000	8,200	475
1,300	1,400	99	8,200	8,400	485
1,400	1,500	105	8,400	8,600	495
1,500	1,600	111	8,600	8,800	505
1,600	1,700	117	8,800	9,000	515
1,700	1,800	123	9,000	9,200	525
1,800	1,900	129	9,200	9,400	535
1,900	2,000	135	9,400	9,600	545
2,000	2,100	141	9,600	9,800	555
2,100	2,200	147	9,800	10,000	565
2,200	2,300	153	10,000	10,500	585
2,300	2,400	159	10,500	11,000	605
2,400	2,500	165	11,000	11,500	625
2,500	2,600	171	11,500	12,000	645
2,600	2,700	177	12,000	12,500	665
2,700	2,800	183	12,500	13,000	685
2,800	2,900	189	13,000	13,500	705
2,900	3,000	195	13,500	14,000	725
3,000	3,100	201	14,000	14,500	745
3,100	3,200	207	14,500	15,000	765
3,200	3,300	213	15,000	15,500	785
3,300	3,400	219	15,500	16,000	805
3,400	3,500	225	16,000	16,500	825
3,500	3,600	231	16,500	17,000	845
3,600	3,700	237	17,000	17,500	865
3,700	3,800	243	17,500	18,000	885
3,800	3,900	249	18,000	18,500	905
3,900	4,000	255	18,500	19,000	925
4,000	4,100	261	19,000	19,500	945
4,100	4,200	267	19,500	20,000	965
4,200	4,300	273	20,000	21,000	995
4,300	4,400	279	21,000	22,000	1,025
4,400	4,500	285	22,000	23,000	1,055
4,500	4,600	291	23,000	24,000	1,085
4,600	4,700	297	24,000	25,000	1,115
4,700	4,800	303	25,000	26,000	1,145
4,800	4,900	309	26,000	27,000	1,175
4,900	5,000	315	27,000	28,000	1,205
5,000	5,200	325	28,000	29,000	1,235
5,200	5,400	335	29,000	30,000	1,265
5,400	5,600	345	30,000	32,000	1,295
5,600	5,800	355	32,000	34,000	1,325
5,800	6,000	365	34,000	36,000	1,355
6,000	6,200	375	36,000	38,000	1,385
6,200	6,400	385	38,000	40,000	1,415
6,400	6,600	395	40,000	42,000	1,445
6,600	6,800	405	42,000	44,000	1,475
6,800	7,000	415	44,000	46,000	1,505
7,000	7,200	425	46,000	48,000	1,535
7,200	7,400	435	48,000	50,000	1,565
7,400	7,600	445			

When the amount or value of the subject-matter exceeds fifty thousand rupees, for every five thousand rupees or part thereof in excess of fifty thousand rupees—Thirty rupees: Provided that the maximum fee leviable shall not exceed five thousand rupees."

5. In Schedule II to the said Act—

(a) in the third column of Article 1 for the words "One anna" opposite clause (a), the words "Two annas" shall be substituted;

(b) for clause (b) of Article 1 in the second column and the entry opposite it in the third column, the following clause and entries shall be substituted, namely:—

"(b) When containing a complaint or charge of any offence other than an offence for which police officers may, under the Code of Criminal Procedure, 1898, arrest without warrant, and presented to any Criminal Court;		Twelve annas.
or	for orders of arrest or attachment before judgment or for temporary injunctions;	Two rupees.
or	for compensation for arrest or attachment before judgment or in respect of a temporary injunction obtained on insufficient grounds;	Two rupees.
or	for the appointment of a receiver in a case in which the applicant has no present right of possession of the properties in dispute;	Five rupees.
or	for setting aside decrees passed <i>ex parte</i> and for review of orders dismissing suits for default;	Twelve annas.
or	when presented to a Civil, Criminal or Revenue Court, or to a Collector, or any Revenue Officer having jurisdiction equal or subordinate to a Collector, or to any Magistrate in his executive capacity, and not otherwise provided for by this Act;	Twelve annas.
or	to deposit in Court Revenue or rent;	Eight annas.
or	for determination by a Court of the amount of compensation to be paid by landlord to his tenant;"	Eight annas.

(c) for clauses (c) and (d) in the second column of article 1 and for the entries in the third column opposite these clauses, the following clauses and entries shall be substituted, namely:—

"(c) When presented to a Commissioner of Revenue or to any Chief Officer charged with the executive administration of a division, and not otherwise provided for by this Act.		One rupee and eight annas.
(d)	When presented to a Chief Controlling Revenue Authority or Executive Authority and not otherwise provided for by this Act.	Two rupees.
(e)	When presented to the Court of the Judicial Commissioner—	
	(i) otherwise than under S. 25 of the Provincial Small Causes Courts Act, 1887, or S. 115 of the Code of Civil Procedure, 1908;	Two rupees.
	(ii) under S. 25 of the Provincial Small Causes Courts Act, 1887;	Five rupees.
	(iii) under S. 115 of the Code of Civil Procedure, 1908.	Five rupees."

(d) in the third column of Article 10, for the words "Eight annas" opposite clause (a), the words "Twelve annas", and for the words "Two rupees" opposite clause (c) the words "Two rupees and eight annas" shall be substituted;

(e) in the third column of Article 11, for the words "Eight annas" opposite clause (a), the words "One rupee", and for the words "Two rupees" opposite clause (b), the words "Four rupees" shall be substituted;

(f) for Articles 17, 18 and 19, the following articles, shall be substituted namely:—

"17. **Plaint or memorandum of appeal** in each of the following suits:—

(i) to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court;

(ii) to alter or cancel any entry in a register of the names of proprietors of revenue paying estates;

(iii) to obtain a declaratory decree where no consequential relief is prayed;

(iv) to set aside an award;

(v) to set aside an adoption;

(vi) every other suit where it is not possible to estimate at a money value the subject-matter in dispute, and which is not otherwise provided for by this Act.

.. Fifteen rupees.

18. **Applications—**

(a) under paragraph 17 or 20 of the Second Schedule to the Code of Civil Procedure, 1908 (V of 1908);

.. One rupee.

(b) for opinion or advice or for discharge from a trust, or for appointment of new trustees, under Ss. 34, 72, 73 or 74 of the Indian Trusts Act, 1882 (II of 1882);

.. Ten rupees.

(c) for the winding up of company, under S. 166 of the Indian Companies Act, 1913 (VII of 1913).

.. Ten rupees.

(d) for the appointment or declaration of a person as guardian of the person or property, or both, of minors, under the Guardians and Wards Act, 1890 (VIII of 1890).

.. Two rupees.

19. **Agreement in writing** stating a question for the opinion of the Court under the Code of Civil Procedure, 1908, O. 36, R. (1).

.. Fifteen rupees."

6. Nothing in this Act shall apply to any probate, Letters of Administration or certificate in respect of which the fee payable under the law for the time being in force has been paid prior to the commencement of this Act but which have not been issued.

VII.—MADRAS ACT NO. V OF 1922.

Passed by the Legislative Council of Madras.

[Received the assent of the Governor on the 30th March, 1922 and that of the Governor-General on the 17th April, 1922; the assent of the Governor-General was first published in the

Fort St. George Gazette of the
18th April, 1922.]

An Act to amend the Court-Fees Act, 1870.

WHEREAS it is expedient to amend the Court-Fees Act, 1870, in its application to the Presidency of Madras;

It is hereby enacted as follows:—

1. (a) This Act may be called THE MADRAS COURT-FEES (AMENDMENT) ACT, 1922.

(b) It extends to the whole of the Presidency of Madras.

2. (1) In this Act "the principal Act" shall mean "the Court-Fees Act, 1870".

(2) In this Act and in the principal Act, unless there is anything repugnant in the subject or context, "Memorandum of appeal" shall include memorandum of cross-objection.

3. In the second paragraph of section 5 of the principal Act, the words "Registrar" and "Chief Judge" shall be substituted for "clerk of the Court" and "first Judge" respectively.

4. In section 7 of the principal Act the words "except suits for relief under section 14 of the Religious Endowments Act, 1863, or under section 91 or section 92 of the Code of Civil Procedure, 1908," shall be added between the words "mentioned" and "shall".

5. In section 7 (ii) of the principal Act, after the words "shall be deemed to be" the words "in suits for maintenance, the amount claimed to be payable for one year and in other suits" shall be added.

6. The following shall be added after the words "Memorandum of appeal" in section 7, paragraph (iv), of the principal Act:—

"Provided that in suits coming under sub-clause (c), in cases where the relief sought is with reference to any immovable property, such valuation shall not be less than half the value of the immovable property calculated in the manner provided for by paragraph (v) of this section."

7. In section 7 of the principal Act between paragraphs (iv) and (v) the following paragraph shall be added as (iv-A):—

"In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value,

according to the value of the subject-matter of the suit, and such value shall be deemed to be—

if the whole decree or other document is sought to be cancelled, the amount or the value of the property for which the decree was passed or the other document executed,

if a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property."

8. In section 7 (v) of the principal Act—

in (a) for the word "ten" the word "twenty" shall be substituted;

in (b) for the word "five" the word "ten" shall be substituted;

and after clause (d) the following proviso shall be substituted for the existing proviso:—

"Provided that if rules are framed under section 3 of the Suits Valuation Act, 1887, for determining the value of land for the purposes of jurisdiction, the value so determined shall be deemed to be the value of the land for the purposes of this paragraph."

9. For the second paragraph of section 11 of the principal Act the following paragraph shall be substituted:—

"Where a decree directs an inquiry as to mesne profits which have accrued on the property during a period prior to the institution of the suit, if the profits ascertained on such inquiry exceed the profits claimed, no final decree shall be passed till the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the claim for the excess shall be dismissed, unless the Court, for sufficient cause, extends the time for payment.

"Where a decree directs an inquiry as to mesne profits from the institution of the suit, and a final decree is passed in accordance with the result of such inquiry, the decree shall not be executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted therefor."

10. In section 18 of the principal Act, for the words "eight annas" the words "one rupee" shall be substituted.

11. For Schedules I and II of the principal Act, the following schedules shall be substituted:—

SCHEDULE I.
Ad valorem Fees.

Number.		Proper Fee.
1. ¹ Plaint, or written statement, pleading, a set-off or counter-claim or memorandum of appeal (not otherwise provided for in this Act) presented to any Civil or Revenue Court except those mentioned in section 3.	When the amount or value of the subject-matter in dispute does not exceed five rupees.	Eight annas.
	When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.	Nine annas.
	When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to one thousand rupees.	One rupee two annas.
	When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to five thousand rupees.	Seven rupees eight annas.
	When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees, or part thereof, in excess of five thousand rupees, up to ten thousand rupees.	Fifteen rupees.
	When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Twenty-two rupees eight annas.
	When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees.	Thirty rupees.
	When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.	Thirty rupees.
	When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees.	Thirty rupees.
¹ Plaint, or written statement, pleading, a set-off or counter-claim presented to a Court outside the Presidency Town in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter does not exceed Rs. 500.	When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
	When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees up to one hundred rupees.	Six annas.
	When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees up to five hundred rupees.	Twelve annas.

¹ To ascertain the proper fee leviable on the institution of a suit, see the Table annexed to this schedule.

Number.		Proper Fee.
3. Plaintiff in a suit for possession under the Specific Relief Act, 1877, section 9.		An amount of one-half the scale of fee prescribed in Article 1 above.
4. Application for review of judgment, if presented on or after the ninetieth day from the date of the decree.		The fee leviable on the plaint or memorandum of appeal.
5. Application for review of judgment, if presented before the ninetieth day from the date of the decree.		One-half of the fee leviable on the plaint or memorandum of appeal.
6. Copy or translation of a judgment or order not being or having the force of a decree.	When such judgment or order is passed by any Civil Court other than a High Court, or by the presiding officer of any Revenue Court or Office, or by any other Judicial or Executive Authority—	
	(a) If the amount or value of the subject-matter is fifty or less than fifty rupees.	Six annas.
	(b) If such amount or value exceeds fifty rupees.	Twelve annas.
	When such judgment or order is passed by a High Court.	One rupee eight annas.
6-A. Copy or translation of a judgment or order of a Criminal Court.		Eight annas.
7. Copy of a decree or order having the force of a decree.	When such decree or order is made by any Civil Court other than a High Court, or by any Revenue Court—	
	(a) If the amount or value of the subject-matter of the suit wherein such decree or order is made is fifty or less than fifty rupees.	Eight annas.
	(b) If such amount or value exceeds fifty rupees.	One rupee.
	When such decree or order is made by a High Court.	Four rupees.
	(a) When the stamp-duty chargeable on the original does not exceed eight annas.	The amount of the duty chargeable on the original.
	(b) In any other case.	Eight annas.
8. Copy of any document liable to stamp-duty under the Indian Stamp Act, 1899, when left by any party to a suit or proceeding in place of the original withdrawn.		
9. Copy of any revenue or judicial proceeding or order not otherwise provided for by this Act, or copy of any account, statement, report or the like, taken out of any Civil or Criminal or Revenue Court or office, or from the office of any chief officer charged with the executive administration of a Division.	For every three hundred and sixty words or fraction of three hundred and sixty words.	Eight annas.
10. [Repealed by the Guardians and Wards Act, 1890 (VIII of 1890.)]		

Number.

Proper Fee.

11. Probate of a will or letters of administration with or without will annexed.

When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees, but does not exceed five thousand rupees.

Two per centum on such amount or value.

When such amount or value exceeds five thousand rupees:

Three per centum on such amount or value.

Provided that, when after the grant of a certificate under the Succession Certificate Act, 1889, or under the Regulation of the Bombay Code, No. VIII of 1827, in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of the fee paid in respect of the former grant.

12. Certificate under the Succession Certificate Act, 1889.

When the amount or value of any debt or security specified in the certificate under section 8 of the Act does not exceed five thousand rupees.

Two per centum on such amount or value, and three per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

When such amount or value exceeds five thousand rupees.

Three per centum on such amount or value, and four and a half per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

NOTE.—(1) The amount of a debt is its amount including interest, on the day on which the inclusion of the debt in the certificate is applied for, so far as such amount can be ascertained.

(2) Whether or not any power with respect to a security specified in a certificate has been conferred under the Act; and where such a power has been so conferred, whether the power is for the receiving of interest of dividends on, or for the negotiation or transfer of the security, or for both purposes, the value of the security is its market-value on the day on which the inclusion of the security in the certificate is applied for, so far as such value can be ascertained.

SCHEDULE I.

TABLE OF *Ad valorem* FEES LEVIABLE.

(a) On plaints, etc., mentioned in Article 1 of this Schedule.

When the amount or value of the subject- matter exceeds—	But does not exceed—	Proper fee.	When the amount or value of the subject- matter exceeds—	But does not exceed—	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
...	5	0 8	530	540	60 11
5	10	1 1	540	550	61 13
10	15	1 10	550	560	62 15
15	20	2 3	560	570	64 1
20	25	2 12	570	580	65 3
25	30	3 5	580	590	66 5
30	35	3 14	590	600	67 7
35	40	4 7	600	610	68 9
40	45	5 0	610	620	69 11
45	50	5 9	620	630	70 13
50	55	6 2	630	640	71 15
55	60	6 11	640	650	73 1
60	65	7 4	650	660	74 3
65	70	7 13	660	670	75 5
70	75	8 6	670	680	76 7
75	80	8 15	680	690	77 9
80	85	9 8	690	700	78 11
85	90	10 1	700	710	79 13
90	95	10 10	710	720	80 15
95	100	11 3	720	730	82 1
100	110	12 5	730	740	83 3
110	120	13 7	740	750	84 5
120	130	14 9	750	760	85 7
130	140	15 11	760	770	86 9
140	150	16 13	770	780	87 11
150	160	17 15	780	790	88 13
160	170	19 1	790	800	89 15
170	180	20 3	800	810	91 1
180	190	21 5	810	820	92 3
190	200	22 7	820	830	93 5
200	210	23 9	830	840	94 7
210	220	24 11	840	850	95 9
220	230	25 13	850	860	96 11
230	240	26 15	860	870	97 13
240	250	28 1	870	880	98 15
250	260	29 3	880	890	100 1
260	270	30 5	890	900	101 3
270	280	31 7	900	910	102 5
280	290	32 9	910	920	103 7
290	300	33 11	920	930	104 9
300	310	34 13	930	940	105 11
310	320	35 15	940	950	106 13
320	330	37 1	950	960	107 15
330	340	38 3	960	970	109 1
340	350	39 5	970	980	110 3
350	360	40 7	980	990	111 5
360	370	41 9	990	1,000	112 7
370	380	42 11	1,000	1,100	119 15
380	390	43 13	1,100	1,200	127 7
390	400	44 15	1,200	1,300	134 15
400	410	46 1	1,300	1,400	142 7
410	420	47 3	1,400	1,500	149 15
420	430	48 5	1,500	1,600	157 7
430	440	49 7	1,600	1,700	164 15
440	450	50 9	1,700	1,800	172 7
450	460	51 11	1,800	1,900	179 15
460	470	52 13	1,900	2,000	187 7
470	480	53 15	2,000	2,100	194 15
480	490	55 1	2,100	2,200	202 7
490	500	56 3	2,200	2,300	209 15
500	510	57 5	2,300	2,400	217 7
510	520	58 7	2,400	2,500	224 15
520	530	59 9	2,500	2,600	232 7

When the amount or value of the subject-matter exceeds—			When the amount or value of the subject-matter exceeds—		
Rs.	But does not exceed—	Proper fee.	Rs.	But does not exceed—	Proper fee.
2,600	Rs. 2,700	Rs. A. 239 15	9,500	Rs. 9,750	Rs. A. 697 7
2,700	2,800	247 7	9,750	10,000	712 7
2,800	2,900	254 15	10,000	10,500	734 15
2,900	3,000	262 7	10,500	11,000	757 7
3,000	3,100	269 15	11,000	11,500	779 15
3,100	3,200	277 7	11,500	12,000	802 7
3,200	3,300	284 15	12,000	12,500	824 15
3,300	3,400	292 7	12,500	13,000	847 7
3,400	3,500	299 15	13,000	13,500	869 15
3,500	3,600	307 7	13,500	14,000	892 7
3,600	3,700	314 15	14,000	14,500	914 15
3,700	3,800	322 7	14,500	15,000	937 7
3,800	3,900	329 15	15,000	15,500	959 15
3,900	4,000	337 7	15,500	16,000	982 7
4,000	4,100	344 15	16,000	16,500	1,004 15
4,100	4,200	352 7	16,500	17,000	1,027 7
4,200	4,300	359 15	17,000	17,500	1,049 15
4,300	4,400	367 7	17,500	18,000	1,072 7
4,400	4,500	374 15	18,000	18,500	1,094 15
4,500	4,600	382 7	18,500	19,000	1,117 7
4,600	4,700	389 15	19,000	19,500	1,139 15
4,700	4,800	397 7	19,500	20,000	1,162 7
4,800	4,900	404 15	20,000	21,000	1,192 7
4,900	5,000	412 7	21,000	22,000	1,222 7
5,000	5,250	427 7	22,000	23,000	1,252 7
5,250	5,500	442 7	23,000	24,000	1,282 7
5,500	5,750	457 7	24,000	25,000	1,312 7
5,750	6,000	472 7	25,000	26,000	1,342 7
6,000	6,250	487 7	26,000	27,000	1,372 7
6,250	6,500	502 7	27,000	28,000	1,402 7
6,500	6,750	517 7	28,000	29,000	1,432 7
6,750	7,000	532 7	29,000	30,000	1,462 7
7,000	7,250	547 7	30,000	32,000	1,492 7
7,250	7,500	562 7	32,000	34,000	1,522 7
7,500	7,750	577 7	34,000	36,000	1,552 7
7,750	8,000	592 7	36,000	38,000	1,582 7
8,000	8,250	607 7	38,000	40,000	1,612 7
8,250	8,500	622 7	40,000	42,000	1,642 7
8,500	8,750	637 0	42,000	44,000	1,672 7
8,750	9,000	652 7	44,000	46,000	1,702 7
9,000	9,250	667 7	46,000	48,000	1,732 7
9,250	1,500	682 7	48,000	50,000	1,762 7

When the amount or value of the subject-matter exceeds Rs. 50,000, for every five thousand rupees or part thereof in excess of fifty thousand rupees—thirty rupees.

(b) On plaints, etc., mentioned in Article 2 of this Schedule.

When the amount or value of the subject-matter exceeds—			When the amount or value of the subject-matter exceeds—		
Rs.	But does not exceed—	Proper fee.	Rs.	But does not exceed—	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
...	5	0 6	80	85	6 6
5	10	0 12	85	90	6 12
10	15	1 2	90	95	7 2
15	20	1 8	95	100	7 8
20	25	1 14	100	110	8 4
25	30	2 4	110	120	9 0
30	35	2 10	120	130	9 12
35	40	3 0	130	140	10 8
40	45	3 6	140	150	11 4
45	50	3 12	150	160	12 0
50	55	4 2	160	170	12 12
55	60	4 8	170	180	13 8
60	65	4 14	180	190	14 4
65	70	5 4	190	200	15 0
70	75	5 10	200	210	15 12
75	80	6 0	210	220	16 8
			220	230	17 4

When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper Fee.	When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper Fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
230	240	18 0	370	380	28 8
240	250	18 12	380	390	29 4
250	260	19 8	390	400	30 0
260	270	20 4	400	410	30 12
270	280	21 0	410	420	31 8
280	290	21 12	420	430	32 4
290	300	22 8	430	440	33 0
300	310	23 4	440	450	33 12
310	320	24 0	450	460	34 8
320	330	24 12	460	470	35 4
330	340	25 8	470	480	36 0
340	350	26 4	480	490	36 12
350	360	27 0	490	500	37 8
360	370	27 12			

SCHEDULE II.
FIXED FEES.

Number.		Proper fee.
1. Application or petition.	<p>(a) When presented to any officer of the Customs or Excise Department or to any Magistrate by any person having dealings with the Government, and when the subject-matter of such application relates exclusively to those dealings;</p> <p>or when presented to any officer of land-revenue by any person holding temporarily settled land under direct engagement with Government, and when the subject-matter of the application or petition relates exclusively to such engagement;</p> <p>or when presented to any Municipal Commissioner under any Act for the time being in force for the conservancy or improvement of any place, if the application or petition relates solely to such conservancy or improvement;</p> <p>or when presented to any Civil Court other than a principal Civil Court of original jurisdiction, or to any Court of Small Causes constituted under Act No. IX of 1887, or to a Collector or other officer of revenue in relation to any suit or case in which the amount or value of the subject-matter is less than fifty rupees;</p> <p>or when presented to any Civil, Criminal or Revenue Court, or to any Board or executive officer for the purpose of obtaining a copy or translation of any judgment, decree or order passed by such Court, Board or officer, or of any other document on record in such Court or Office.</p> <p>(b) When containing a complaint or charge of any offence other than an offence for which police-</p>	<p>One anna.</p> <p>Two annas.</p> <p>One anna.</p> <p>Two annas.</p> <p>Two annas.</p> <p>In the case of a criminal complaint one rupee and in other cases</p>

Number.		Proper Fee.
1. Application or petition— <i>Contd.</i>	<p>officers may, under the Criminal Procedure Code, arrest without warrant, and presented to any Criminal Court;</p> <p>or when presented to a Civil, Criminal or Revenue Court, or to a Collector, or any Revenue officer having jurisdiction equal or subordinate to a Collector, or to any Magistrate in his executive capacity, and not otherwise provided for by this Act;</p> <p>or to deposit in Court revenue or rent;</p> <p>or for determination by a Court of the amount of compensation to be paid by landlord to his tenant.</p> <p>(c) When presented to a Chief Commissioner or other Chief Controlling Revenue or Executive authority, or to a Commissioner of Revenue or Circuit, or to any chief officer charged with the executive administration of a division and not otherwise provided for by this Act.</p> <p>(d) (i) When presented to a High Court under section 115 of the Code of Civil Procedure, 1908, for revision of an order—</p> <p>(a) When the value of the suit or proceeding to which the order relates does not exceed thousand rupees;</p> <p>(b) When the value of the suit or proceeding exceeds thousand rupees.</p> <p>(ii) When presented to a High Court otherwise than under that section.</p>	<p>twelve annas.</p> <p>In the case of a criminal complaint one rupee and in other cases twelve annas.</p> <p>Eight annas.</p> <p>One rupee eight annas.</p> <p>Five rupees.</p> <p>Ten rupees.</p> <p>Two rupees.</p>
1-A. Application to any Civil Court that records may be called for from another Court.	When the Court grants the application and is of opinion that the transmission of such records involves the use of the post.	Twelve annas in addition to any fee levied on the application under clause (a), clause (b) or clause (d) of article 1 of this schedule.
2. Application for leave to sue as a pauper.		Eight annas.
3. Application for leave to appeal as a pauper.	(a) When presented to a District Court or a Sub-Court.	One rupee.
	(b) When presented to a Commissioner or a High Court.	Two rupees.
4. Omitted.		Eight annas.
5. Complaint or memorandum of appeal in a suit to establish or disprove a right of occupancy.		
6. Bail-bond or other instrument of obligation given in pursuance of an order made by a Court or Magistrate under any section of the Code of Criminal Procedure, 1898, or the Code of		Eight annas.

Number.

Proper fee.

Civil Procedure, 1908, and not otherwise provided for in this Act.

7. Undertaking under section 49 of the Indian Divorce Act, 1869.

[8. *Rep. by the Repealing and Amending Act, 1891 (XII of 1891).*]

9. [*Rep. by Act XII of 1891.*]

10. Mukhtarnama, Vakalatnama or any paper signed by an Advocate signifying or intimating that he is retained for a party.

11. Memorandum of appeal when the appeal is from an order inclusive of an order determining any question under section 47 or section 144 of the Code of Civil Procedure, 1908, and is presented.

12. Caveat.

13.

14. Petition in a suit under the Native Converts' Marriage Dissolution Act, 1866.

15. [*Rep. by Act V of 1908.*]

16. [*Rep. by Act VI of 1889, S. 18 (1).*]

17. Complaint or memorandum of appeal in a suit—

i. to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court;

ii. to alter or cancel any entry in a register of the names of proprietors of revenue-paying estates:

When presented for the conduct of any one case—

(a) to any Civil or Criminal Court other than a High Court, or to any Revenue Court, or to any Collector or Magistrate, or other Executive Officer, except those mentioned in clauses (b) and (c) of this number;

(b) to a Commissioner of Revenue, Circuit or Customs or to any officer charged with the executive administration of a Division, not being the Chief Revenue or Executive Authority;

(c) to a High Court, Chief Commissioner, Board of Revenue or other Chief Controlling Revenue, or Executive Authority.

(a) to any Civil Court other than a High Court or to any Revenue Court or Executive Officer other than the High Court or Chief Controlling Revenue or Executive Authority;

(b) to a High Court or Chief Commissioner, or other Chief Controlling Executive or Revenue Authority.

Omitted.

Eight annas.

One rupee.

One rupee eight annas.

Three rupees.

One rupee.

Two rupees.

Ten rupees.

Five rupees.

Fifteen rupees.

Fifteen rupees.

Number.		Proper fee.
iii. for relief under section 14 of the Religious Endowments Act, 1863, or under section 91 or section 92 of the Code of Civil Procedure, 1908.		Fifty rupees.
17-A. Plaint or memorandum of appeal in a suit—	When the plaint is presented to or the memorandum of appeal is against the decree of—	
i. to obtain a declaratory decree where no consequential relief is prayed;	a District Munsif's Court or the City Civil Court,	Fifteen rupees.
ii. to set aside an award;		
iii. to obtain a declaration that an alleged adoption is invalid or never in fact took place or to obtain a declaration that an adoption is valid.	a District Court or a Sub-Court.	Hundred rupees if the value for purposes of jurisdiction is less than ten thousand rupees; five hundred rupees if such value is ten thousand rupees or upwards.
17-B. Plaint or memorandum of appeal in every suit where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for by this Act.	When the plaint is presented to or the memorandum of appeal is against the decree of—	
	a Revenue Court,	Ten rupees.
	a District Munsif's Court or the City Civil Court,	Fifteen rupees.
	a District Court or a Sub-Court.	One hundred rupees.
18. Applications under section 17 or section 20 of the 2nd schedule of the Code of Civil Procedure, 1908.	When presented to a District Munsif's Court or the City Civil Court.	Fifteen rupees.
19. Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908.	When presented to a District Court or a Sub-Court.	One hundred rupees.
20. Every petition under the Indian Divorce Act, 1869, except petitions under section 44 of the same Act, and every memorandum of appeal under section 55 of the same Act.		Twenty rupees.
21. Plaint or memorandum of appeal under the Parsi Marriage and Divorce Act, 1865.		Twenty rupees.

VIII.—THE MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (II OF 1927).

Sec. 81. (1) Notwithstanding anything contained in the first or second Schedule to the Madras Court-Fees Amendment Act, 1922, the proper fees for the documents described in columns 1 and 2 of Schedule II shall be the fees indicated in column 3 thereof.

(2) The provisions of the Madras Court-Fees Amendment Act, 1922, shall otherwise, so far as may be, apply to the documents mentioned in Schedule II.

SCHEDULE II.

Section. (1)	Description of the document. (2)	Proper fee. (3)
43 (2)	Appeal to the committee by any office-holder or servant against an order of punishment by a trustee under sub-section (1).	Two rupees.
43 (3)	Further appeal to the Board by a hereditary office-holder or servant against an order of the committee on appeal under sub-section (2).	Two rupees.
43 (4)	Appeal to the Board by an office-holder or servant of an excepted temple.	Two rupees.
44	Application to Court by the trustee to recover the amount from the person in possession or by the person in possession from the person responsible in law.	The fee leviable on a plaint for the amount claimed under the Madras Court-Fees Act, 1922.
53 (3)	Appeal to the Board or application to Court against an order of suspension, dismissal or removal by the committee of a trustee.	Twenty-five rupees.
55 (4)	Appeal to the Board by a trustee or person having interest against the order of a committee under sub-section (3) fixing standard scales of expenditure.	Twenty rupees.
55 (4)	Suit under the sub-section ..	Fifty rupees.
57 (3)	Suit under the sub-section ..	Fifty rupees.
57 (4)	Suit under the sub-section ..	Fifty rupees.
62	Application to the Board by not less than twenty persons having interest for framing a scheme of administration for a math or excepted temple.	Fifty rupees.
63 (4)	Suit under the sub-section ..	Fifty rupees.
65	Suit under the sub-section ..	Fifty rupees.
67 (4)	Suit under the sub-section ..	Fifty rupees.
67 (5)	Suit sub-under the section ..	Fifty rupees.
70 (2)	Application to Court to recover from the funds of the endowment the contribution leviable by the Board or Committee.	Two rupees.
73	Suits under the section ..	Fifty rupees.
76 (2)	Application to the Court by a trustee of a math or temple or any person having interest for modifying or cancelling any order of the Board sanctioning alienation of immovable property under sub-section (1).	The fee leviable on a plaint under article 17, Schedule II of the Madras Court-Fees Amendment Act, 1922.
77 (2)	Application to a Court to modify or set aside an order of the Board under sub-section (1) allocating any endowment, property or the income therefrom to religious and secular purposes.	Twenty rupees.
78	Application to the Court for delivery of possession of endowments to a trustee appointed by the committee.	Two rupees.
84 (2)	Application to modify or set aside the decision of the Board under sub-section (1).	The fee leviable on a plaint under article 17, Schedule II of the Madras Court-Fees Amendment Act, 1922.

Grant of Copies.

Sec. 82. The President of a Board or Committee may grant copies of proceedings or other records of his office on payment of such fees and subject to such conditions as may be determined by the Board.

X.—THE MADRAS CITY CIVIL COURT ACT (VII OF 1892).

* * * * *

Constitution of the City Court.

3. The Local Government may, by notification in the official Gazette, establish a Court to be called the Madras City Civil Court with jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature not exceeding two thousand five hundred rupees in value and arising within the City of Madras, except suits or proceedings which are cognizable,

(a) by the High Court, as a Court of Admiralty, or, Vice-Admiralty; or, as a Colonial Court of Admiralty, or, as a Court having testamentary, intestate or matrimonial jurisdiction, or

(b) by the Court for the relief of insolvent debtors, or

(c) by the Small Cause Court.

* * * * *

Valuation of immovable property for jurisdictional purposes.

9. When the subject-matter of any suit or other proceeding is land or a house or a garden, its value for the purposes of the jurisdiction conferred on the City Court by this Act shall, subject to the other provisions of the Act, be fixed in manner provided by the Court-Fees Act (VII of 1870), S. 7, cl. (v).

Process fees.

10. Fees chargeable for serving or executing processes issued by the City Court or served or executed under its direction or control shall be such as the High Court may prescribe with the approval of the Governor of the Fort St. George in Council.

* * * * *

Repayment of half fees on settlement before hearing.

13. Whenever any suit or proceeding in the City Court is settled by agreement of the parties before issues have been settled or any evidence recorded half the amount of institution fees paid by the plaintiff shall be repaid to him by the Court.

Allowance for fees paid in the City Court in cases removed to High Court.

14. When under section 13 of the Letters Patent for the High Court, dated the 28th day of December, 1865, or under section 25 of the Code of Civil Procedure (XIV of 1882) the High Court has removed for trial by itself any suit from the City Court, fees on the scale for the time being in force in the High Court as a Court of ordinary original jurisdiction shall be payable in that Court in respect of the suit and proceedings therein:

Provided that, in the levy of any such fees which, according to the practice of the Court are credited to the Government, credit shall be given to the plaintiff in the suit for any fee which in the City Civil Court he has already paid under the Court-Fees Act, 1870 (VII of 1870), on the plaint.

Appeals.

15. (1) The Court authorised to hear appeals from the City Court shall be the High Court.

(2) The period of limitation for an appeal from a decree or order of the City Court shall be the same as that provided by law for an appeal from a decree or order of the High Court in the exercise of its original jurisdiction.

Saving of original jurisdiction of High Court.

16. Nothing in this Act contained shall affect the original civil jurisdiction of the High Court:

Provided that—

(1) if any suit or other proceeding is instituted in the High Court which in the opinion of the Judge who tries the same (whose opinion shall be final) ought to have been instituted in the City Civil Court, no costs shall be allowed to a successful plaintiff, and a successful defendant shall be allowed his costs as between attorney and client;

(2) in any suit or other proceeding pending at any time in the High Court, any Judge of such Court may at any stage thereof make an order transferring the same to the City Civil Court if in his opinion such suit or proceeding is within the jurisdiction of that Court and should be tried therein;

(3) in any suit or other proceeding so transferred the Court-Fees Act, 1870 (VII of 1870) shall apply credit being given for any fees levied in the High Court.

* * * * *

XI.—For Orissa, see ORISSA COURT-FEES AMENDMENT ACT (V OF 1939).**XII.—PUNJAB ACT NO. VII OF 1922.****THE COURT-FEES (PUNJAB AMENDMENT) ACT, 1922.**

As amended by Punjab Acts I and VI of 1926.

An Act to amend the Court-Fees Act, 1870, with reference to the scale of Court-fees in the Punjab.

WHEREAS it is necessary to revise the scale of Court-fees provided in the Court-Fees Act, 1870, in its application to the Punjab in the manner hereinafter appearing;

THE ORISSA COURT-FEES (AMENDMENT) ACT (V OF 1939).

[31st October, 1939.]

An Act to amend the law relating to Court-fees in its application to the Province of Orissa.

WHEREAS it is expedient to amend the law relating to Court-fees in its application to the Province of Orissa:

It is hereby enacted as follows:—

Short title and commencement. 1. (i) This Act may be called THE ORISSA COURT-FEES (AMENDMENT) ACT, 1939.

(ii) It extends to the whole of Orissa.

(iii) It shall come into force on such date as the Provincial Government may, by notification in the Gazette, appoint.

2. The Acts mentioned in Schedule A to this Act, so far as they apply to the whole or any part of the Province of Orissa, are hereby repealed to the extent specified in the third column of that Schedule.

Amendment of section 2 of Act VII of 1870. 3. For section 2 of the Court-Fees Act 1870, hereinafter called the principal Act, the following section shall be substituted:—

Definitions. "2. In this Act, unless there is anything repugnant in the subject or context,—

(1) 'appeal' includes a cross objection;

(2) 'suit' includes an appeal from a decree except in section 8-A."

Amendment of section 6 of Act VII of 1870. 4. Section 6 of the principal Act shall be re-numbered as sub-section (1) of section 6 and, after the said sub-section, the following sub-section shall be inserted:—

"(2) Notwithstanding anything contained in sub-section (1), the Provincial Government may, by notification, direct that a copy of a document, specified as chargeable in Schedules I and II to this Act annexed, shall be furnished by a public officer without payment of the fee indicated by either of the said Schedules as the proper fee for such copy and the copy so furnished shall be chargeable with the requisite fee only when it is filed, exhibited or recorded in any Court of justice or received by a public officer as mentioned in sub-section (1)."

5. In section 7 of the principal Act, for the words "in the suits next hereinafter mentioned" the words "in the suits next hereinafter mentioned except suits for relief under section 14 of the Religious Endowments Act, 1863, or under section 91 or section 92 of the Code of Civil Procedure, 1908", shall be substituted.

Amendment of section 7 (ii) of Act VII of 1870. 6. In section 7 (ii) of the principal Act, after the words "shall be deemed to be" the words "in suits for maintenance five times and in other suits" shall be inserted.

Omission of clause (b) of section 7 (iv) of Act VII of 1870. 7. Clause (b) of section 7 (iv) of the principal Act shall be omitted.

Insertion of new paragraph (iv-A) in section 7 of Act VII of 1870. 8. In section 7 of the principal Act, after paragraph (iv) the following paragraph shall be inserted:—

"(iv-A) In a suit for cancellation of a decree for money or other property having a money-value, or other document securing money or other property having such value, according to the value of the subject-matter of the suit, and such value shall be deemed to be—

if the whole decree or other document is sought to be cancelled, the amount or the value of the property for which the decree was passed or the other document executed;

if a part of the decree or other document is sought to be cancelled such part of the amount or value of the property.

Explanation.—In any case where a suit for the cancellation of a whole decree for money or other property having a money value, or other document securing money or

other property having such value has to be instituted, but the substantial relief claimed is only in respect of a part of the amount or the value of the property for which the decree was passed or the other document was executed, the value of the subject-matter of the suit shall be deemed to be such part of the amount or value of the property in respect of which the relief is sought".

Amendment of paragraph (v) of section 7 of Act VII of 1870.

9. In paragraph (v) of section 7 of the principal Act.

- (1) In clause (a), for the word "ten" the word "twenty" shall be substituted;
- (2) in clause (b), for the word "five" the word "ten" shall be substituted;
- (3) the following proviso shall be inserted after the existing proviso:—

"Provided further that in suits for possession of land if rules are framed under section 3 of the Suits Valuation Act, 1887, for determining the value for the purposes of jurisdiction, the value so determined shall be deemed to be the value of the land for the purposes of this paragraph; and

(4) the existing Explanation shall be re-numbered as Explanation 1, and, after the Explanation so re-numbered, the following Explanation shall be added, namely:—

"*Explanation II.*—In this paragraph 'building' includes a house, outhouse, stable, privy, urinal, shed, hut, wall, and any other such structure whether of masonry, bricks, wood, mud, metal or any other material whatsoever."

Insertion of new paragraph (vi-A) in section 7 of Act VII of 1870.

10. In section 7 of the principal Act after paragraph (vi) the following paragraph shall be inserted:—

"(vi-A) In suits for partition and separate possession of a share of joint family property or of joint property, or to enforce a right to a share in any property on the ground that it is joint family property or joint property—

if the plaintiff alleges that he has been excluded from possession of the property of which he claims to be a coparcener or co-owner—according to the market-value of the share in respect of which the suit is instituted.

Explanation.—The word 'possession' for the purposes of this paragraph includes constructive possession".

Insertion of new section 8-A in Act VII of 1870.

11. After section 8 of the principal Act, the following section shall be inserted:—

"8-A. In every suit in which an *ad valorem* Court-fee is payable under this Act on the plaint, the plaintiff shall file with the plaint a statement of particulars of the subject-matter of the suit and his own valuation thereof unless such particulars and the valuation are contained in the plaint. The statement shall be in such form and shall contain such particulars as may be prescribed by the Provincial Government by notification in the Gazette. In every such suit the plaintiff shall also, if the Court so directs, file a duplicate copy of the plaint and of the said statement".

Amendment of section 11 of Act VII of 1870.

12. For the second paragraph of section 11 of the principal Act the following paragraph shall be substituted:—

"Where a decree directs an enquiry as to mesne profits which have accrued on the property during a period prior to the institution of the suit, if the profits ascertained on such inquiry exceed the profits claimed, no final decree shall be passed till the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the claim for the excess shall be dismissed, unless the Court, for sufficient cause, extends the time for payment.

Where a decree directs an inquiry as to mesne profits from the institution of the suit and a final decree is passed in accordance with the result of such inquiry, the decree shall not be executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted therefor".

Amendment of section 12 of Act VII of 1870.

13. (1) In section 12 of the principal Act, for paragraph (ii) the following paragraph shall be substituted:—

"(ii) But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided, it shall—

(a) in any case in which the decision is to the detriment of revenue, require the party by whom such fee has been paid, to pay so much additional fee as would have been payable had the question been rightly decided and thereafter—

(i) if the party required to pay is the appellant or petitioner, the appeal or petition shall be stayed until the additional fee is paid. If the additional fee is not paid within such time as the Court shall fix, the appeal or petition shall be dismissed;

(ii) if the party required to pay is the respondent or the opposite party, the Court shall fix a date before which such party shall pay the amount of Court-fee due from him and, if such party fails to pay the fee required before the date fixed by the Court, the Court shall recover the amount of such fee from him as if it were an arrear of land revenue. Where the Court considers that the amount of such fee should be paid to the respondent or the opposite party by the appellant or the petitioner, as the case may be, the Court may provide for such payment in the order as to cost in the said appeal or petition; and

(b) in any case in which the decision is that any excess fee has been levied, direct the refund of so much excess fee to the party who paid it as would not have been payable had the question been rightly decided.

Explanation.—For the purposes of this section a question relating to the classification of any suit in regard to section 7 shall not be deemed to be a question relating to valuation."

Amendment of section 18 of Act VII of 1870.

14. In section 18 of the principal Act, for the words "eight annas" the words "one rupee" shall be substituted.

Amendment of section 35 of Act VII of 1870.

15. For section 35 of the principal Act, the following section shall be substituted:—

"35. (1) The Provincial Government may from time to time subject to such conditions or restrictions as it may think fit to impose, by notification in the Gazette suspend the payment of or reduce or remit, in the whole of Orissa or in any part thereof, all or any of the fees mentioned in Schedules I and II to this Act annexed and may in like manner cancel or vary such order.

(2) The Provincial Government may from time to time by rules prescribe the manner in which any fee the payment of which is suspended under sub-section (1) may be realised and for this purpose direct that such fee may be recovered as if it were an arrear of land revenue."

Amendment of Article 1 of Schedule I of Act VII of 1870.

16. For Article 1 of Schedule I of the principal Act the following Article shall be substituted:—

Number.		Proper fee.
"(1) Complaint, written statement pleading a set-off or counter-claim or memorandum of appeal (not otherwise provided for in this Act) presented to any Civil or Revenue Court except those mentioned in section 3.	When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
	When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.	Six annas.
	When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to five hundred rupees.	One rupee.
	When such amount or value exceeds five hundred rupees, for every ten rupees, or part thereof, in excess of five hundred rupees up to one thousand rupees.	One rupee two annas.
	When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to seven thousand five hundred rupees.	Seven rupees eight annas.
	When such amount or value exceeds seven thousand five hundred rupees, for every two hundred and fifty rupees or part thereof, in	Fifteen rupees.

Number.

Proper fee.

excess of seven thousand five hundred rupees, up to ten thousand rupees.

When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.

Twenty-two rupees eight annas.

When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees.

Thirty rupees.

When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.

Thirty rupees.

When such amount or value exceeds fifty thousand rupees for every five thousand rupees, or part thereof, in excess of fifty thousand rupees.

Thirty-seven rupees eight annas."

Insertion of new Articles 3 and 3-A in Schedule I of Act VII of 1870.

17. In Schedule I of the principal Act after Article 2, the following Articles shall be inserted:—

Number.

Proper fee.

"3. Plaint, or written statement pleading a set-off or counter-claim in any suit of the nature cognisable by a Court of Small Causes when the amount or value of the subject-matter does not exceed Rs. 500.

When the amount or value of the subject-matter in dispute does not exceed five rupees.

Six annas.

When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.

Six annas.

When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to five hundred rupees.

Twelve annas.

3-A. Plaint or memorandum of appeal in each of the following suits:—

When the value for purposes of jurisdiction does not exceed three thousand rupees.

Fifteen rupees.

(1) to obtain a declaratory decree where no consequential relief is prayed;

When the value exceeds three thousand rupees but does not exceed four thousand rupees.

Fifty rupees.

(2) to set aside an award;

When such value exceeds four thousand rupees, for every two thousand rupees, or part thereof, in excess of four thousand rupees, up to ten thousand rupees.

Fifty rupees.

Number.

(3) to obtain a declaration that an alleged adoption is invalid or never in fact took place or to obtain a declaration that an adoption is valid.

When such value exceeds ten thousand rupees, for every ten thousand rupees, or part thereof, in excess of ten thousand rupees, up to fifty thousand rupees.

When such value exceeds fifty thousand rupees, for every fifty thousand rupees, or part thereof, in excess of fifty thousand rupees.

Proper fee.
Fifty rupees.

One hundred rupees."

Amendment of Article 6 of Schedule I of Act VII of 1870.

18. In the third column of Article 6 of Schedule I of the principal Act—

(a) for the words "four annas" the words "six annas" shall be substituted;

(b) for the words "eight annas" the words "twelve annas" shall be substituted;

(c) for the words "one rupee" the words "one rupee eight annas" shall be substituted.

Amendment of Article 7 of Schedule I of Act VII of 1870.

19. For Article 7 of Schedule I of the principal Act the following Article shall be substituted:—

Number.

"Copy of decree or order having the force of a decree.

When such decree or order is made by a Munsif's Court or a Court of Small Causes, or a Revenue Court—

(a) if the amount or value of the subject-matter of the suit wherein such decree or order is made does not exceed one hundred rupees;

(b) if such amount or value exceeds one hundred rupees but does not exceed one thousand rupees;

(c) if such amount or value exceeds one thousand rupees.

When such decree or order is made by the Court of a District Judge or of a Subordinate Judge.

When such decree or order is made by a High Court.

Proper fee.

Eight annas.

One rupee.

One rupee eight annas.

Three rupees.

Three rupees if the amount or value of the subject-matter of the suit wherein such decree or order is made does not exceed one thousand rupees; six rupees, if such amount or value exceeds one thousand rupees."

Amendment of Article 9 of Schedule I of Act VII of 1870.

20. In the third column of Article 9 of Schedule I of the principal Act, for the words "eight annas" the words "twelve annas" shall be substituted.

Amendment of table of rates and insertion of new tables in Schedule I of Act VII of 1870.

21. For the table of rates of *ad valorem* fees annexed to Schedule I of the principal Act, the tables set forth in Schedule B to this Act shall be substituted.

Amendment of Article I of Schedule II of Act VII of 1870.

22. In Article I of Schedule II of the principal Act,—

(a) in the third column opposite clause (a), for the words "one anna" the words "two annas" shall be substituted;

(b) In the third column opposite clause (b) for the words "eight annas" the words "in the case of a criminal complaint and appeal one rupee and in other cases twelve annas" shall be substituted;

(c) in the third column opposite clause (c) for the words "one rupee" the words "one rupee eight annas" shall be substituted;

(d) in the second and third columns, for clause (d) and the words opposite the said clause the following shall be substituted:—

“(d) (i) When presented to a High Court under section 115 of the Code of Civil Procedure, 1908, for revision of an order—

(a) When the value of the suit or proceedings to which the order relates does not exceed one thousand rupees; Five rupees.

(b) When the value of the suit or proceeding exceeds one thousand rupees. Ten rupees.

(ii) When presented to a High Court otherwise than under that section. Two rupees.”

Amendment of Article I-A of Schedule II of Act VII of 1870.

23. In the third column of Article 1-A of Schedule II of the principal Act, for the words “twelve annas” the words “one rupee” shall be substituted.

Amendment of Article 10 of Schedule II of Act VII of 1870.

24. In Article 10 of Schedule II of the principal Act,—

in the third column—

(i) for the words “eight annas” the words “one rupee” shall be substituted;

(ii) for the words “one rupee” the words “two rupees” shall be substituted;

(iii) for the words “two rupees” the words “three rupees” shall be substituted.

Amendment of Article 11 of Schedule II of Act VII of 1870.

25. In Article 11 of Schedule II of the principal Act—

(a) for the entry in the first column, the following entry shall be substituted:—

“Memorandum of appeal when the appeal is from an order inclusive of an order determining any question under section 47 or section 144 of the Code of Civil Procedure and is presented”.

(b) in the third column—

(i) for the words “eight annas” the words “one rupee” shall be substituted;

(ii) for the words “two rupees” the words “four rupees” shall be substituted.

Amendment of Article 12 of Schedule II of Act VII of 1870.

26. In the third column in Article 12 of Schedule II of the principal Act, for the words “five rupees” the words “ten rupees” shall be substituted.

Amendment of Article 14 of Schedule II of Act VII of 1870.

27. In the third column in Article 14 of Schedule II of the principal Act, for the words “five rupees” the words “ten rupees” shall be substituted.

Amendment of Article 17 and insertion of new Article 17-A in Schedule II of Act VII of 1870.

28. For Article 17 of Schedule II of the principal Act the following two Articles shall be substituted:—

Number.

Proper fee.

“17. Complaint or memorandum of appeal in a suit,—

Fifteen rupees.

(i) to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court;

Fifteen rupees.

(ii) to alter or cancel any entry in a register of the names of the proprietors of revenue-paying estates;

Fifteen rupees.

(iii) for relief under section 14 of the Religious Endowment Act,

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Number.

Proper fee.

1863, or under section 91 or section 92 of the Code of Civil Procedure, 1908.

17-A. Complaint or memorandum of appeal in every suit where it is not possible to estimate at a money-value the subject-matter in dispute and which is not otherwise provided for by this Act.

When the complaint is presented to, or the memorandum of appeal is against the decree of—

(a) a Revenue Court in the district of Ganjam or Koraput; Ten rupees.

(b) any other Revenue Court, or any Court of a District Judge, Subordinate Judge or Munsif. Fifteen rupees if the value for purposes of jurisdiction does not exceed four thousand rupees, one hundred rupees if such value exceeds four thousand rupees."

Amendment of Article 18 of Schedule II of Act VII of 1870.

29. In Article 18 of Schedule II of the principal Act—

(a) for the entry in the first column, the following entry shall be substituted:—"Application under paragraph 17 or paragraph 20 of the Second Schedule to the Code of Civil Procedure, 1908";

(b) in the third column for the words "ten rupees" the words "fifteen rupees" shall be substituted.

Amendment of Article 19 of Schedule II of Act VII of 1870.

30. In the third column in Article 19 of Schedule II of the principal Act, for the words "ten rupees" the words "fifteen rupees" shall be substituted.

Amendment of Article 20 of Schedule II of Act VII of 1870.

31. In the third column in Article 20, Schedule II of the principal Act, for the words "twenty rupees" the words "thirty rupees" shall be substituted.

Amendment of Article 21 of Schedule II of Act VII of 1870.

32. In the third column in Article 21, Schedule II of the principal Act, for the words "twenty rupees" the words "thirty rupees" shall be substituted.

SCHEDULE A.

(See section 2.)

Province, year and number.	Title.	Extent of Repeal.
1	2	3
Bihar and Orissa Act I of 1922.	Bihar and Orissa Court-Fees (Amendment) Act, 1922.	The whole Act, except Sections 6, 9, 10 and 13.
Madras Act V of 1922	Madras Court-Fees (Amendment) Act, 1922.	The whole Act, except section 11 in respect of Articles 11 and 12, Schedule I.
Central Provinces Act XVI of 1935.	Court-Fees (Central Provinces Amendment) Act, 1935.	The whole Act, except section 4 (e).

SCHEDULE B.

(See section 21.)

(a) Table of rates of *ad valorem* fees leviable on plaints, etc., mentioned in Article 1 of Schedule I.

When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee.	When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
...	5	0 6	500	510	48 10
5	10	0 12	510	520	49 12
10	15	1 2	520	530	50 14
15	20	1 8	530	540	52 0
20	25	1 14	540	550	53 2
25	30	2 4	550	560	54 4
30	35	2 10	560	570	55 6
35	40	3 0	570	580	56 8
40	45	3 6	580	590	57 10
45	50	3 12	590	600	58 12
50	55	4 2	600	610	59 14
55	60	4 8	610	620	61 0
60	65	4 14	620	630	62 2
65	70	5 4	630	640	63 4
70	75	5 10	640	650	64 6
75	80	6 0	650	660	65 8
80	85	6 6	660	670	66 10
85	90	6 12	670	680	67 12
90	95	7 2	680	690	68 14
95	100	7 8	690	700	70 0
100	110	8 8	700	710	71 2
110	120	9 8	710	720	72 4
120	130	10 8	720	730	73 6
130	140	11 8	730	740	74 8
140	150	12 8	740	750	75 10
150	160	13 8	750	760	76 12
160	170	14 8	760	770	77 14
170	180	15 8	770	780	79 0
180	190	16 8	780	790	80 2
190	200	17 8	790	800	81 4
200	210	18 8	800	810	82 6
210	220	19 8	810	820	83 8
220	230	20 8	820	830	84 10
230	240	21 8	830	840	85 12
240	250	22 8	840	850	86 14
250	260	23 8	850	860	88 0
260	270	24 8	860	870	89 2
270	280	25 8	870	880	90 4
280	290	26 8	880	890	91 6
290	300	27 8	890	900	92 8
300	310	28 8	900	910	93 10
310	320	29 8	910	920	94 12
320	330	30 8	920	930	95 14
330	340	31 8	930	940	97 0
340	350	32 8	940	950	98 2
350	360	33 8	950	960	99 4
360	370	34 8	960	970	100 6
370	380	35 8	970	980	101 8
380	390	36 8	980	990	102 10
390	400	37 8	990	1,000	103 12
400	410	38 8	1,000	1,100	111 4
410	420	39 8	1,100	1,200	118 12
420	430	40 8	1,200	1,300	126 4
430	440	41 8	1,300	1,400	133 12
440	450	42 8	1,400	1,500	141 4
450	460	43 8	1,500	1,600	148 12
460	470	44 8	1,600	1,700	156 4
470	480	45 8	1,700	1,800	163 12
480	490	46 8	1,800	1,900	171 4
490	500	47 8	1,900	2,000	178 12

When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee.	When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
2,000	2,100	186 4	7,300	7,400	583 12
2,100	2,200	193 12	7,400	7,500	591 4
2,200	2,300	201 4	7,500	7,750	606 4
2,300	2,400	208 12	7,750	8,000	621 4
2,400	2,500	216 4	8,000	8,250	636 4
2,500	2,600	223 12	8,250	8,500	651 4
2,600	2,700	231 4	8,500	8,750	666 4
2,700	2,800	238 12	8,750	9,000	681 4
2,800	2,900	246 4	9,000	9,250	696 4
2,900	3,000	253 12	9,250	9,500	711 4
3,000	3,100	261 4	9,500	9,750	726 4
3,100	3,200	268 12	9,750	10,000	741 4
3,200	3,300	276 4	10,000	10,500	763 12
3,300	3,400	283 12	10,500	11,000	786 4
3,400	3,500	291 4	11,000	11,500	808 12
3,500	3,600	298 12	11,500	12,000	831 4
3,600	3,700	306 4	12,000	12,500	853 12
3,700	3,800	313 1 2	12,500	13,000	876 4
3,800	3,900	321 4	13,000	13,500	898 12
3,900	4,000	328 12	13,500	14,000	921 4
4,000	4,100	336 4	14,000	14,500	943 12
4,100	4,200	343 12	14,500	15,000	966 4
4,200	4,300	351 4	15,000	15,500	988 12
4,300	4,400	358 12	15,500	16,000	1,011 4
4,400	4,500	366 4	16,000	16,500	1,033 12
4,500	4,600	373 12	16,500	17,000	1,056 4
4,600	4,700	381 4	17,000	17,500	1,078 12
4,700	4,800	388 12	17,500	18,000	1,101 4
4,800	4,900	396 4	18,000	18,500	1,123 12
4,900	5,000	403 12	18,500	19,000	1,146 4
5,000	5,100	411 4	19,000	19,500	1,168 12
5,100	5,200	418 12	19,500	20,000	1,191 4
5,200	5,300	426 4	20,000	21,000	1,221 4
5,300	5,400	433 12	21,000	22,000	1,251 4
5,400	5,500	441 4	22,000	23,000	1,281 4
5,500	5,600	448 12	23,000	24,000	1,311 4
5,600	5,700	456 4	24,000	25,000	1,341 4
5,700	5,800	463 12	25,000	26,000	1,371 4
5,800	5,900	471 4	26,000	27,000	1,401 4
5,900	6,000	478 12	27,000	28,000	1,431 4
6,000	6,100	486 4	28,000	29,000	1,461 4
6,100	6,200	493 12	29,000	30,000	1,491 4
6,200	6,300	501 4	30,000	32,000	1,521 4
6,300	6,400	508 12	32,000	34,000	1,551 4
6,400	6,500	516 4	34,000	36,000	1,581 4
6,500	6,600	523 12	36,000	38,000	1,611 4
6,600	6,700	531 4	38,000	40,000	1,641 4
6,700	6,800	538 12	40,000	42,000	1,671 4
6,800	6,900	546 4	42,000	44,000	1,701 4
6,900	7,000	553 12	44,000	46,000	1,731 4
7,000	7,100	561 4	46,000	48,000	1,761 4
7,100	7,200	568 12	48,000	50,000	1,791 4
7,200	7,300	576 4			

When the amount or value exceeds Rs. 50,000 for every five thousand rupees or part thereof in excess of fifty thousand rupees—thirty-seven rupees eight annas.

(b) Table of rates of *ad valorem* fees leviable on plaints, etc., mentioned in Article 3 of Schedule I.

When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee.	When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
...	5	0 6	200	210	15 12
5	10	0 12	210	220	16 8
10	15	1 2	220	230	17 4
15	20	1 8	230	240	18 0
20	25	1 14	240	250	18 12
25	30	2 4	250	260	19 8
30	35	2 10	260	270	20 4
35	40	3 0	270	280	21 0
40	45	3 6	280	290	21 12
45	50	3 12	290	300	22 8
50	55	4 2	300	310	23 4
55	60	4 8	310	320	24 0
60	65	4 14	320	330	24 12
65	70	5 4	330	340	25 8
70	75	5 10	340	350	26 4
75	80	6 0	350	360	27 0
80	85	6 6	360	370	27 12
85	90	6 12	370	380	28 8
90	95	7 2	380	390	29 4
95	100	7 8	390	400	30 0
100	110	8 4	400	410	30 12
110	120	9 0	410	420	31 8
120	130	9 12	420	430	32 4
130	140	10 8	430	440	33 0
140	150	11 4	440	450	33 12
150	160	12 0	450	460	34 8
160	170	12 12	460	470	35 4
170	180	13 8	470	480	36 0
180	190	14 4	480	490	36 12
190	200	15 0	490	500	37 8

It is hereby enacted as follows:—

1. (1) This Act may be called THE COURT-FEES (PUNJAB AMENDMENT) ACT, 1922.
- (2) It extends to the Punjab.
- (3) It shall come into force on such date as the Local Government may by notification appoint in this behalf.
2. (1) The Court-Fees Act, 1870, shall be amended in its application to the Punjab in the manner hereinafter provided.
- (2) The sections and schedules hereinafter referred to by number mean the sections and schedules respectively so numbered in the Court-Fees Act, 1870, unless it shall appear to the contrary.
3. In section 4 the word "one" shall be substituted for the word "two" between the word "of" and the word "or".
4. In section 18 between the word "of" and the word "unless" for the words "eight annas" the words "one rupee" shall be substituted.
5. For Article 1 of Schedule I the following Article shall be substituted, namely:—

Number.	Proper fee.
1. Plaint, written statement, pleading, a set-off or counter-claim or memorandum of appeal (not otherwise provided for in this Act) or of cross-objection presented to any Civil or Revenue Court except those mentioned in section 3.	<p>When the amount or value of the subject-matter in dispute does not exceed five rupees. Six annas.</p> <p>When such amount or value exceeds five rupees, but does not exceed five hundred rupees, for every five rupees or part thereof in excess of five rupees up to one hundred rupees. Six annas.</p> <p>When such amount or value exceeds one hundred rupees, but does not exceed five hundred rupees for every ten rupees or part thereof in excess of one hundred rupees up to five hundred rupees. Twelve annas.</p> <p>When such amount or value exceeds five hundred rupees, for every ten rupees or part thereof up to one thousand rupees. One rupee two annas.</p> <p>When such amount or value exceeds one thousand rupees, for every one hundred rupees or part thereof in excess of one thousand rupees up to five thousand rupees. Seven rupees eight annas.</p> <p>When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees or part thereof in excess of five thousand rupees up to ten thousand rupees. Fifteen rupees.</p> <p>When such amount or value exceeds ten thousand rupees, for every five hundred rupees or part thereof in excess of ten thousand rupees up to twenty thousand rupees. Twenty-two rupees eight annas.</p> <p>When such amount or value exceeds twenty thousand rupees, for every one thousand rupees or part thereof in excess of twenty thousand rupees up to thirty thousand rupees. Thirty rupees.</p> <p>When such amount or value exceeds thirty thousand rupees, for every two thousand rupees or part thereof in excess of thirty thousand rupees up to fifty thousand rupees. Thirty rupees.</p> <p>When such amount or value exceeds fifty thousand rupees, for every five thousand rupees or part thereof in excess of fifty thousand rupees. Thirty rupees.</p>

(2) The proviso, as to the maximum, after the ninth entry in the second column of the said Article in the same schedule, shall be omitted.

6. Article 13 of Schedule I which was repealed by the Punjab Courts (Amendment) Act, 1912, in so far as it affected the Punjab is hereby re-enacted, save that for the words "Chief Court in the Punjab," the words "High Court of Judicature at Lahore," for the figures "70" the figures "44" and for the figures "1884" the figures "1918" shall be substituted; and the words and figures "as amended by the Punjab Courts Act, 1899" shall be omitted.

7. For the table of rates of *ad valorem* fees leviable on the institution of suits set forth at the end of Schedule I, the table set forth in the Schedule to this Act shall be substituted.

8. In Article 1 of Schedule II—

(1) for the words "one anna" in the third column opposite clause (a) in the second column, the words "two annas" shall be substituted;

(2) for the words "eight annas" in the third column opposite cl. (b) in the second column, the words "one rupee" shall be substituted;

(3) for clause (d) in the second column and the corresponding entry in the third column shall be substituted the following clause and entries, namely:—

(d) When presented to the High Court—

(i) Under the Indian Companies Act, 1913, for winding up
a Company

.. One hundred rupees.

(ii) Under the same Act for taking some other judicial action .. Five rupees.

(iii) In all other cases .. Two rupees.

9. In the third column of Articles 4, 5 and 7 respectively of Schedule II—

for the words "eight annas" the words "one rupee" shall be substituted.

10. In the third column of Art. 10, Schedule II—

for the words "eight annas" opposite clause (a) in the second column, the words "one rupee" shall be substituted.

11. In the third column of Art. 11 of Schedule II—

(1) for the words "eight annas" opposite clause (a) in the second column, the words "one rupee" shall be substituted.

(2) for the words "two rupees" opposite clause (b) in the second column, the words "four rupees" shall be substituted.

12. The following new article with the corresponding entry in the third column shall be added to the first column of Schedule II, namely:—

22. Plaint or memorandum of appeal in a suit by a reversioner under the Punjab Customary Law for a declaration in respect of an alienation of ancestral land

.. Twenty rupees.

SCHEDULE.

TABLE OF RATES OF *ad valorem* FEES LEVIABLE ON THE INSTITUTION OF SUITS.

(See Section 7.)

When the amount or But does not Proper fee value of the subject- exceed— (Act VII of 1922) matter exceeds— as amended				When the amount or But does not Proper fee value of the subject- exceed— (Act VII of 1922) matter exceeds— as amended.			
Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.
...	5	0	6	120	130	9	12
5	10	0	12	130	140	10	8
10	15	1	2	140	150	11	4
15	20	1	8	150	160	12	0
20	25	1	14	160	170	12	12
25	30	2	4	170	180	13	8
30	35	2	10	180	190	14	4
35	40	3	0	190	200	15	0
40	45	3	6	200	210	15	12
45	50	3	12	210	220	16	8
50	55	4	2	220	230	17	4
55	60	4	8	230	240	18	0
60	65	4	14	240	250	18	12
65	70	5	4	250	260	19	8
70	75	5	10	260	270	20	4
75	80	6	0	270	280	21	0
80	85	6	6	280	290	21	12
85	90	6	12	290	300	22	8
90	95	7	2	300	310	23	4
95	100	7	8	310	320	24	0
100	110	8	4	320	330	24	12
110	120	9	0	330	340	25	8
				340	350	26	4

When the amount or But does not Proper fee
value of the subject- exceed— (Act VII of 1922)
matter exceeds— as amended.

Rs.	Rs.	Rs.	A.
350	360	27	0
360	370	27	12
370	380	28	8
380	390	29	4
390	400	30	0
400	410	30	12
410	420	31	8
420	430	32	4
430	440	33	0
440	450	33	12
450	460	34	8
460	470	35	4
470	480	36	0
480	490	36	12
490	500	37	8
500	510	57	6
510	520	58	8
520	530	59	10
530	540	60	12
540	550	61	14
550	560	63	0
560	570	64	2
570	580	65	4
580	590	66	6
590	600	67	8
600	610	68	10
610	620	69	12
620	630	70	14
630	640	72	0
640	650	73	2
650	660	74	4
660	670	75	6
670	680	76	8
680	690	77	10
690	700	78	12
700	710	79	14
710	720	81	0
720	730	82	2
730	740	83	4
740	750	84	6
750	760	85	8
760	770	86	10
770	780	87	12
780	790	88	14
790	800	90	0
800	810	91	2
810	820	92	4
820	830	93	6
830	840	94	8
840	850	95	10
850	860	96	12
860	870	97	14
870	880	99	2
880	890	100	2
890	900	101	4
900	910	102	6
910	920	103	8
920	930	104	10
930	940	105	12
940	950	106	14
950	960	108	0
960	970	109	2
970	980	110	4
980	990	111	6
990	1,000	112	8
1,000	1,100	120	0
1,100	1,200	127	8
1,200	1,300	135	0

When the amount or But does not Proper fee
value of the subject- exceed— (Act VII of 1922)
matter exceeds— as amended.

Rs.	Rs.	Rs.	A.
1,300	1,400	142	8
1,400	1,500	150	0
1,500	1,600	157	8
1,600	1,700	165	0
1,700	1,800	172	8
1,800	1,900	180	0
1,900	2,000	187	8
2,000	2,100	195	0
2,100	2,200	202	8
2,200	2,300	210	0
2,300	2,400	217	8
2,400	2,500	225	0
2,500	2,600	232	8
2,600	2,700	240	0
2,700	2,800	247	8
2,800	2,900	255	0
2,900	3,000	262	8
3,000	3,100	270	0
3,100	3,200	277	8
3,200	3,300	285	0
3,300	3,400	292	8
3,400	3,500	300	0
3,500	3,600	307	8
3,600	3,700	315	0
3,700	3,800	322	8
3,800	3,900	330	0
3,900	4,000	337	8
4,000	4,100	345	0
4,100	4,200	352	8
4,200	4,300	360	0
4,300	4,400	367	8
4,400	4,500	375	0
4,500	4,600	382	8
4,600	4,700	390	0
4,700	4,800	397	8
4,800	4,900	405	0
4,900	5,000	412	8
5,000	5,250	427	8
5,250	5,500	442	8
5,500	5,750	457	8
5,750	6,000	472	8
6,000	6,250	487	8
6,250	6,500	502	8
6,500	6,750	517	8
6,750	7,000	532	8
7,000	7,250	547	8
7,250	7,500	562	8
7,500	7,750	577	8
7,750	8,000	592	8
8,000	8,250	607	8
8,250	8,500	622	8
8,500	8,750	637	8
8,750	9,000	652	8
9,000	9,250	667	8
9,250	9,500	682	8
9,500	9,750	697	8
9,750	10,000	712	8
10,000	10,500	735	0
10,500	11,000	757	8
11,000	11,500	780	0
11,500	12,000	802	8
12,000	12,500	825	0
12,500	13,000	847	8
13,000	13,500	870	0
13,500	14,000	892	8
14,000	14,500	915	0
14,500	15,000	937	8
15,000	15,500	960	0

When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee (Act VII of 1922) as amended.		When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee (Act VII of 1922) as amended.	
Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.
15,000	16,000	982	8	1,55,000	1,60,000	2,422	8
16,000	16,500	1,005	0	1,60,000	1,65,000	2,452	8
16,500	17,000	1,027	8	1,65,000	1,70,000	2,482	8
17,000	17,500	1,050	0	1,70,000	1,75,000	2,512	8
17,500	18,000	1,072	8	1,75,000	1,80,000	2,542	8
18,000	18,500	1,095	0	1,80,000	1,85,000	2,572	8
18,500	19,000	1,117	8	1,85,000	1,90,000	2,602	8
19,000	19,500	1,140	0	1,90,000	1,95,000	2,632	8
19,500	20,000	1,162	8	1,95,000	2,00,000	2,662	8
20,000	21,000	1,192	8	2,00,000	2,05,000	2,692	8
21,000	22,000	1,222	8	2,05,000	2,10,000	2,722	8
22,000	23,000	1,252	8	2,10,000	2,15,000	2,752	8
23,000	24,000	1,282	8	2,15,000	2,20,000	2,782	8
24,000	25,000	1,312	8	2,20,000	2,25,000	2,812	8
25,000	26,000	1,342	8	2,25,000	2,30,000	2,842	8
26,000	27,000	1,372	8	2,30,000	2,35,000	2,872	8
27,000	28,000	1,402	8	2,35,000	2,40,000	2,902	8
28,000	29,000	1,432	8	2,40,000	2,45,000	2,932	8
29,000	30,000	1,462	8	2,45,000	2,50,000	2,962	8
30,000	32,000	1,492	8	2,50,000	2,55,000	2,992	8
32,000	34,000	1,522	8	2,55,000	2,60,000	3,022	8
34,000	36,000	1,552	8	2,60,000	2,65,000	3,052	8
36,000	38,000	1,582	8	2,65,000	2,70,000	3,082	8
38,000	40,000	1,612	8	2,70,000	2,75,000	3,112	8
40,000	42,000	1,642	8	2,75,000	2,80,000	3,142	8
42,000	44,000	1,672	8	2,80,000	2,85,000	3,172	8
44,000	46,000	1,702	8	2,85,000	2,90,000	3,202	8
46,000	48,000	1,732	8	2,90,000	2,95,000	3,232	8
48,000	50,000	1,762	8	2,95,000	3,00,000	3,262	8
50,000	55,000	1,792	8	3,00,000	3,05,000	3,292	8
55,000	60,000	1,822	8	3,05,000	3,10,000	3,322	8
60,000	65,000	1,852	8	3,10,000	3,15,000	3,352	8
65,000	70,000	1,882	8	3,15,000	3,20,000	3,382	8
70,000	75,000	1,912	8	3,20,000	3,25,000	3,412	8
75,000	80,000	1,942	8	3,25,000	3,30,000	3,442	8
80,000	85,000	1,972	8	3,30,000	3,35,000	3,472	8
85,000	90,000	2,002	8	3,35,000	3,40,000	3,502	8
90,000	95,000	2,032	8	3,40,000	3,45,000	3,532	8
95,000	1,00,000	2,062	8	3,45,000	3,50,000	3,562	8
1,00,000	1,05,000	2,092	8	3,50,000	3,55,000	3,592	8
1,05,000	1,10,000	2,122	8	3,55,000	3,60,000	3,622	8
1,10,000	1,15,000	2,152	8	3,60,000	3,65,000	3,652	8
1,15,000	1,20,000	2,182	8	3,65,000	3,70,000	3,682	8
1,20,000	1,25,000	2,212	8	3,70,000	3,75,000	3,712	8
1,25,000	1,30,000	2,242	8	3,75,000	3,80,000	3,742	8
1,30,000	1,35,000	2,272	8	3,80,000	3,85,000	3,772	8
1,35,000	1,40,000	2,302	8	3,85,000	3,90,000	3,802	8
1,40,000	1,45,000	2,332	8	3,90,000	3,95,000	3,832	8
1,45,000	1,50,000	2,362	8	3,95,000	4,00,000	3,862	8
1,50,000	1,55,000	2,392	8				

And when the amount or value of the subject-matter exceeds Rs. 4,00,000 the proper fee leviable shall be Rs. 3,862 annas 8 plus Rs. 30 for each five thousand rupees or part thereof in excess of Rs. 4,00,000.

THE COURT-FEES (PUNJAB AMENDMENT) ACT, 1939.

[Received the assent of the Governor on the 24th April, 1939, and is published in the "Punjab Gazette," Extraordinary, dated the 27th April, 1939.]

PUNJAB ACT No. IV of 1939.

An Act further to amend the Court-Fees Act, 1870, in its application to the Punjab.

Preamble.

WHEREAS it has been found expedient further to amend the Court-Fees Act, 1870, in the manner hereinafter appearing;

It is hereby enacted as follows:—

Short title.

- (1) This Act may be called THE COURT-FEES (PUNJAB AMENDMENT) ACT, 1939.
- Addition of section 20-A to Act VII of 1870—The following section shall be deemed to be added as section 20-A after section 20 of the Court-Fees Act, 1870:—

"20-A. *Exemption for certain processes.*—(1) Notwithstanding anything contained in the preceding section or in the rules made thereunder, no fees shall be charged for serving and executing processes on behalf of the prosecution in any criminal proceedings taken on information presented or complaint made by a public officer acting in his official capacity.

(2) The Provincial Government may by notification determine what persons shall be deemed to be public officers for the purpose of the preceding sub-section."

XIII.—UNITED PROVINCES ACT No. III OF 1932.

THE UNITED PROVINCES COURT-FEES (AMENDMENT) ACT, 1932.

[Passed by the Local Legislature of the United Provinces of Agra and Oudh.]
(Received the assent of the Governor of the United Provinces of Agra and Oudh on April 14, 1932, and of the Governor-General on April 25th, 1932; and was published under S. 81 of the Government of India Act on May 7, 1932.)
An Act further to amend the Court-Fees Act, 1870, in its application to the United Provinces.

WHEREAS it is expedient further to amend the Court-Fees Act, 1870, in its application to the United Provinces.

AND WHEREAS the previous sanction of the Governor-General has been obtained, under section 80-A, sub-section (3), of the Government of India Act, to the passing of this Act;

It is hereby enacted as follows:—

1. (1) This Act may be called THE UNITED PROVINCES COURT-FEES (AMENDMENT) ACT, 1932.

(2) It extends to the territories for the time being administered by the Local Government of the United Provinces.

(3) It shall come into force on the first day of May, 1932, and shall remain in force up till [June 1936]¹.

2. To section 6 of the Court-Fees Act, 1870, hereinafter referred to as "the said Act", the following proviso shall be added, namely:—

Provided that where such document relates to any suit, appeal or other proceeding under the Oudh Rent Act, 1886, the Agra Tenancy Act, 1926; or the United Provinces Land Revenue Act, 1901, the proper fee shall be three-quarters of the fee indicated in either of the said schedules except where the document is of any of the kinds specified as chargeable in the first schedule and the amount or value of the subject-matter of the suit, appeal or proceeding to which it relates exceeds the value of Rs. 500:

Provided further that the fee payable in respect of any such document as is mentioned in the foregoing proviso shall not be less than that indicated by either of the said schedules before the commencement of this Act.

3. In paragraph (v) of section 7 of the said Act the word "ten" in clause (a) shall be read as "twenty" and the word "five" in clause (b) shall be read as "six".

4. For paragraph (ix) of section 7 of the said Act the following clause shall be substituted, namely:—

(ix) In suits against a mortgagee for the recovery of the property mortgaged according to the principal money expressed to be secured by the instrument of mortgage.

(ix) (a) In suits by a mortgagee to foreclose the mortgage, or where the mortgage is made by conditional sale, to have the sale declared absolute, according to the total amount claimed by way of principal and interest.

5. In section 18 of the said Act for the words "eight annas" the words "twelve annas" shall be substituted.

6. In schedule I to the said Act the following amendments shall be made, namely:—

(i) In Article 1 for the entries in the second and third columns the entries shown in the first and second columns of Schedule A to this Act shall be substituted.

(ii) In Article 6 for the words "four", "eight" and "one rupee" in the third column the words "six", "twelve" and "one rupee eight annas", respectively, shall be substituted.

(iii) In Article 7 for the words "eight" and "one rupee" in the third column the words "twelve" and "one rupee eight annas", respectively, shall be substituted.

(iv) In Article 8 for the word "eight" in the third column the word "twelve" shall be substituted.

(v) In Article 11 for the entries above the proviso in the second and third columns the following shall be substituted:—

1. When the amount or value of the property in respect of which the grant of Probate of Letters is made exceeds one thousand rupees, but does not exceed ten thousand rupees;

Two per centum on such amount or value.

and

2. When such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees;

Two and one-half per centum on such amount or value.

¹ See U. P. Act XI of 1934.

and
3. When such amount or value exceeds fifty thousand rupees, but does not exceed one lakh of rupees, for the portion of such amount or value which is in excess of fifty thousand rupees; Three per centum on such amount or value.

and
4. When such amount or value exceeds a lakh of rupees, for the portion of such amount or value which is in excess of a lakh of rupees. Four per centum on such amount or value.

(vi) In Article 12 for the entries in the first and second columns and for the first paragraph in the third column the following shall be substituted:—

12. Certificate under the Indian Succession Act, 1925.	1. When the amount or value of any debt or security specified in the certificate under section 374 of the Act does not exceed twenty thousand rupees;	Two per centum on such amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.
	and 2. When such amount or value exceeds twenty thousand rupees, but does not exceed fifty thousand rupees, for the portion of such amount or value which is in excess of twenty thousand rupees;	Two and a half per centum on such amount or value and three and a three-quarters per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.
	and 3. When such amount or value exceeds fifty thousand rupees, but does not exceed a lakh of rupees, for the portion of such amount or value which is in excess of fifty thousand rupees;	Three per centum on such amount or value and four and a half per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.
	and 4. When such amount or value exceeds a lakh of rupees, for the portion of such amount or value which is in excess of a lakh of rupees.	Four per centum on such amount or value and six per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.

(vii) For the table of *ad valorem* fees leviable on the institution of suits the Table shown in Schedule B to this Act shall be substituted.

7. In Schedule II to the said Act the following amendments shall be made, namely:—

(i) In Article 1 for the words "one anna", "eight annas" and "one rupee" in the third column the words "two annas", "twelve annas" and "one rupee and eight annas", respectively, shall be substituted: and the following clause shall be substituted for clause (d):—

(d) I. When presented to the Board of Revenue for revision of judgment or order	Three rupees.
II. When presented to a High Court—	
(1) Under the Indian Companies Act, 1913 (Act VII of 1913), for winding up a company	Fifty rupees.
(2) Under section 115 of the Code of Civil Procedure, 1908 (Act V of 1908), for revision of an order	Four rupees.
(3) In any other case	Three rupees.

(ii) In Article 1-A for the words "twelve annas", in the third column the words "one rupee two annas" shall be substituted.

(iii) In Articles 5, 6 and 7 for the word "eight", in the third column the word "twelve" shall be substituted.

(iv) In Article 10 for the words "eight annas", "one rupee" and "two rupees" in the third column, the words "twelve annas", "one rupee eight annas" and "three rupees", respectively, shall be substituted.

(v) For Article 11, the following shall be substituted:—

11. Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree, and is presented.	(a) to any Civil Court other than a High Court, or to any Revenue Court or Executive Officer other than a Commissioner of the division or Chief Controlling Revenue or Executive Authority.	Twelve annas.
	(b) to a Commissioner of the division.	Two rupees.
	(c) to a High Court or to a Chief Controlling Executive or Revenue Authority.	Three rupees.

(vi) The bracket opposite Articles 12, 13 and 14 in the second column shall be omitted and for Article 12 the following shall be substituted:—

12. Caveat.	When the amount or value of the property in respect of which the caveat is lodged—	
	(a) does not exceed five thousand rupees.	Five rupees.
	(b) exceeds five thousand rupees.	Ten rupees.

(vii) For Article 14 the following shall be substituted:—

14. Petition in a suit under the Native Converts' Marriage Dissolution Act, 1866.	Seven rupees eight annas.
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(viii) In Article 17 for the words "ten rupees" in the third column, the words "fifteen rupees" shall be substituted, and the following proviso shall be added:—

Provided that in a suit filed before a High Court under its original jurisdiction the fee chargeable under this article shall be one hundred rupees.

(ix) In Articles 18 and 19 for the word "ten" in the third column the word "fifteen" shall be substituted.

(x) In Articles 20 and 22 for the word "twenty" in the third column the word "thirty" shall be substituted.

SCHEDULE A.

When the amount or value of the subject-matter in dispute does not exceed five rupees. Six annas.

When such amount or value exceeds five rupees, for every five rupees or part thereof, in excess of five rupees up to one hundred rupees. Six annas.

When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees up to two hundred rupees. Twelve annas.

When such amount or value exceeds two hundred rupees, for every ten rupees, or part thereof, in excess of two hundred rupees up to five hundred rupees. One rupee.

When such amount or value exceeds five hundred rupees, for every ten rupees, or part thereof, in excess of five hundred rupees, up to one thousand rupees. One rupee four annas.

When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees up to five thousand rupees. Six rupees for annas.

When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees, or part thereof, in excess of five thousand rupees, up to ten thousand rupees. Twelve rupees eight annas.

When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees. Eighteen rupees twelve annas.

When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees. Twenty-five rupees.

When such amount or value exceeds thirty thousand Twenty-five rupees, rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.

When such amount or value exceeds fifty thousand Thirty-one rupees four annas, rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees:

Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be four thousand five hundred rupees.

SCHEDULE B.

Table of rates of *ad valorem* fees leviable on the institution of suits.

When the amount or value of the subject-matter exceeds—				When the amount or value of the subject-matter exceeds—			
But does not exceed—		Proper fee.		But does not exceed—		Proper fee.	
Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.
	5	0	6	440	450	40	0
5	10	0	12	450	460	41	0
10	15	1	2	460	470	42	0
15	20	1	8	470	480	43	0
20	25	1	14	480	490	44	0
25	30	2	4	490	500	45	0
30	35	2	10	500	510	46	4
35	40	3	0	510	520	47	8
40	45	3	6	520	530	48	12
45	50	3	12	530	540	50	0
50	55	4	2	540	550	51	4
55	60	4	8	550	560	52	8
60	65	4	14	560	570	53	12
65	70	5	4	570	580	55	0
70	75	5	10	580	590	56	4
75	80	6	0	590	600	57	8
80	85	6	6	600	610	58	12
85	90	6	12	610	620	60	0
90	95	7	2	620	630	61	4
95	100	7	8	630	640	62	8
100	110	8	4	640	650	63	12
110	120	9	0	650	660	65	0
120	130	9	12	660	670	66	4
130	140	10	8	670	680	67	8
140	150	11	4	680	690	68	12
150	160	12	0	690	700	70	0
160	170	12	12	700	710	71	4
170	180	13	8	710	720	72	8
180	190	14	4	720	730	73	12
190	200	15	0	730	740	75	0
200	210	16	0	740	750	76	4
210	220	17	0	750	760	77	8
220	230	18	0	760	770	78	12
230	240	19	0	770	780	80	0
240	250	20	0	780	790	81	4
250	260	21	0	790	800	82	8
260	270	22	0	800	810	83	12
270	280	23	0	810	820	85	0
280	290	24	0	820	830	86	4
290	300	25	0	830	840	87	8
300	310	26	0	840	850	88	12
310	320	27	0	850	860	90	0
320	330	28	0	860	870	91	4
330	340	29	0	870	880	92	8
340	350	30	0	880	890	93	12
350	360	31	0	890	900	95	0
360	370	32	0	900	910	96	4
370	380	33	0	910	920	97	8
380	390	34	0	920	930	98	12
390	400	35	0	930	940	100	0
400	410	36	0	940	950	101	4
410	420	37	0	950	960	102	8
420	430	38	0	960	970	103	12
430	440	39	0	970	980	105	0
				980	990	106	4

When the amount or value of the subject matter exceeds	But does not exceed	Proper fee.	When the amount or value of the subject matter exceeds	But does not exceed	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
990	1,000	107 8	8,750	9,000	557 8
1,000	1,100	113 12	9,000	9,250	570 0
1,100	1,200	120 0	9,250	9,500	582 8
1,200	1,300	126 4	9,500	9,750	595 0
1,300	1,400	132 8	9,750	10,000	607 8
1,400	1,500	138 12	10,000	10,500	626 4
1,500	1,600	145 0	10,500	11,000	645 0
1,600	1,700	151 4	11,000	11,500	663 12
1,700	1,800	157 8	11,500	12,000	682 8
1,800	1,900	163 12	12,000	12,500	701 4
1,900	2,000	170 0	12,500	13,000	720 0
2,000	2,100	176 4	13,000	13,500	738 12
2,100	2,200	182 8	13,500	14,000	757 8
2,200	2,300	188 12	14,000	14,500	776 4
2,300	2,400	195 0	14,500	15,000	795 0
2,400	2,500	201 4	15,000	15,500	813 12
2,500	2,600	207 8	15,500	16,000	832 8
2,600	2,700	213 12	16,000	16,500	851 4
2,700	2,800	220 0	16,500	17,000	870 0
2,800	2,900	226 4	17,000	17,500	888 12
2,900	3,000	232 8	17,500	18,000	907 8
3,000	3,100	238 12	18,000	18,500	926 4
3,100	3,200	245 0	18,500	19,000	945 0
3,200	3,300	251 4	19,000	19,500	963 12
3,300	3,400	257 8	19,500	20,000	982 8
3,400	3,500	263 12	20,000	21,000	1,007 8
3,500	3,600	270 0	21,000	22,000	1,032 8
3,600	3,700	276 4	22,000	23,000	1,057 8
3,700	3,800	282 8	23,000	24,000	1,082 8
3,800	3,900	288 12	24,000	25,000	1,107 8
3,900	4,000	295 0	25,000	26,000	1,132 8
4,000	4,100	301 4	26,000	27,000	1,157 8
4,100	4,200	307 8	27,000	28,000	1,182 8
4,200	4,300	313 12	28,000	29,000	1,207 8
4,300	4,400	320 0	29,000	30,000	1,232 8
4,400	4,500	326 4	30,000	32,000	1,257 8
4,500	4,600	332 8	32,000	34,000	1,282 8
4,600	4,700	338 12	34,000	36,000	1,307 8
4,700	4,800	345 0	36,000	38,000	1,332 8
4,800	4,900	351 4	38,000	40,000	1,357 8
4,900	5,000	357 8	40,000	42,000	1,382 8
5,000	5,250	370 0	42,000	44,000	1,407 8
5,250	5,500	382 8	44,000	46,000	1,432 8
5,500	5,750	395 0	46,000	48,000	1,457 8
5,750	6,000	407 8	48,000	50,000	1,482 8
6,000	6,250	420 0	50,000	55,000	1,513 12
6,250	6,500	432 8	55,000	60,000	1,545 0
6,500	6,750	445 0	60,000	65,000	1,576 4
6,750	7,000	457 8	65,000	70,000	1,607 8
7,000	7,250	470 0	70,000	75,000	1,638 12
7,250	7,500	482 8	75,000	80,000	1,670 0
7,500	7,750	495 0	80,000	85,000	1,701 4
7,750	8,000	507 8	85,000	90,000	1,732 8
8,000	8,250	520 0	90,000	95,000	1,763 12
8,250	8,500	532 8	95,000	1,00,000	1,795 0
8,500	8,750	545 0			

And the fee increases at the rate of thirty-one rupees four annas for every five thousand rupees or part thereof, for example—

Rs.	Rs.	A.
2,00,000	2,420	0
3,00,000	3,045	0
4,00,000	3,670	0
5,00,000	4,295	0
5,35,000	4,500	0

THE UNITED PROVINCES COURT-FEES (AMENDMENT) ACT (III OF 1933.)

WHEREAS it is expedient to amend the Court-Fees Act, 1870 in its application to the United Provinces for the purposes hereinafter appearing;
It is hereby enacted as follows:—

1. (1) This Act may be called THE UNITED PROVINCES COURT-FEES (AMENDMENT) Act, 1933.

(2) It extends to the territories administered by the Local Government of the United Provinces.

2. In Schedule II to the Court-Fees Act, 1870, the following Article shall be added after Article 21:

- | | | |
|------------------------|--|---------------------|
| 22. Election petition. | (a) A petition presented to the commissioner of a division or to the Collector of a district (or to some other person or tribunal specially appointed by rule in this behalf) under sub-section (2) of the section 22 of the United Provinces Municipalities Act (Act II of 1916) questioning the election of any person as a member of a Municipal Board. | One hundred rupees. |
| | (b) A petition presented to a District Judge (or to some other person or tribunal specially appointed by rule in this behalf) to a Munsif under sub-section (2) of section 18 of the District Boards Act (Act X of 1922) questioning the election of any person as a member of a District Board. | One hundred rupees. |

U. P. COURT-FEES (AMENDMENT) ACT (II OF 1936).

(Passed by the Local Legislature of the United Provinces of Agra and Oudh.)

[2nd April, 1936.]

An Act further to amend the Court-Fees Act, 1870 (VII of 1870) in its application to the United Provinces.

Preamble.

WHEREAS it is expedient further to amend the Court-Fees Act, 1870, in its application to the United Provinces;

And whereas the previous sanction of the Governor-General has been obtained, under section 80-A, sub-section (3) of the Government of India Act, to the passing of this Act;

It is hereby enacted as follows:—

Title, extent, commencement, and duration.

1. (1) This Act may be called THE UNITED PROVINCES COURT-FEES (AMENDMENT) ACT, 1936.

(2) It extends to the whole of the United Provinces.

(3) It shall come into force on the first day of May, 1936, and shall remain in force up to the thirtieth day of April, 1939.

Amendment of S. 6 of Act VII of 1870.

2. To section 6 of the Court-Fees Act, 1870, hereinafter referred to as "the said Act," the following provisos shall be added, namely:

"Provided that where such document relates to any suit, appeal or other proceeding under the Oudh Rent Act, 1886, the Agra Tenancy Act, 1926, or the United Provinces Land Revenue Act, 1901, the fee payable shall be three-quarters of the fee indicated in either of the said schedules except where the document is of any of the kinds specified as chargeable in the first schedule and the amount or value of the subject-matter of the suit, appeal or proceeding to which it relates exceeds Rs. 500:

Provided further that the fee payable in respect of any such document as is mentioned in the foregoing proviso shall not be less than that indicated by either of the said Schedules before the commencement of this Act."

Amendment of paragraph (v) of S. 7 of Act VII of 1870.

3. In paragraph (v) of section 7 of the said Act for the word "ten" in cl. (a) the word "twenty" shall be substituted and for the word "five" in cl. (b) the word "six" shall be substituted.

Amendment of paragraph (ix) of S. 7 of Act VII of 1870.

4. For paragraph (ix) of section 7 of the said Act the following shall be substituted, namely:—

"(ix) In suits against a mortgagee for the recovery of the property mortgaged; according to the principal money expressed to be secured by the instrument of mortgage.

(ix) (a) In suits by a mortgagee to foreclose the mortgage, or where the mortgage is made by conditional sale, to have the sale declared absolute; according to the total amount claimed by way of principal and interest."

Amendment of S. 18 of Act VII of 1870.

5. In section 18 of the said Act for the words "eight annas" the words "twelve annas" shall be substituted.

Amendment of Sch. I to Act VII of 1870.

6. In Sch. I to the said Act the following amendments shall be made, namely:—

(i) In Art. 1 for the entries in the second and third columns, the entries shown in the first and second columns, respectively, of Sch. A to this Act shall be substituted.

(ii) After Art. 2 the following shall be added as Art. 2-A, namely:—

"2-A. Application or written statement by a defendant in a suit for partition praying for partition of his share in the property sought to be partitioned.

The same fee which would have been payable on a plaint if such defendant instituted a suit for partition."

(iii) In Art. 6 for the words "four," "eight" and "one rupee" in the third column, the words "six," "twelve" and "one rupee eight annas," respectively, shall be substituted.

(iv) In Art. 7 for the words "eight" and "one rupee" in the third column, the words "twelve" and "one rupee eight annas," respectively, shall be substituted.

(v) In Art. 8 for the word "eight" in the third column the word "twelve" shall be substituted.

(vi) In Art. 11 for the entries above the proviso in the second column and the entries in the third column, the following shall be substituted:—

"When the amount or value of the property in respect of which the grant of Probate or Letters is made exceeds one thousand rupees, but does not exceed ten thousand rupees;

Two per centum on such amount or value.

When such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees;

Two and one-half per centum on such amount or value.

When such amount or value exceeds fifty thousand rupees, but does not exceed one lakh of rupees;

Three per centum on such amount or value.

When such amount or value exceeds a lakh of rupees, for the portion of such amount or value which is in excess of a lakh of rupees.

Four per centum on such amount or value.

(vii) In Art. 12 for the entries in the first and second columns and for the first paragraph in the third column, the following shall be substituted:

"12. Succession certificate under the Indian Succession Act, 1925.

When the amount or value of the debt or security or the aggregate amount of the debts or securities specified in the certificate under S. 374 of the Act does not exceed twenty thousand rupees;

Two per centum on such amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act.

When such amount or value exceeds twenty thousand rupees, but does not exceed fifty thousand rupees, for the portion of such amount or value which is in excess of twenty thousand rupees;

Two and a half per centum on such amount or value and three and a three-quarters per centum on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act.

When such amount or value exceeds fifty thousand rupees, but does not exceed a lakh of rupees, for the portion of such amount or value which is in excess of fifty thousand rupees.

Three per centum on such amount or value and four and a half per centum on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act.

When such amount or value exceeds a lakh of rupees, for the portion of such amount or value which is in excess of a lakh of rupees.

Four per centum on such amount or value and six per centum on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act."

(viii) For the table of *ad valorem* fees leviable on the institution of suits, the table shown in Sch. B to this Act shall be substituted.

Amendment of Sch. II to Act VII of 1870.

7. In Schedule II to the said Act the following amendments shall be made, namely:—

(i) In Article 1 for the words "one anna," "eight annas," and "one rupee" in the third column the words "two annas," "twelve annas" and "one rupee and eight annas," respectively, shall be substituted; and the following shall be substituted for Clause (d) in the second column and the entry against the same in the third column:

"(d) When presented to the Board of Revenue for revision of a judgment or order. Three rupees.

(e) When presented to a High Court:

(1) Under the Indian Companies Act, 1913 (Act VII of 1913), for winding up a company. Fifty rupees.

(2) Under section 115 of the Code of Civil Procedure, 1908 (Act V of 1908), for revision of an order. Four rupees.

(3) In any other case.

Three rupees."

(ii) In Article 1-A for the words "twelve annas" in the third column the words "one rupee two annas" shall be substituted.

(iii) In Articles 5, 6 and 7 for the word "eight" in the third column the word "twelve" shall be substituted.

(iv) In Article 10 for the words "eight annas" "one rupee" and "two rupees" in the third column the words "twelve annas" "one rupee eight annas" and "three rupees" respectively, shall be substituted.

(v) For Article 11, the following shall be substituted:

11. Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree and is presented. (a) to any Civil Court other than a High Court or to any Revenue Court or Executive Officer other than a Commissioner of the division or Chief Controlling Revenue or executive Authority; Twelve annas.

(b) to a Commissioner of the division; Two rupees.

(c) to a High Court or to a Chief Controlling Executive or Revenue Authority. Three rupees."

(vi) The bracket opposite Articles 12, 13 and 14 in the second column shall be omitted and for Article 12 the following shall be substituted:

"12. Caveat

Where the amount or value of the property in respect of which the caveat is lodged—

(a) does not exceed five thousand rupees; Five rupees.

(b) exceeds five thousand rupees. Ten rupees."

(vii) For Article 14 the following shall be substituted, namely,—

"14. Petition in a suit under the Native Converts' Marriage Dissolution Act, 1886. Seven rupees eight annas."

(viii) In Article 17 for the words "Ten rupees" in the third column, the words "Fifteen rupees" shall be substituted, and the following proviso shall be added:

"Provided that in a suit filed before a High Court under its original jurisdiction the fee chargeable under this article shall be one hundred rupees."

(ix) For Article 18 the following shall be substituted, namely:—

"18. Application under Paragraph 17 or paragraph 20 of the second schedule of the Code of Civil Procedure, 1908. Fifteen rupees."

(x) In Article 19 for the word "ten" in the third column, the word "fifteen" shall be substituted.

(xi) In Articles 20 and 21 for word "twenty" in the third column the word "thirty" shall be substituted.

8. Nothing in this Act shall apply to any application or proceeding under the United Provinces Agriculturists Relief Act, 1934, the United Provinces Encumbered Estates Act, 1934, and the United Provinces Regulation of Execution Act, 1934, and the United Provinces Regulation of Sales Act, 1934, which shall continue to be governed by the Court-Fees Act, 1870, as if it had not been amended by this Act.

SCHEDULE A.

When the amount or value of the subject-matter in dispute does not exceed five rupees.

Six annas.

When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.

Six annas.

When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to two hundred rupees.

Twelve annas.

When such amount or value exceeds two hundred rupees, for every ten rupees, or part thereof, in excess of two hundred rupees, up to five hundred rupees.

One rupee.

When such amount or value exceeds five hundred rupees, for every ten rupees, or part thereof, in excess of five hundred rupees, up to one thousand rupees.

One rupee four annas.

When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to five thousand rupees.

Six rupees four annas.

When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees, or part thereof, in excess of five thousand rupees, up to ten thousand rupees.

Twelve rupees eight annas.

When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.

Eighteen rupees twelve annas.

When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees.

Twenty-five rupees.

When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.

Twenty-five rupees.

When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees:

Thirty-one rupees four annas.

Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be four thousand five hundred rupees.

U. P. COURT-FEES (AMENDMENT) ACT, (XIX OF 1938).

[Assented by Governor on January 9, 1939 and published in U. P. Gazette, dated January, 14, 1939.]

An Act further to amend the Court-Fees Act, 1870 (as amended by the United Provinces Court-Fees Amendment Act, 1936), in its application to the United Provinces.

WHEREAS it is expedient further to amend the Court-Fees Act, 1870 (as amended by the United Provinces Court-Fees Amendment Act, 1936) in its application to the United Provinces in the manner

Preamble.

hereinafter appearing;

It is hereby enacted as follows:

Short title, extent and commencement.

1. (1) This Act may be called the United Provinces Court-Fees (Amendment) Act, 1938.

(2) It extends to the whole of the United Provinces.

(3) It shall come into force on such date as the Provincial Government may by notification direct, and shall remain in force up to the thirtieth day of June, 1941.

Amendment of Section 1 (3), United Provinces Act II of 1936.

2. In sub-section (3) of section 1 of the United Provinces Court-Fees (Amendment) Act, 1936, for the words, 'April, 1939', the words 'June 1941', shall be substituted.

Amendment of Section 2, Act VII of 1870.

3. For section 2 of the Court-Fees Act, 1870, the following section shall be substituted, namely:

"Definitions.—2. In this Act unless there is anything repugnant in the subject or context—

(i) "Appeal" includes a cross-objection.

(ii) "Collector" includes any officer, not below the rank of a Deputy Collector, appointed by the Collector, with the previous sanction of the Chief Controlling Revenue Authority, to perform the functions of a Collector under this Act.

(iii) "Revenue" means land revenue, as recorded in the Collector's register and does not include cesses of any kind.

(iv) "Suit" includes a first or second appeal from a decree in a suit."

4. The existing section 6 of the Court-Fees Act 1870 (as amended by section 2 of the United Provinces Court-Fees Amendment Act, 1936), shall be numbered as sub-section (1) of section 6, from the first proviso thereto the words "the document is of any of the kinds specified as chargeable in the first schedule and" shall be omitted, and the following sub-sections shall be added to it as sub-sections (2), (3), (4), (5), and (6) namely:—

Amendment of Section 6, Act VII of 1870, as amended by Section 2 of the United Provinces Act II of 1936.

"(2) Notwithstanding the provisions of sub-section (1), a Court may receive a plaint or memorandum of appeal in respect of which an insufficient fee has been paid but no such plaint or memorandum of appeal shall be acted upon unless the plaintiff or the appellant, as the case may be, makes good the deficiency in court-fee within such time as may from time to time be fixed by the Court.

(3) If a question of deficiency in court-fee in respect of any plaint or memorandum of appeal is raised by an officer mentioned in section 24-A the Court shall, before proceeding further with the suit or appeal, record a finding whether the court-fee paid is sufficient or not. If the Court finds that the court-fee paid is insufficient, it shall call upon the plaintiff or the appellant as the case may be, to make good the deficiency within such time as it may fix, and in case of default shall reject the plaint or memorandum of appeal:

Provided that the Court may, for sufficient reasons to be recorded proceed with the suit or appeal if the plaintiff or the appellant, as the case may be, gives security, to the satisfaction of the Court, for payment of the deficiency in court-fee within such further time as the Court may allow. In no case, however, shall judgment be delivered unless the deficiency in court-fee has been made good, and if the deficiency is not made good within such time as the Court may from time to time allow, the Court may dismiss the suit or appeal.

(4) Whenever a question of the proper amount of court-fee payable is raised otherwise than under sub-section (3), the Court shall decide such question before proceeding with any other issue.

(5) In case the deficiency in court-fee is made good within the time allowed by the Court the date of the institution of the suit or appeal shall be deemed to be the date on which the suit was filed or the appeal presented.

(6) In all cases in which the report of the officer referred to in sub-section (3) is not accepted by the Court, a copy of the findings of the Court shall forthwith be sent to the Chief Inspector of Stamps."

Insertion of new Sections 6-A, 6-B, and 6-C after Section 6.

5. After section 6 of the Court-Fees Act, 1870, the following sections shall be inserted as sections 6-A, 6-B, and 6-C. namely:—

"6-A. (1) Any person called upon to make good a deficiency in court-fee may appeal against such order as if it were an order appealable under section 104 of the Code of Civil Procedure.

The party appealing shall file with the memorandum of appeal, a certified copy of the plaint together with that of the order appealed against.

(2) In case an appeal is filed under sub-section (1), and the plaintiff does not make good the deficiency, all proceedings in the suit shall be stayed, and all interim orders made, including an order granting an injunction or appointing a receiver, shall be discharged.

(3) A copy of the memorandum of appeal shall be sent forthwith by the appellate Court to the Chief Inspector of Stamps.

(4) If such order is varied or reversed in appeal, the appellate Court shall if the deficiency has been made good before the appeal is decided, grant to the appellant a certificate, authorizing him to receive back from the Collector such amount as is determined by the appellate Court to have been paid in excess of the proper court-fee.

(5) The Court may make such order for the payment of costs of such appeal as it deems fit, and where such costs are payable to the Government, they shall be recoverable as arrears of land revenue.

"6-B. (1) If the order of the Court passed under sub-section (3) of section 6 is at variance with the opinion of the officer by whom the question of deficiency in court-fee has been raised, the Chief Inspector of Stamps may, within three months from the date of receipt of such order, move, by an application in writing, the Court to which an appeal lies from a decree in the suit or appeal in which such order has been passed, for revision of such order.

(2) If such Court is of opinion that the proper court-fee has not been paid on the plaint or the memorandum of appeal to which such order relates, it shall record a declaration to that effect and determine the amount of deficiency in court-fee. No appeal shall lie from such order:

Provided that no such declaration shall be made until the party liable to pay the court-fee has had an opportunity of being heard.

(3) The Court, while recording a declaration under sub-section (2) may make such order for the payment of costs as it deems fit. Where such costs are payable to the Government, they shall be recoverable in the manner laid down in sub-section (4) for the recovery of deficiency in court-fee.

(4) When a declaration has been recorded under sub-section (2), the Court recording the same shall, unless the suit or appeal has come up in appeal before such Court, in which case the deficiency in court-fee shall be recovered in the manner laid down in sub-section (ii) of section 12, send forthwith a copy of such declaration to the Court which passed the order under sub-section (3) of section 6. Such Court shall, if the suit or appeal is still pending before it, follow the procedure prescribed in sub-section (3) of section 6. If the suit or appeal has already been disposed of, the Court shall forward a copy of such declaration to the Collector who shall recover the deficiency from the party concerned as if it were an arrear of land revenue.

"6-C. (1) When the Chief Controlling Revenue Authority is of opinion that the court-fee paid on any document filed in any Civil Court in a pending suit, appeal or other proceeding is insufficient, and that the question is one of general importance and no action under section 6-B has been taken, it may refer the case, with its own opinion thereon, to the High Court to which such Civil Court is subordinate.

(2) Every such case shall be decided by not less than two Judges of the High Court to which it is referred.

(3) The High Court upon the hearing of any such case shall decide the question raised thereby and shall deliver its judgment thereon containing the grounds on which the decision is founded.

(4) If the High Court finds that the court-fee paid was insufficient, the procedure prescribed by sub-section (4) of section 6-B for realization of the deficiency shall be followed as if the decision of the High Court were a declaration under that section."

Amendment of S. 7 (iv),
Act VII of 1870.

6. For sub-section (ii) of section 7 of the Court-Fees Act, 1870, the following shall be substituted:—

"(ii) (a) In suits for maintenance and annuities or other sums payable periodically:— according to the value of the subject-matter of the suit and such value shall be deemed to be ten times the amount claimed to be payable for one year;

Provided that in suits for personal maintenance by females and minors, such value shall be deemed to be the amount claimed to be payable for one year.

(b) In suits for reduction or enhancement of maintenance and annuities or other sums payable periodically—according to the value of the subject-matter of the suit and such value shall be deemed to be ten times the amount sought to be reduced or enhanced for one year."

Amendment of S. 7 (iv),
Act VII of 1870.

7. For sub-section (iv) of section 7 of the Court-Fees Act, 1870, the following sub-section shall be substituted namely:—

"(iv) In suits—

(a) to obtain a declaratory decree or order, where consequential relief is prayed; and

(b) for accounts;

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal:

Provided that in suits falling under clause (a), where the relief sought is with reference to any immovable property, such amount shall be the value of the consequential relief and if such relief is incapable of valuation, then the value of the immovable property computed in accordance with sub-section (v), (v-A) or (v-B) of this section as the case may be:

Provided, further, that in suits falling under clause (b), such amount shall be the approximate sum due to the plaintiff and the said sum shall form the basis for calculating (or determining) the valuation of an appeal from a preliminary decree passed in the suit.

"(iv-A) In suits for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market value, or an instrument securing money or other property having such value.

(1) where the plaintiff or his predecessor-in-title was a party to the decree or the instrument, according to the value of the subject-matter, and

(2) where he or his predecessor-in-title was not a party to the decree or instrument, according to one-fifth of the value of the subject-matter, and such value shall be deemed to be—

if the whole decree or instrument is involved in the suit, the amount for which or value of the property in respect of which the decree was passed or the instrument executed, and if only a part of the decree or instrument is involved in the suit, the amount or value of the property to which such part relates.

Explanation.—"The value of the property," for the purposes of this sub-section, shall be the market value, which in the case of immovable property shall be deemed to be the value as computed in accordance with sub-sections (v), (v-A) or (v-B) as the case may be.

"(iv-B) In suits—

(a) for a right to some benefit (not herein otherwise provided for) to arise out of land;

(b) to obtain an injunction;

(c) to establish an adoption or to obtain a declaration that an alleged adoption is valid;

(d) to set aside an adoption or to obtain a declaration that an alleged adoption is invalid or never, in fact, took place;

(e) to set aside an award not being an award mentioned in section 8; according to the amount at which the relief sought is valued in the plaint:

Provided that in the case of (a), (b) and (c) such amount shall be not less than one-tenth of the market value of the property involved in or affected by the relief sought or Rs. 50 whichever is greater, and in the case of the remaining classes of suits not less than one-fifth of such value or Rs. 200 whichever is greater:

And provided further that in the case of (a) and (b) the amount of court-fee leviable shall in no case exceed Rs. 200.

Explanation 1.—When the relief sought is with reference to any immovable property the market value of such property shall be deemed to be the value computed in accordance with sub-section (v), (v-A) or (v-B) of this section as the case may be.

Explanation 2.—In the case of suits—

(i) falling under clauses (a) and (b) the property which is affected by the relief sought, and where properties of both the plaintiff and defendant are affected the property of the plaintiff so affected

(ii) falling under clauses (c) and (d) the property to which title by succession or otherwise may be diverted or affected by the alleged adoption, and

(iii) falling under clause (e) the property which forms the subject-matter of the award,

shall be deemed to be the property involved in or affected by the relief sought within the meaning of the proviso to this sub-section.

“(iv-C) In suits—

(a) for the restitution of conjugal rights;

(b) for establishing or annulling or dissolving a marriage;

(c) for establishing a right to the custody or guardianship of any person such as minor, including guardianship for the purpose of marriage;

according to the amount at which the relief sought is valued in the plaint but in no case shall such amount be less than Rs. 200.

Explanation.—Clauses (a) and (b) do not include petitions or suits under any special Act relating to the dissolution of marriage.”

Amendment of sub-section (v) of section 7, Act VII of 1870, as amended by section 3, United Provinces Act, II of 1936.

8. For sub-section (v) of section 7 of the Court-Fees Act, 1870, the following shall be substituted namely:—

“(v) In suits for the possession of land, buildings or gardens—

according to the value of the subject-matter; and such value shall be deemed to be—

(I) where the subject-matter is land, and

(a) where the land forms an entire estate or a definite share of an estate paying annual revenue to Government, or forms part of such an estate, and is recorded in the Collector's register as separately assessed with such revenue and such revenue is permanently settled,

thirty times the revenue so payable;

(b) where the land forms an entire estate or a definite share of an estate paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid and such revenue is settled but not permanently,

ten times the revenue so payable;

(c) where the land pays no such revenue or has been partially exempted from such payment or is charged with any fixed payment in lieu of such revenue, and nett profits have arisen from the land during the three years immediately preceding the date of presenting the plaint,

twenty times the annual average of such net profits;

but when no such net profits have arisen therefrom, the market-value, which shall be determined by multiplying by twenty the annual average net profits of similar land for the three years immediately preceding the date of presenting the plaint;

(d) where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and does not come under clauses (a), (b) or (c) above—the market-value of the land, which shall be determined by multiplying by fifteen the rental value of the land including assumed rent on proprietary cultivation, if any;

(II) where the subject-matter is a building or garden—

according to the market-value of the building or garden, as the case may be.

Explanation.—The word “estate” as used in this sub-section, means any land subject to the payment of revenue for which the proprietor or farmer or raiyat shall have executed a separate engagement to Government or which, in the absence of such engagement shall have been separately assessed with revenue.”

Insertion of new sub-sections after sub-section (v) of section 7, Act VII of 1870, as amended by the foregoing clause.

9. After sub-section (v) of section 7 of the Court-Fees Act, 1870, the following shall be inserted as sub-sections (v-A) and v-B), namely:—

“(v-A) In suits for possession—
(1) of superior proprietary rights where under-proprietary or sub-proprietary rights exist in the land—

according to the market value of the subject-matter, and such value shall be determined by multiplying by fifteen the annual nett profits of the superior proprietor;

(2) of under-proprietary or sub-proprietary land as such—
according to the value of the subject-matter, and such value shall be determined by multiplying by ten the annual under-proprietary or sub-proprietary rent, as the case may be, recorded in the Collector's register as payable for the land for the year next before the presentation of the plaint.

If no such rent is recorded in the Collector's register, the value shall be determined in the manner laid down in clause (c) of sub-Section (v) of this section save that the multiple will be ten.

Explanation.—Land held by any permanent lessees shall be treated for the purposes of this sub-section as under-proprietary or sub-proprietary land.”

“(v-B) In suits for possession of land between rival tenants and by tenants against trespassers—

according to the value of the subject-matter and such value shall be determined if such land is the land of

(a) a permanent tenure holder or a fixed rate tenant—
by multiplying by twenty the annual rent recorded in the Collector's register as payable for the land for the year next before the presentation of the plaint;

(b) an ex-proprietary or occupancy tenant—by multiplying by two such rent in case of suits for possession of land between rival tenants, and by annual rent in suits by tenants against trespassers.

(c) any other tenant—by annual rent.

If no such rent is recorded in the Collector's register, the value shall be determined in the manner laid down in clause (c) of sub-section (v) of this section save that the multiple shall be that entered in clauses (a), (b) and (c) of this sub-section according as the class of tenancy affected is governed by clauses (a) or (b) or (c) of this sub-section.”

Amendment of sub-section (vi) of section 7, Act VII of 1870.

10. In sub-section (vi) of section 7 of the Court-Fees Act, 1870, the word “building” shall be substituted for the word “house.”

Insertion of a new sub-section after sub-section (vi) of section 7, Act VII of 1870.

11. After sub-section (vi) of section 7 of the Court-Fees Act, 1870, the following sub-section shall be inserted; as sub-section (vi-A), namely:—

“(vi-A) In suits for partition—

according to one-quarter of the value of the plaintiff's share of the property, and according to the full value of such share if on the date of presenting the plaint the plaintiff is out of possession of the property of which he claims to be a coparcener or co-owner and his claim to be a co-parcener or co-owner on such date is denied.

Explanation.—The value of the property for the purposes of this sub-section shall be the market-value which in the case of immovable property shall be deemed to be the value as computed in accordance with sub-section (v), (v-A) or (v-B) as the case may be.”

Amendment of sub-section (viii) of section 7, Act VII of 1870.

12. For sub-section (viii) of section 7 of the Court-Fees Act, 1870, the following sub-section shall be substituted, namely:—

“(viii) in suits to set aside or restore an attachment including suits to set aside an order passed under Order 21, Rules 60, 61 or 62 of the Code of Civil Procedure, according to half of the amount for which attachment was made, or according to half of the value of the property or interest attached, whichever is less.

Explanation.—The value of the property or interest for the purposes of this sub-section, shall be the market-value which in the case of immovable property or interest in such property shall be deemed to be the value as computed in accordance with sub-section (v), (v-A) or (v-B) as the case may be.”

Amendment of clause (d) of sub-sections (x) of section 7, Act VII of 1870.

13. In clause (d) of sub-section (x) of section 7 of the Court-Fees Act, 1870, a comma shall be substituted for the semi-colon at the end and the following shall be added thereafter, namely:

"and such value shall be the market-value which in the case of immovable property shall be deemed to be the value as computed in accordance with sub-section (v), (v-A) or (v-B) as the case may be."

Amendment of sub-section (xi) of section 7, Act VII of 1870. 14. In sub-section (xi) of section 7 of the Court-Fees Act, 1870, the word "and" at the end of clause (e) and the dash at the end of clause (f) shall be deleted and the following two clauses shall be added after clause (f), namely:—

"(g) for the commutation of rent and
(h) for determination of rent—".

A comma shall be substituted for the full-stop occurring at the end of this sub-section and the following words shall be added at the end of the sub-section:—

"except in the case of suits falling under clause (h) in which, according to twice the amount claimed by the plaintiff to be the annual rent."

Amendment of section 8, Act VII of 1870.

15. In section 8 of the Court-Fees Act, 1870, the following words shall be inserted between the words "public purposes" and "shall be computed," namely:—

"or against an award made by a tribunal constituted under the United Provinces Town Improvement Act or any other similar statute."

Amendment of section 9, Act VII of 1870.

16. In the beginning of section 9 of the Court-Fees Act, 1870, the following sentence shall be added namely:—

"in every suit the plaintiff shall file with the plaint a statement, in such form as may be prescribed for the purpose, of particulars and valuation of the subject-matter of the suit, unless such particulars and valuation are contained in the plaint itself."

Amendment of section 11, Act VII of 1870.

17. For the second paragraph of section 11 of the Court-Fees Act, 1870, the following paragraphs shall be substituted namely:—

"Where a decree directs an inquiry as to mesne profits which have accrued in respect of the property during a period prior to the institution of the suit, if the profits ascertained on such inquiry exceed the profits claimed, no final decree shall be passed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If such difference is not paid within such time as the Court shall fix, the claim for the excess shall be dismissed, unless the Court, for sufficient cause, extends the time for payment.

Where a decree directs an inquiry as to mesne profits from the institution of the suit, and a final decree is passed in accordance with the result of such inquiry, the decree shall not be executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted therefor."

Amendment of sub-section (ii) of section 12, Act VII of 1870.

18. For sub-section (ii) of section 12 of the Court-Fees Act, 1870, the following sub-section shall be substituted namely:—

"(ii) But whenever any such suit comes before a Court of appeal reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay, within such time as may be fixed by it, so much additional fee as would have been payable had the question been rightly decided. If such additional fee is not paid within the time fixed and the defaulter is the appellant, the appeal shall be dismissed, but if the defaulter is the respondent, the Court shall inform the Collector who shall recover the deficiency as if it were an arrear of land revenue."

Amendment of section 17, Act VII of 1870.

19. For section 17 of the Court-Fees Act, 1870, the following section shall be substituted, namely:—

"17 (1) In any suit in which two or more separate and distinct causes of action are joined, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees with which the plaints or memoranda of appeal would be chargeable under this Act if separate suits were instituted in respect of each such cause of action:

Provided that nothing in this sub-section shall be deemed to affect any power conferred by or under the Code of Civil Procedure, to order separate trials.

(2) When more reliefs than one based on the same cause of action are sought in the alternative the fee shall be paid according to the value of the relief in respect of which the largest fee is payable."

Amendment of section 19 (iii), Act VII of 1870.

20. For clause (iii) of section 19 of the Court-Fees Act, 1870, the following shall be substituted, namely:—

"(iii) Written statement not being one mentioned in Article 2-A, Schedule I, nor one containing a counter-claim, set-off, or a prayer other than a prayer for instalments or relating to costs of the suit."

Amendment of section 19-A, Act VII of 1870.

21. At the end of clause (c) of section 19-A of the Court-Fees Act, 1870, a comma shall be substituted for the full-stop and the following words shall be added, namely:—

"after deducting one anna for each rupee or fraction thereof."

Amendment of section 19-H, Act VII of 1870.

"Provided that no such motion shall be made after the expiration of one year from the date of the exhibition of the inventory required by section 317 of the Indian Succession Act."

Amendment of sub-section (1) of section 19-I, Act VII of 1870.

"(1) No order entitling the petitioner to the grant of Probate or Letters of Administration shall be made upon an application for such grant until the petitioner has filed in the Court, in the form set forth in the third schedule, a valuation, according to the market-rates current on the date of the application of all the assets and liabilities of the deceased in British India, at the time of the latter's death, and the Court is satisfied that the fee mentioned in Article 11 of the First schedule has been paid on such valuation.

Explanation.—If at the time of his death, the deceased was a member of a joint Hindu family governed by the Mitakshara Law, such portion of the assets and liabilities of the family as would have been allotted to the deceased in a partition made immediately before his death, shall be deemed to be the assets and liabilities of the deceased within the meaning of this sub-section."

Amendment of heading of Chapter IV and substitution of sections 20 and 21 in place of the sections 19-H (8), 20—23, 27, 34 (1) and 34 (2) and deletions of sections 22, 23 and 27, Act VII of 1870.

22. In section 19-H of the Court-Fees Act, 1870, the following proviso shall be substituted for the existing proviso to sub-section (iv), and sub-section (8) shall be deleted:

23. For sub-section (1) of section 19-I of the Court Fees Act, 1870, the following sub-section shall be substituted, namely:—

24. (1) For the heading of Chapter IV the words "Power to make rules" shall be substituted for "Process fees;" and the following shall be substituted for sections 20 and 21:—

"20. The High Court may make rules to provide for or regulate all or any of the following matters, namely:—

(a) the fees payable for serving and executing processes issued by such Court in its appellate jurisdiction and by the Civil and Criminal Courts established within the local limits of such jurisdiction;

(b) the remuneration of persons employed by the Courts mentioned in clause (a) in the service or execution of processes;

(c) the fixing by District and Sessions Judges and District Magistrates of the number, of process-servers necessary to be employed for the service and execution of processes issued from their respective Courts and Courts subordinate thereto; and

(d) the display in each Court of a table in the English and Vernacular languages showing the fees payable for the service and execution of processes.

All such rules shall be subject to the confirmation of the Provincial Government and on such confirmation, shall be published in the Official Gazette and shall thereupon have effect as if enacted in this Act.

"21. (1) The Chief Controlling Revenue Authority may, with the previous sanction of the Provincial Government, make rules consistent with this Act to provide for or regulate all or any of the following matters namely:—

(a) the fees chargeable for serving and executing processes issued by the Chief Controlling Revenue Authority and by the Revenue Courts established within the local limits of its jurisdiction;

(b) the remuneration of the persons necessary to be employed for the service and execution of such processes;

(c) the fixing by Collectors of the number of persons necessary to be employed for the service and execution of such processes;

(d) the guidance of Collectors in the exercise of the powers conferred on them by sub-section (iii) of section 19-H;

(e) the supply of stamps to be used under this Act;

(f) the number of stamps to be used for denoting any fee chargeable under this Act;

(g) the keeping of accounts of all stamps used under this Act;

(h) the circumstances in which stamps may be held to be damaged or spoiled;

(i) the circumstances in which and the manner in which, allowance for used, damaged or spoiled stamps may be made; and

(j) the regulation of the sale of stamps to be used under this Act, the person by whom alone such stamps may be sold, and the duties and remuneration of such persons:

Provided that, in the case of stamps used under section 3 in a High Court, such rules shall be made with the concurrence of the Chief Justice of such Court.

(2) All rules made under this section shall be published in the Official Gazette, and on such publication, shall have effect as if enacted in this Act."

(II) Sections 22, 23 and 27 of the Court-Fees Act, 1870, shall be deleted.

Insertion of a new section at the beginning of Chapter V, Act VII of 1870.

25. At the beginning of Chapter V of the Court-Fees Act, 1870, the following shall be inserted as section 24-A, namely:—

"24-A. The levy of fees under this Act shall be under the general control and superintendence of the Chief Controlling Revenue Authority, who may be assisted in their supervision thereof by the Chief Inspector of Stamps and by as many Inspectors of Stamps as the Provincial Government may appoint in this behalf or by any other subordinate agency appointed for the purpose.

The Chief Inspector of Stamps and Inspectors of Stamps shall have access to all records, and shall be furnished with all such information as may be required by them for the performance of their duties under this Act."

Insertion of new section 30-A, after section 30, Act VII of 1870.

26. After section 30 of the Court-Fees Act, 1870, the following shall be inserted as section 30-A namely:—

"30-A. Where allowance is made in this Act, for damaged or spoiled stamps or where refund is permitted on the strength of a certificate granted by a Court, the Collector may, on the application of the holder of the same and after satisfying himself about the genuineness of the certificate or the stamps produced, give in lieu thereof the same amount or value in stamps of the same or any other description, or, if the applicant desires, the same amount or value in money, provided that in the latter case a deduction shall be made of one anna for each rupee or fraction thereof. No such deduction shall, however, be made where refund is claimed in respect of Court-fee paid in pursuance of an order of the Court which has been varied or reversed in appeal."

Amendment of section 34, Act VII of 1870.

27. For section 34 of the Court-Fees Act, 1870, the following shall be substituted, namely:—

"34. Any person appointed to sell stamps who disobeys any rule made under this Act, and any person, not so appointed, who sells or offers for sale any stamps; shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees or with both."

Deletion of section 8 of the United Provinces Act, II of 1936.

28. Section 8 of the United Provinces Court-Fees (Amendment) Act, 1936, shall be deleted.

Amendment of Schedule I, Act VII of 1870, as amended by section 6 of the United Provinces Act, II of 1936.

29. In schedule I to the Court-Fees Act, 1870, as amended by section 6 of the United Provinces Court-Fees Amendment Act, 1936, the following amendments shall be made namely:—

(i) In the first column of Article 1, the words "or of a cross-objection" shall be omitted.

(ii) In the proviso to Article 1, the words "ten thousand" shall be substituted for words "four thousand five hundred", and in the second column of the article, the words "two hundred rupees" wherever they occur be substituted by the words "three hundred rupees" and in the last column of this article, the words "fourteen annas", "seven rupees eight annas", "fifteen rupees", "twenty-two rupees eight annas", "thirty rupees" and "thirty-seven rupees eight annas" shall be substituted respectively for the words "one rupee", "six rupees four annas", "twelve rupees eight annas", "eighteen rupees twelve annas", "twenty-five rupees" and "thirty-one rupees four annas".

(iii) After Article 2-A the following shall be inserted as article 2-B, namely:—

"2-B. — Memorandum of appeal filed under Section 23 of the United Provinces Agriculturists' Relief Act, 1934.

the same fee as would be leviable on a memorandum of appeal, under Article 1."

(iv) Between articles 8 and 9 the following shall be inserted as article 8-A, namely:

"8-A.—A copy of a power of attorney when filed in any suit or proceedings.

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0 12 0."

(v) In Article 11, for the entries in the second and third columns, above the proviso, the following shall be substituted, namely:—

"When the amount or value of the property in respect of which the grant of Probate or Letters is made exceeds one thousand rupees, but does not exceed ten thousand rupees;

Two per centum on such amount or value.

When such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees;

Two and a half per centum on such amount or value.

When such amount or value exceeds fifty thousand rupees, but does not exceed one lakh of rupees;

When such amount or value exceeds one lakh of rupees, on the portion of such amount or value which is in excess of a lakh of rupees up to two lakhs of rupees;

When such amount or value exceeds two lakhs of rupees, on the portion of such amount or value which is in excess of two lakhs of rupees up to three lakhs of rupees;

When such amount or value exceeds three lakhs of rupees, on the portion of such amount or value which is in excess of three lakhs of rupees up to four lakhs of rupees;

When such amount or value exceeds four lakhs of rupees, on the portion of such amount or value which is in excess of four lakhs of rupees up to five lakhs of rupees; and

When such amount or value exceeds five lakhs of rupees, on the portion of such amount or value which is in excess of five lakhs of rupees.

Three per centum on such amount or value.

Four per centum.

Five per centum.

Six per centum.

Six and a half per centum.

Seven per centum."

(vi) In Article 12 for the entries in the first and second columns and for the first paragraph in the third column, the following shall be substituted:—

When the amount or value of the debt or security or the aggregate amount of the debts or securities specified in the certificate under the Indian Succession Act, 1925, does not exceed twenty thousand rupees;

Two per centum on such amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under Section 376 of the Act.

When such amount or value exceeds twenty thousand rupees but does not exceed fifty thousand rupees, on the portion of such amount or value which is in excess of twenty thousand rupees;

Two and a half per centum on such amount or value, and three and a three-quarters per centum on the amount or value of any debt or security to which the certificate is extended under Section 376 of the Act.

When such amount or value exceeds fifty thousand rupees but does not exceed a lakh of rupees, on the portion of such amount or value which is in excess of fifty thousand rupees;

Three per centum on such amount or value and four and a half per centum on the amount or value of any debt or security to which the certificate is extended under Section 376 of the Act.

When such amount or value exceeds a lakh of rupees but does not exceed two lakhs of rupees, on the portion of such amount or value which is in excess of a lakh of rupees;

Four per centum on such amount or value and six per centum on the amount or value of any debt or security to which the certificate is extended under Section 376 of the Act.

When such amount or value exceeds two lakhs of rupees but does not exceed three lakhs of rupees, on the portion of such amount or value which is in excess of two lakhs of rupees;

Five per centum on such amount or value and seven and half per centum on the amount or value of any debt or security to which the certificate is extended under Section 376 of the Act.

When such amount or value exceeds three lakhs of rupees but does not exceed four lakhs of rupees, on the portion of such amount or value which is in excess of three lakhs of rupees;

Six per centum on such amount or value and nine per centum on the amount or value of any debt or security to which the certificate is extended under Section 376 of the Act.

When such amount or value exceeds four lakhs of rupees but does not exceed five lakhs of rupees, on the portion of such amount or value which is in excess of four lakhs of rupees;

Six and a half per centum on such amount or value and eight and a quarter per centum on the amount or value of any debt or security to which the certificate is extended under Section 376 of the Act.

and

When such amount or value exceeds five lakhs of rupees, on the portion of such amount or value which is in excess of five lakhs of rupees.

Seven per centum on such amount or value and ten and a half per centum on the amount or value of any debt or security to which the certificate is extended under Section 376 of the Act."

Amendment of Schedule II, Act VII of 1870, as amended by the United Provinces Act, II of 1936.

30. In Schedule II to the Court-Fees Act, 1870, as amended by section 7 of the United Provinces Court-Fees (Amendment) Act, 1936, the following amendment shall be made, namely:—

(i) From Article 1 (a), the clause, "when presented to any Municipal Commissioner under any Act, for the time being in force for the conservancy or improvement of any place, if the application or petition relates solely to such conservancy or improvement" shall be omitted and in its place the following new clause shall be inserted, namely:—

"when presented to the District Magistrate or any other officer for the correction of an electoral roll."

(ii) In Article 1 (b) the words "other than an offence for which police officer may, under the Code of Criminal Procedure arrest without warrant" shall be deleted from the first paragraph and the following paragraphs shall be inserted between the first and second paragraphs:—

"or when presented to a Collector containing a request from a local body, such as the Municipal Board, the District Board or the Notified Area Committee, for the realization of any dues by issue of warrant or any other distress;

"or when presented to a District Magistrate for permission to have displays of fireworks or for a police escort;

"or when presented to a District Magistrate, the form of a programme or in any other form, for the exhibition of a film at a shorter notice than that permitted by the conditions of the licence issued to cinema companies for exhibiting films;

"or when presented to a District Magistrate or Collector or any officer subordinate to him, under the Village Panchayat Act, the Indian Arms Act, the Poisons Act, the Explosives Act, the Stage Carriage Act, the Indian Cinematograph Act; or any other enactment for the time being in force unless specifically exempted from payment of Court-fee."

(iii) In clause (i) of Article 17, in column 1, put a comma, after the word "order" and insert thereafter the following, namely:—

"not being one passed under Order 21, Rules 60, 61 or 62 of the Code of Civil Procedure."

(iv) To Article 17 (iii), in column 1, the following words shall be added at the end: "in any suit not otherwise provided for by this Act,"

(v) From Article 17, the following sub-articles shall be deleted namely:—

"(iv) to set aside an award;

(v) to set aside an adoption;"

(vi) For Article 22, the following article shall be substituted, namely:—

"22.—Election petition questioning the election of any person.	(a) As a member of a local Board, other than a Notified or Town Area Committee.	One hundred rupees.
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(b) As a member of a Notified or Town Area Committee.	Ten rupees."
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THE UNITED PROVINCES STAMP (AMENDMENT) ACT (XVIII OF 1938).

Further to amend the Indian Stamp Act, 1899 (as amended by the United Provinces Stamp Amendment Act, III of 1936), in its application to the United Provinces.

[26th January, 1939.]

WHEREAS it is expedient further to amend the Indian Stamp Act, 1899 (as amended by the United Provinces Stamp Amendment Act, 1936) in its application to the United Provinces in the manner herein after appearing;

Preamble.

It is hereby enacted as follows:—

Short title, extent and commencement.	1. (1) This Act may be called THE UNITED PROVINCES STAMP (AMENDMENT) ACT, 1938.
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(2) It extends to the whole of the United Provinces.

(3) It shall come into force on such date as the Provincial Government may be notified direct and shall remain in force up to the thirtieth day of June, 1941.

NOTE.—Government of the United Provinces has made Notification No. 288/X—511-1939, dated, Lucknow, January 30, 1939, in this connection:—"It is hereby notified for general information that the Governor is pleased to direct that the United Provinces Stamp (Amendment) Act, 1938 (XVIII of 1938), shall come into force on February 13, 1939"—*Vide*, U. P. Gazette Extraordinary, dated January 30, 1939, page 4.

Amendment of S. 1 (3), United Provinces Act III of 1936.

2. In sub-section (3) of section 1 of the United Provinces Stamp (Amendment) Act, 1936, for the words "April, 1939" the words "June, 1941" shall be substituted.

3. Section 27 of the Indian Stamp Act, 1899, shall be made Amendment of S. 27, Act II of 1899.

section and the following shall be added as sub-section (2), namely:—

"(2) In the case of instruments relating to immovable property chargeable with an *ad valorem* duty on the value of the property, and not on the value set forth, the instrument shall fully and truly set forth the annual land revenue in the case of revenue paying land, the annual rental or gross assets, if any, in the case of other immovable property, the local rates, Municipal or other taxes, if any, to which such property may be subject, and any other particulars which may be prescribed by rules made under this Act."

3-A. In clause (a) of the proviso to section 35 of the Indian Stamp Act, 1899, for the words 'an instrument chargeable with a duty of one anna or half an anna only', the words 'a receipt' shall be substituted.

Amendment of S. 35, Act II of 1899.

Amendment of S. 40 (b), Act II of 1899.

4. In clause (b) of section 40 of the Indian Stamp Act, 1899, the semi-colon after the words 'a penalty of five rupees' shall be deleted and a comma inserted between the words 'fit' and 'an amount'.

Amendment of S. 73, Act II of 1899.

5. In section 73 of the Indian Stamp Act, 1899, for the words 'any person' the following words shall be substituted, namely:—

"any officer whose duty it is to see that proper duty is paid or any other person."

Amendment of Schedule I-A to the United Provinces Stamp Amendment Act, 1936.

6. In Schedule I-A added to the Indian Stamp Act, 1899, by the United Provinces Stamp (Amendment) Act, 1936, the following amendments shall be made:—

(i) Between articles 2 and 4, the following shall be inserted as Article 3, namely:—

"3. Adoption deed, that is to say, any instrument (other than a will) recording an adoption or conferring or purporting to confer an authority to adopt" } Twenty rupees.

(ii) In article 12 for clause (c) the following clause shall be substituted, namely:—

"(c) If it exceeds Rs. 5,000, for every additional Rs. 1,000 or part thereof in excess of Rs. 5,000." } Eight annas.

(iii) Article 14 shall be omitted.

(iv) In Article 15 for the words "one rupee eight annas," "two rupees," "two rupees eight annas," "three rupees four annas," "four rupees," "four rupees twelve annas," "five rupees eight annas" and "six rupees four annas" in column 2, the words "one rupee ten annas," "two rupees four annas," "two rupees fourteen annas," "four rupees eight annas," "five rupees four annas," "six rupees," "six rupees twelve annas" and seven rupees eight annas," respectively, shall be substituted.

(v) In article 23 for the words "three rupees," "four rupees," "five rupees," "six rupees eight annas," "eight rupees," "nine rupees eight annas," "eleven rupees" and "twelve rupees eight annas," in column 2, the words "three rupees four annas," "four rupees eight annas," "five rupees twelve annas," "nine rupees," "ten rupees eight annas," "twelve rupees," "thirteen rupees eight annas" and "fifteen rupees," respectively, shall be substituted.

(vi) In item (i) of article 24, in column 2, the following words shall be inserted before the semi-colon and after the word 'land', namely:—

"and the value of the subject-matter of the original does not exceed one thousand rupees"

(vii) After article 25, the following new article shall be inserted as article 25-A, namely:—

"25-A.—Instrument correcting a purely clerical error in an instrument chargeable with duty and in respect of which the proper duty has been paid—

(a) if the duty with which the original instrument is chargeable does not exceed one half of the duty payable on the original, three rupees;

(b) in any other case ... one rupee eight annas."

(viii) In Article 35 the existing explanation at the end shall be numbered as 1 and the following shall be added as explanations 2 and 3, namely:—

"Explanation 2.—A lease from month to month or year to year without any fixed period or one for a fixed period with a provision allowing the lessee to hold over thereafter for an indefinite term, shall be deemed for the purposes of this article to be a lease not purporting to be for any definite term.

"Explanation 3.—Rent paid in advance shall be deemed to be money advanced within the meaning of this article unless it is specifically provided in the lease that the rent paid in advance will be set off towards the last instalment or instalments of rent."

(ix) In Article 45 for proviso (b) in column 2 the following proviso shall be substituted, namely:—

"(b) where land is held on revenue settlement, the value for the purposes of this article shall be deemed to be—

(i) sixteen times the annual revenue, if the settlement is permanent;

(ii) eight times the annual revenue, if the settlement is temporary; and

(iii) eight times the nett profits that have arisen from the land during the year next before the date of partition, where the land is wholly or partly exempt from payment of "revenue":—

(x) In Article 57 the following words shall be added in the first column after the word "contract".

"or the due discharge of a liability."

THE UNITED PROVINCES COURT-FEES (AMENDMENT) ACT (II OF 1936).

An Act further to amend the Court-Fees Act, 1870 (VII of 1870) in its application to the United Provinces.

[2nd April, 1936.]

Preamble.

WHEREAS it is expedient further to amend the Court-Fees Act, 1870, in its application to the United Provinces;

AND WHEREAS the previous sanction of the Governor-General has been obtained, under section 80-A, sub-section (3), of the Government of India Act, to the passing of this Act;

It is hereby enacted as follows:—

Title, extent, commencement, and duration.

1. (1) This Act may be called THE UNITED PROVINCES COURT-FEES (AMENDMENT) ACT, 1936.

(2) It extends to the whole of the United Provinces.

(3) It shall come into force on the first day of May, 1936, and shall remain in force up to the thirtieth day of April, 1939.

Amendment of Section 6 of Act VII of 1870.

2. To section 6 of the Court-Fees Act, 1870, hereinafter referred to as "the said Act," the following provisos shall be added, namely,—

"Provided that where such document relates to any suit, appeal or other proceeding under the Oudh Rent Act, 1886, the Agra Tenancy Act, 1926, or the United Provinces Land Revenue Act, 1901, the fee payable shall be three-quarters of the fee indicated in either of the said schedules except where the document is of any of the kinds specified as chargeable in the first schedule and the amount or value of the subject-matter of the suit, appeal or proceeding to which it relates exceeds Rs. 500:

Provided further that the fee payable in respect of any such document as is mentioned in the foregoing proviso shall not be less than that indicated by either of the said schedules before the commencement of this Act."

3. In paragraph (v) of section 7 of the said Act for the word "ten" in clause (a) the word "twenty" shall be substituted and for the word "five" in clause (b) the word "six" shall be substituted.

Amendment of paragraph (ix) of section 7 of Act VII of 1870.

4. For paragraph (ix) of section 7 of the said Act the following shall be substituted, namely,—

"(ix) In suits against a mortgagee for the recovery of the property mortgaged; according to the principal money expressed to be secured by the instrument of mortgage.

(ix) (a) In suits by a mortgagee to foreclose the mortgage, or where the mortgage is made by conditional sale, to have the sale declared absolute; according to the total amount claimed by way of principal and interest."

Amendment of section 18 of Act VII of 1870.

5. In section 18 of the said Act for the words "eight annas" the words "twelve annas" shall be substituted.

Amendment of Schedule I to Act VII of 1870.

6. In Schedule I to the said Act the following amendments shall be made, namely,—

(i) In Article 1 for the entries in the second and third columns, the entries shown in the first and second columns respectively of Schedule A to this Act shall be substituted.

(ii) After article 2 the following shall be added as article 2-A, namely—

"2-A.—Application or written statement by a defendant in a suit for partition praying for partition of his share in the property sought to be partitioned.

The same fee which would have been payable on a plaint if such defendant instituted a suit for partition."

(iii) In article 6 for the words "four", "eight" and "one rupee" in the third column, the words "six", "twelve" and "one rupee eight annas", respectively, shall be substituted.

(iv) In article 7 for the words "eight" and "one rupee" in the third column, the words "twelve" and "one rupee eight annas", respectively, shall be substituted.

(v) In article 8 for the word "eight" in the third column the word "twelve" shall be substituted.

(vi) In article 11 for the entries above the proviso in the second column and the entries in the third column, the following shall be substituted:

"When the amount or value of the property in respect of which the grant of Probate or Letters is made exceeds one thousand rupees, but does not exceed ten thousand rupees;

Two per centum on such amount or value.

When such amount or value exceeds ten thousand rupees but does not exceed fifty thousand rupees;

Two and one-half per centum on such amount or value.

When such amount or value exceeds fifty thousand rupees, but does not exceed one lakh of rupees;

Three per centum on such amount or value.

When such amount or value exceeds a lakh of rupees, for the portion of such amount or value which is in excess of a lakh of rupees;

Four per centum on such amount or value."

(vi) In article 12 for the entries in the first and second columns and for the first paragraph in the third column, the following shall be substituted:

"12. Succession certificate under the Indian Succession Act, 1925.

When the amount or value of the debt or security or the aggregate amount of the debts or securities specified in the certificate under section 374 of the Act does not exceed twenty thousand rupees;

Two per centum on such amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.

When such amount or value exceeds twenty thousand rupees, but does not exceed fifty thousand rupees, for the portion of such amount or value which is in excess of twenty thousand rupees;

Two and a half per centum on such amount or value and three and a three-quarters per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.

When such amount or value exceeds fifty thousand rupees, but does not exceed a lakh of rupees, for the portion of such amount or value which is in excess of fifty thousand rupees;

Three per centum on such amount or value and four and a half per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.

When such amount or value exceeds a lakh of rupees, for the portion of such amount or value which is in excess of a lakh of rupees.

Four per centum on such amount or value and six per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act."

(vii) For the table of *ad valorem* fees leviable on the institution of suits, the table shown in Schedule B to this Act shall be substituted.

Amendment of Schedule II to Act VII of 1870.

7. In Schedule II to the said Act the following amendments shall be made, namely:—

(i) In article 1 for the words "one anna," "eight annas" and "one rupee" in the third column the words "two annas," "twelve annas" and "one rupee and eight annas", respectively, shall be substituted: and the following shall be substituted for clause (d) in the second column and the entry against the same in the third column:

"(d) When presented to the Board of Revenue for revision of a judgment or order.

Three rupees.

(e) When presented to a High Court:

(1) Under the Indian Companies Act, 1913 (Act VII of 1913), for winding up a company.

Fifty rupees.

(2) Under Section 115 of the Code of Civil Procedure, 1908 (Act V of 1908), for revision of an order.

Four rupees.

(3) In any other case.

Three rupees."

(ii) In article 1-A for the words "twelve annas" in the third column the words "one rupee two annas" shall be substituted.

(iii) In articles 5, 6 and 7 for the word "eight" in the third column the word "twelve" shall be substituted.

(iv) In article 10 for the words "eight annas", "one rupee" and "two rupees" in the third column the words "twelve annas", "one rupee eight annas" and "three rupees", respectively, shall be substituted.

(v) For article 11, the following shall be substituted:—

"11. Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree and is presented.

(a) to any Civil Court other than a High Court or to any Revenue Court or Executive Officer other than a Commissioner of the division or Chief Controlling Revenue or Executive Authority;

Twelve annas.

(b) to a Commissioner of the division;

Two rupees.

(c) to a High Court or to a Chief Controlling Executive or Revenue Authority.

Three rupees."

(vi) The bracket opposite articles 12, 13 and 14 in the second column shall be omitted and for article 12 the following shall be substituted:

"12. Caveat...

Where the amount or value of the property in respect of which the caveat is lodged—

(a) does not exceed five thousand rupees;

Five rupees.

(b) exceeds five thousand rupees.

Ten rupees."

(vii) For article 14 the following shall be substituted, namely:—

"14. Petition in a suit under the Native Converts' Marriage Dissolution Act, 1866.

Seven rupees eight annas."

(viii) In article 17 for the words "Ten rupees" in the third column, the words "Fifteen rupees" shall be substituted, and the following proviso shall be added:—

"Provided that in a suit filed before a High Court under its original jurisdiction the fee chargeable under this article shall be one hundred rupees.

(ix) For article 18, the following shall be substituted, namely:—

"18. Application under paragraph 17 or paragraph 20 of the second Schedule of the Code of Civil Procedure, 1908.

Fifteen rupees."

(x) In article 19 for the word "ten" in the third column, the word "fifteen" shall be substituted.

(xi) In articles 20 and 21 for the word "twenty" in the third column the word "thirty" shall be substituted.

8. "Nothing in this Act shall apply to any application or proceeding under the United Provinces Agriculturists' Relief Act, 1934, the United Provinces Encumbered Estates Act, 1934, the United Provinces Regulation of Execution Act, 1934, and the United Pro-

vinces Regulation of Sales Act, 1934, which shall continue to be governed by the Court-Fees Act, 1870, as if it had not been amended by this Act.

SCHEDULE A.

When the amount or value of the subject-matter in dispute does not exceed five rupees.

Six annas.

When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.

Six annas.

When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to two hundred rupees.

Twelve annas.

When such amount or value exceeds two hundred rupees, for every ten rupees, or part thereof, in excess of two hundred rupees, up to five hundred rupees.

One rupee.

When such amount or value exceeds five hundred rupees, for every ten rupees, or part thereof, in excess of five hundred rupees, up to one thousand rupees.

One rupee four annas.

When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to five thousand rupees.

Six rupees four annas.

When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees, or part thereof, in excess of five thousand rupees, up to ten thousand rupees.

Twelve rupees eight annas.

When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.

Eighteen rupees twelve annas.

When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees.

Twenty-five rupees.

When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.

Twenty-five rupees.

When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees:

Thirty-one rupees four annas.

Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be four thousand five hundred rupees.

SCHEDULE B.

Table of rates of ad valorem fees leviable on the institution of suits.

When the amount or value of the subject-matter exceeds— Rs.	But does not exceed— Rs.	Proper fee. Rs. A.	When the amount or value of the subject-matter exceeds— Rs.	But does not exceed— Rs.	Proper fee. Rs. A.
...	5	0 6	420	430	38 0
5	10	0 12	430	440	39 0
10	15	1 2	440	450	40 0
15	20	1 8	450	460	41 0
20	25	1 14	460	470	42 0
25	30	2 4	470	480	43 0
30	35	2 10	480	490	44 0
35	40	3 0	490	500	45 0
40	45	3 6	500	510	46 4
45	50	3 12	510	520	47 8
50	55	4 2	520	530	48 12
55	60	4 8	530	540	50 0
60	65	4 14	540	550	51 4
65	70	5 4	550	560	52 8
70	75	5 10	560	570	53 12
75	80	6 0	570	580	55 0
80	85	6 6	580	590	56 4
85	90	6 12	590	600	57 8
90	95	7 2	600	610	58 12
95	100	7 8	610	620	60 0
100	110	8 4	620	630	61 4
110	120	9 0	630	640	62 8
120	130	9 12	640	650	63 12
130	140	10 8	650	660	65 0
140	150	11 4	660	670	66 4
150	160	12 0	670	680	67 8
160	170	12 12	680	690	68 12
170	180	13 8	690	700	70 0
180	190	14 4	700	710	71 4
190	200	15 0	710	720	72 8
200	210	16 0	720	730	73 12
210	220	17 0	730	740	75 0
220	230	18 0	740	750	76 4
230	240	19 0	750	760	77 8
240	250	20 0	760	770	78 12
250	260	21 0	770	780	80 0
260	270	22 0	780	790	81 4
270	280	23 0	790	800	82 8
280	290	24 0	800	810	83 12
290	300	25 0	810	820	85 0
300	310	26 0	820	830	86 4
310	320	27 0	830	840	87 8
320	330	28 0	840	850	88 12
330	340	29 0	850	860	90 0
340	350	30 0	860	870	91 4
350	360	31 0	870	880	92 8
360	370	32 0	880	890	93 12
370	380	33 0	890	900	95 0
380	390	34 0	900	910	96 4
390	400	35 0	910	920	97 8
400	410	36 0	920	930	98 12
410	420	37 0	930	940	100 0

When the amount
or value of the
subject-matter
exceeds—

Rs.

940
950
960
970
980
990
1,000
1,100
1,200
1,300
1,400
1,500
1,600
1,700
1,800
1,900
2,000
2,100
2,200
2,300
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4,500
4,600
4,700
4,800
4,900
5,000
5,250
5,500
5,750
6,000
6,250
6,500
6,750
7,000
7,250
7,500
7,750

But does not
exceed—

Rs.

950
960
970
980
990
1,000
1,100
1,200
1,300
1,400
1,500
1,600
1,700
1,800
1,900
2,000
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2,200
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4,700
4,800
4,900
5,000
5,250
5,500
5,750
6,000
6,250
6,500
6,750
7,000
7,250
7,500
7,750
8,000

Proper fee.

Rs. A.

101 4
102 8
103 12
105 0
106 4
107 8
113 12
120 0
126 4
132 8
138 12
145 0
151 4
157 8
163 12
170 0
176 4
182 8
188 12
195 0
201 4
207 8
213 12
220 0
226 4
232 8
238 12
245 0
251 4
257 8
263 12
270 0
276 4
282 8
288 12
295 0
301 4
307 8
313 12
320 0
326 4
332 8
338 12
345 0
351 4
357 8
370 0
382 8
395 0
407 8
420 0
432 8
445 0
457 8
470 0
482 8
495 0
507 8

When the amount
or value of the
subject-matter
exceeds—

Rs.

8,000
8,250
8,500
8,750
9,000
9,250
9,500
9,750
10,000
10,500
11,000
11,500
12,000
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55,000
60,000
65,000
70,000
75,000
80,000
85,000
90,000
95,000

But does not
exceed—

Rs.

8,250
8,500
8,750
9,000
9,250
9,500
9,750
10,000
10,500
11,000
11,500
12,000
12,500
13,000
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48,000
50,000
55,000
60,000
65,000
70,000
75,000
80,000
85,000
90,000
95,000
1,00,000

Proper fee.

Rs. A.

520 0
532 8
545 0
557 8
570 0
582 8
595 0
607 8
626 4
645 0
663 12
682 8
701 4
720 0
738 12
757 8
776 4
795 0
813 12
832 8
851 4
870 0
888 12
907 8
926 4
945 0
963 12
982 8
1,007 8
1,032 8
1,057 8
1,082 8
1,107 8
1,132 8
1,157 8
1,182 8
1,207 8
1,232 8
1,257 8
1,282 8
1,307 8
1,332 8
1,357 8
1,382 8
1,407 8
1,432 8
1,457 8
1,482 8
1,513 12
1,545 0
1,576 4
1,607 8
1,638 12
1,670 0
1,701 4
1,732 8
1,763 12
1,795 0

And the fee increases at the rate of thirty-one rupees four annas for every five thousand rupees, or part thereof, for example—

Rs.

2,00,000
3,00,000
4,00,000
5,00,000
5,35,000

Rs. A.

2,420 0
3,045 0
3,670 0
4,295 0
4,500 0

COURT-FEES (UNITED PROVINCES AMENDMENT) ACT (IX OF 1941).

[19th June, 1941.]

An Act further to amend the Court-Fees Act, 1870, in its application to the United Provinces, the United Provinces Court-Fees (Amendment) Act, 1936, and the United Provinces Court-Fees (Amendment) Act, 1938.

WHEREAS it is expedient further to amend the Court-Fees Act, 1870, in its application to the United Provinces, the United Provinces Court-Fees (Amendment) Act, 1936, and the United Provinces Court-Fees (Amendment) Act, 1938, for the purposes hereinafter appearing:

AND WHEREAS by the proclamation, dated the third day of November, 1939, promulgated under S. 93 of the Government of India Act, 1935, the Governor of the United Provinces has assumed to himself all powers vested by or under the aforesaid Act in the Provincial Legislature:

AND WHEREAS the continuance in force of the said Proclamation has been approved by resolutions of both the Houses of Parliament.

Now, therefore, the Governor in exercise of the powers aforesaid is pleased to make the following Act:—

Short title.

1. This Act may be called THE COURT-FEES (UNITED PROVINCES AMENDMENT) ACT, 1941.

Amendment of section 1, U.P. Act II of 1936.

2. (1) In sub-section (3) of section 1 of the United Provinces Court-Fees (Amendment) Act, 1936, all the words and commas after the word and figure "May, 1936," shall be omitted.

Amendments of Sections 1 and 2, U.P. Act XIX of 1938.

(2) In the United Provinces Court-Fees (Amendment) Act, 1938—

(a) in sub-section (3) of section 1 all the words and commas after the word "direct" shall be omitted; and

(b) Section 2 shall be omitted.

3. To sub-section (iv) of section 2 of the Court-Fees Act, 1870 (hereinafter referred to as the said Act), the following words shall be added after the word "suit" where it occurs for the second time, namely: "and also a Letters Patent Appeal."

Amendment of Section 6, Act VII of 1870.

4. In section 6 of the said Act—

(1) in sub-section (1)—

(a) in the first proviso for the words and figures "Oudh Rent Act, 1886, the Agra Tenancy Act, 1926" the words and figure "United Provinces Tenancy Act, 1939," shall be substituted; and

(b) in the second proviso for the words "the commencement of this Act" the words and figure "the first day of May, 1936" shall be substituted; and

(2) in sub-section (6) after the words "of the Court" the following words shall be inserted, namely:—"together with a copy of the plaint".

Amendment of Section 6-A, Act VII of 1870.

5. In sub-section (3) of section 6-A, of the said Act, after the word "appeal" the following words shall be inserted, namely:—

"together with a copy of the plaint and of the order appealed against."

Amendment of Section 7, Act VII of 1870.

6. In clause (a), sub-section (iv) of section 7 of the said Act, after the word "relief" the words "other than reliefs specified in sub-section (iv-A)" shall be added.

Amendment of Section 21, Act VII of 1870.

7. After sub-section (1) of section 21 of the said Act, the following shall be added as sub-section (1-A), namely:—

"(1-A) The Provincial Government may make rules to carry out generally the purposes of this Act".

Amendment of Schedule II, Act VII of 1870.

8. In Schedule II of the said Act—

(a) in article 1, after clause (e) the following shall be added as clause (f), namely:—

"(f) When presented under Chapter IV of the Motor Vehicles Act, 1939—

(i) to a Regional Transport Authority or its Chairman or Secretary. One rupee eight annas.

(ii) to the Provincial Transport Authority or its Chairman or Secretary. Three rupees."

(b) in article 11, after clause (c) the following shall be added as clause (d), namely:—

- "(d) in accordance with the provisions of the Motor Vehicles Act, 1939:—
- | | |
|---|---------------|
| (i) under sub-section (2) of Section 13 or sub-section (3) of Section 15 from an order of a licensing authority. | Twelve annas. |
| (ii) under sub-section (2) of Section 16 from an order of a Regional Transport Authority. | Three rupees. |
| (iii) under sub-section (1) of Section 35 from an order of a registering authority or a prescribed Authority, as the case may be. | Twelve annas. |
| (iv) under Section 64 from an order of a Regional Transport Authority. | Three rupees. |
| (v) under Section 64 from an order of the Provincial Transport Authority. | Five rupees." |

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Jammu & Kashmir
Government
Jammu

THE
DIVISIONAL

OFFICE

J. K. Das
Advocate
Jammu
Srinagar.
Court
J. K. Das